

Policing as Assault

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From ending qualified immunity, to establishing community control over policing, to eradicating the institution of policing altogether, proposals to remedy the issue of “police violence” are on everyone’s lips. But, in the deep reservoir of proposals, the meaning of “police violence” has received relatively little attention. How should we think about “police violence” in a manner that permits us to recognize policing’s organizing principles? And what are the benefits, if any, of snapping into focus the meaning of “police violence”?

This Article makes two contributions. First, it proposes a new understanding of “police violence,” arguing that policing, itself, is a tortious assault on class-exploited Black and Brown people. This is effectuated through both violent acts and other forms of abuse that create the “circumstances” under which expectations of harmful contact with police become part of the social contract of being a poor, racialized person.

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Second, it contends that conceptualizing police-inflicted harm through a tort law lens is harmonious with abolitionist projects to address police violence. A fundamental goal of tort law, like police abolition, is to wrest the power to define harm from state-driven processes and return it to the hands of everyday people, a concept understood in abolitionists' projects as "power shifting." At the core of "power shifting" is that the power to define harm should be in the hands of everyday people and their communities. And a linguistic assessment of the Restatement of Torts shows that "community" is the most referenced justificatory concept in tort doctrine. Not morality, efficiency, or deterrence. Community. Tort law demonstrates that in understanding the nature of harmful contact, we should not look to how perpetrators of violence understand or justify their own conduct, but to how the communities subjected to such violence reasonably understand what is being done to them. In both enterprises, law and power are properly mediated by reference to objectively reasonable perceptions within a particular community.

Thus, this Article suggests that recognizing policing as a tortious assault on poor Black and Brown communities is itself a form of power shifting. This Article rearticulates the way police violence is constructed by grounding policing in terms of harmful and offensive contact, as judged by community standards. Using this perspective, including a critical take on the history and current reality of U.S. policing, we can recognize that policing, as currently conceived and operationalized, intrinsically uses violence—or the implicit threat of violence—to repress disempowered, often poor Black and Brown communities. With this perspective, the possibility of and justification for a reconceptualization of the role of police, and remedies for police violence, become easier to understand. These remedies, properly understood, are oriented not toward mere reform of an intrinsically violent system, but toward meaningful steps in abolishing that system.

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INTRODUCTION

[W]hen you see a police officer pressing his knee into a [B]lack man’s neck until he dies, that’s the logical result of policing in America. When a police officer brutalizes a [B]lack person, he is doing what he sees as his job.¹

—Mariame Kaba

Killed while at home, in her bed.² Killed while sleeping in his car.³ Killed while laying on a friend’s couch underneath a blanket.⁴ Killed while in his living

1. Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/58ER-VVFG>].

2. Her name was Breonna Taylor. See Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor’s Death*, N.Y. TIMES (Aug. 23, 2022), <https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/3SEP-56M6>].

3. His name was Rayshard Brooks. See Aimee Ortiz, *What to Know About the Death of Rayshard Brooks*, N.Y. TIMES (Aug. 23, 2022), <https://www.nytimes.com/article/rayshard-brooks-what-we-know.html> [<https://perma.cc/E8V8-CD5H>].

4. His name was Amir Locke. See Olivia Truffaut-Wong & Claire Lampen, *Everything to Know About the Police Shooting of Amir Locke*, THE CUT (Feb. 6, 2022), <https://www.thecut.com/2022/02/a-no-knock-warrant-led-to-the-police-shooting-of-amir-locke.html> [<https://perma.cc/ZJ7C-66ZT>].

room eating ice cream.⁵ Killed while in her home playing video games.⁶ Killed while standing in his grandmother's backyard.⁷ Killed while standing outside his apartment complex.⁸ Killed while inside an apartment complex.⁹ Killed while walking home from a convenience store.¹⁰ Killed while jaywalking.¹¹ Killed while running away.¹² Killed while getting inside his car.¹³ Killed while sitting inside his car.¹⁴ Killed while restrained.¹⁵ Killed while selling "loose

5. See Bruce Tomaso, *Ex-Dallas Cop Missed Clues Before Shooting Man Eating Ice Cream in Own Home: Prosecutor*, REUTERS (Sept. 23, 2019), <https://www.reuters.com/article/us-texas-crime-amber-guyger/ex-dallas-cop-missed-clues-before-shooting-man-eating-ice-cream-in-own-home-prosecutor-idUSKBN1W80XN> [https://perma.cc/M2DL-HCTR] (referring to Botham Jean).

6. See Emily Shapiro & Bill Hutchinson, *Former Officer Who Fatally Shot Atatiana Jefferson in Her Home Indicted for Murder*, ABC NEWS (Dec. 20, 2019), <https://abcnews.go.com/US/officer-fatally-shot-atatiana-jefferson-home-indicted-murder/story?id=67858348> [https://perma.cc/LMN9-FV85] (referring to Atatiana Jefferson).

7. See Barbara Marcolini, Chris Cirillo & Cristoph Koettl, *How Stephon Clark Was Killed by Police in His Backyard*, N.Y. TIMES (Mar. 22, 2018), <https://www.nytimes.com/video/us/10000005813009/stephon-clark-killed-police-sacramento.html> [https://perma.cc/RM4M-RH4N] (referring to Stephon Clark).

8. His name was Amadou Diallo. See Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES (Feb. 26, 2000), <https://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html> [https://perma.cc/SYD4-JSK5] (referring to Amadou Diallo).

9. See Sarah Maslin Nir, *Officer Peter Liang Convicted in Fatal Shooting of Akai Gurley in Brooklyn*, N.Y. TIMES (Feb. 11, 2016), <https://www.nytimes.com/2016/02/12/nyregion/officer-peter-liang-convicted-in-fatal-shooting-of-akai-gurley-in-brooklyn.html> [https://perma.cc/9NA5-N7W8] (referring to Akai Gurley).

10. See Daisy Zavala Magaña & Mike Carter, *Family Outraged After Tacoma Police Chief Clears 2 of the Officers Involved in Manuel Ellis' Death*, THE SEATTLE TIMES (Dec. 21, 2021), <https://www.seattletimes.com/seattle-news/law-justice/tacoma-police-chief-exonerates-two-of-the-officers-involved-in-the-death-of-manuel-ellis-saying-they-acted-appropriately/> [https://perma.cc/T4F3-75LW] (referring to Manuel Ellis).

11. His name was Michael Brown. See *Q&A, What Happened in Ferguson*, N.Y. TIMES (Aug. 10, 2015), <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html> [https://perma.cc/4ENL-LDLY].

12. See Alan Blinder, *Michael Slager, Officer in Walter Scott Shooting, Gets 20-Year Sentence*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/us/michael-slager-sentence-walter-scott.html> [https://perma.cc/SQC2-6D5M] (referring to Walter Scott).

13. See The New York Times, *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/NRM3-T3VW] (referring to Daunte Wright).

14. See German Lopez, *Philando Castile Minnesota Police Shooting: Officer Cleared of Manslaughter Charge*, VOX (June 16, 2017), <https://www.vox.com/2016/7/7/12116288/minnesota-police-shooting-philando-castile-falcon-heights-video> [https://perma.cc/WJE8-9Y9E] (referring to Philando Castille).

15. His name was George Floyd. See Evan Hill, Ainara Tiefenthäler, Christiaan Tribert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [https://perma.cc/YV9F-NZSN] (referring to George Floyd).

cigarettes.”¹⁶ Killed while selling CDs.¹⁷ Killed while experiencing a mental health episode.¹⁸ Killed while playing with a toy gun.¹⁹ Killed while in distress.²⁰

Then there are the survivors. Even if we are spared from aberrant spectacles of policing such as police shootings and killings, we are left with constant fear that we will be subjected to state-sanctioned violence. This is because of the dominion integral to the routine and nature of modern policing in Black and Brown²¹ communities. This violence extends beyond “the excess,”²² to borrow a term from anti-violence organizer Mariame Kaba. It spills over to quotidian activities such as unwarranted police surveillance, street stops, and traffic stops. These “mundane” activities are often misunderstood as falling outside the scope of “police violence.” This improperly suggests that only an aberrant subset of police activity is violent.²³ But in poor Black and Brown communities, policing always operates with the *potential* for exacting harmful or offensive contact with impunity.

Nineteen-year-old Timothy Thomas understood as much before he, too, became a casualty of policing. Thomas was on his way to buy cigarettes in the early morning hours of April 7, 2001, when he was spotted by two off-duty officers.²⁴ The officers attempted to stop him, but the young man took off

16. See Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [https://perma.cc/4TJ7-43VM] (referring to Eric Garner).

17. See German Lopez, *Alton Sterling Shooting: Video from Baton Rouge Police’s Cameras Released*, VOX (Mar. 30, 2018), <https://www.vox.com/2016/7/6/12105380/alton-sterling-police-shooting-baton-rouge-louisiana> [https://perma.cc/D2EA-UL25] (referring to Alton Sterling).

18. Her name was Janisha Fonville. See Associated Press, *NFL Player Honors NC Woman Killed by Police in 2015*, ASSOCIATED PRESS (Jan. 25, 2021), <https://apnews.com/article/nfl-race-and-ethnicity-charlotte-football-police-0902d9dc5a18010b05bb7f550d61b9ef> [https://perma.cc/33BP-FA8Q].

19. His name was Tamir Rice. See Shalia Dewan & Richard A. Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), <https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html> [https://perma.cc/BFQ5-WGPD].

20. See Bil Browning, *Cops Shot a Black Trans Woman in Distress 16 Times. The DA Says It Was Her Own Fault.*, LGTBQ NATION (Sept. 25, 2020), <https://www.lgbtqnation.com/2020/09/cops-shot-black-trans-woman-distress-16-times-da-says-fault/> [https://perma.cc/8FZM-PEED] (referring to Roxanne Moore).

21. I use the term “Brown” here and throughout this Article to refer to Indigenous, Latinx, and Arab people, intending the utmost respect.

22. Anti-violence organizer Mariame Kaba uses the term the “excess” to refer to “the spectacles—dead Black bodies lying in the streets or a Black teenager ambushed by several police officers in military gear, automatic weapons drawn.” MARIAME KABA, WE DO THIS ‘TIL WE FREE US: ABOLITIONISTS ORGANIZING AND TRANSFORMING JUSTICE 84 (2021) [hereinafter KABA, WE DO THIS ‘TIL WE FREE US].

23. See *id.*

24. ELIZABETH HINTON, AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION IN THE 1960S 258 (2021) [hereinafter HINTON, AMERICA ON FIRE].

running.²⁵ The policemen radioed ten officers for backup when they were unable to close the distance while pursuing Thomas.²⁶ The dozen officers followed Thomas for seven minutes, navigating back alleys and fences.²⁷ The chase ended when Officer Steven Roach located Thomas hiding behind an abandoned building.²⁸ Roach fired his service weapon at point-blank range, fatally wounding Thomas.²⁹ Roach alleged that Thomas had made a “sudden movement,” which he interpreted as Thomas trying to retrieve a gun from his waistband.³⁰ Thomas was not armed.³¹

Asked why her son ran from the police, Thomas’s mother explained, “if you are an African [American] male, you will run.”³² The same could be said of Black women. Analyses of people of color’s experiences in racial profiling cases reveal an “*identical pattern of racial disparities in police stops for both men and women*.”³³ Transgender and gender-fluid people are subjected to this same treatment.³⁴ Like many Black and Brown youth trapped in police surveillance’s iron grip, the police had routinely harassed Thomas.³⁵ The interactions followed a template: Police would stop Thomas for “no reason, issuing him citations for [traffic] violations that could only be detected after the officer had initiated contact.”³⁶ Thomas was issued twenty citations in the spring of 2000 alone.³⁷ His record reflected a pattern of over-policing of Black and Brown communities across the country.³⁸ “With little or no concern about the civil rights violations or the collateral damage of these practices, the police [are] free to treat Black [people] as both guilty and dangerous, an assumption that [leads] directly to . . .

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Jerry White, *The Cincinnati Riots and the Class Divide in America, Part 1: Gentrification and Police Repression*, WORLD SOCIALIST WEBSITE (May 24, 2001), <https://www.wsws.org/en/articles/2001/05/cin1-m24.html> [<https://perma.cc/4CTS-66PK>].

33. ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* 10 (2017) [hereinafter RITCHIE, *INVISIBLE NO MORE*] (emphasis in original).

34. For a thorough discussion about police violence against transgender and gender-fluid people, see generally RITCHIE, *INVISIBLE NO MORE*.

35. HINTON, *AMERICA ON FIRE*, *supra* note 24, at 259.

36. *Id.*

37. *Id.*; see also Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 676 (2019) (explaining that people of color are also more likely to get multiple citations in a single traffic stop).

38. ALEX S. VITALE, *THE END OF POLICING 2* (2017) (“Racial profiling remains widespread, and many communities of color experience invasive and disrespectful policing . . . [B]lack and Latinos are overwhelmingly the targets of low-level police interactions, from traffic tickets to searches to arrests for minor infractions, and frequently report being treated in a hostile and degrading manner despite having done nothing wrong.”) [hereinafter VITALE, *THE END OF POLICING*] (citation omitted).

violence, as it had with Thomas.”³⁹ Driven by a mindset that it was “his best option to stay free and alive,” Thomas had tried to elude police on two prior instances in the months before police killed him.⁴⁰ “He ran to avoid being captured and detained, to protect himself from *possible* violence,” writes the legal historian Elizabeth Hinton.⁴¹

After police killed Thomas, the United States witnessed the largest protests since footage of Rodney King’s brutalization at the hands of police went viral.⁴² The uprisings in the wake of Thomas’s killing preceded an emergence of demonstrations seeking justice and accountability for police misconduct.⁴³ This was later brought to full development in cities like Ferguson, Baltimore, and Minneapolis.⁴⁴

As it did then, the issue of how to best expand the scope of remedies for police misconduct, specifically so-called “police violence,” now calls for urgent attention.⁴⁵ Without fully pressing whether the term police violence appropriately captures the full range of harms policing entails, typical responses from commentators include the need for implicit-bias training for police officers,⁴⁶ police-worn body cameras,⁴⁷ community control over policing,⁴⁸ hiring more officers of color,⁴⁹ and an end to qualified immunity.⁵⁰ A less

39. HINTON, *AMERICA ON FIRE*, *supra* note 24, at 260.

40. *Id.* at 258.

41. *Id.* (emphasis added).

42. *See id.* at 261.

43. I use the term “police misconduct” capaciously to capture everything from police shootings to daily indignities, such as unwarranted street stops and verbal harassment of people of color, particularly women and transgender people.

44. HINTON, *AMERICA ON FIRE*, *supra* note 24, at 263 (“The 2001 rebellion in Cincinnati and its aftermath represented the last iteration of the twentieth century uprisings and at the same time anticipated a shift in Black protest that would emerge fully in Ferguson and other cities later in the new century.”).

45. *See, e.g.*, DERECKA PURNELL, *BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM* 6 (2021); Li Zhou, *A Majority of Voters See an Urgent Need for Police Reform Following the Chauvin Verdict*, VOX (May 3, 2021), <https://www.vox.com/2021/5/3/22406099/police-reform-chauvin-congress> [<https://perma.cc/M7VT-9M4B>].

46. Martin Kaste, *NYPD Study: Implicit Bias Training Changes Minds, Not Necessarily Behavior*, NPR (Sept. 10, 2020), <https://www.npr.org/2020/09/10/909380525/nypd-study-implicit-bias-training-changes-minds-not-necessarily-behavior> [<https://perma.cc/4SYG-D74Z>].

47. Ashley Southall, *Police Body Cameras Cited as ‘Powerful Tool’ Against Stop-and-Frisk Abuses*, N.Y. TIMES (Nov. 30, 2020), <https://www.nytimes.com/2020/11/30/nyregion/nypd-body-cameras.html> [<https://perma.cc/699P-RL9W>].

48. Wayne Nealis, *Community Control of the Police – An Idea Whose Time Has Come*, MINN. POST (June 3, 2020), <https://www.minnpost.com/community-voices/2020/06/community-control-of-police-an-idea-whose-time-has-come/> [<https://perma.cc/C6DV-PGKE>].

49. Jen Fifield, *Does Diversifying Police Forces Reduce Tensions?*, PEW (Aug. 22, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/08/22/does-diversifying-police-forces-reduce-tensions> [<https://perma.cc/ZFD3-BCSJ>].

50. Ed Yohnka, Julia Decker, Emma Andersson & Aamra Ahmad, *Ending Qualified Immunity Once and For All is the Next Step in Holding Police Accountable*, ACLU (Mar. 23, 2021),

common response is that meaningful police reform is unattainable.⁵¹ That is, the best way to reduce state violence carried out by police is to disinvest from and eradicate the institution of policing altogether.⁵² When we zoom out from these proposals, one unifying theme is that they have all been pressed under the banner of reducing or eliminating “police violence.”⁵³

But what exactly is “police violence”? How should we think about the term in a manner that permits us to recognize the organizing principles of policing, and the extent, if any, to which “police violence” diverges from the core principles of “policing” itself? And what are the benefits, if any, of snapping into focus the meaning of the term? Even though the issue of “police violence” is on almost everyone’s lips, these questions do not get enough attention in the deep reservoir of proposals on how best to expand the scope of remedies for police misconduct.⁵⁴

Like scholars who have suggested the term “police violence” is a misnomer because policing *is* violence, this Article makes two contributions. The Article’s first contribution offers a more precise understanding of “police violence.” Why does this matter? Progressive thinkers about race have pressed the point that homing in on the meaning of terms and how terms are operationalized facilitates remedial efforts for marginalized groups.⁵⁵ To abjure definitional clarity is to

<https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable/> [<https://perma.cc/W3GJ-L5B8>].

51. See, e.g., Ben Guarino, *Few Americans Want to Abolish Police, Gallup Survey Finds*, USA TODAY (July 22, 2020), <https://www.washingtonpost.com/nation/2020/07/22/abolish-police-gallup-poll/> [<https://perma.cc/E6AQ-8FCA>] (reporting that almost two months after George Floyd was killed by Minneapolis police officer Derek Chauvin, “15 percent of Americans support getting rid of the police”).

52. MICOL SEIGEL, *VIOLENCE WORK: STATE POWER AND THE LIMITS OF POLICE* 3 (2018) [hereinafter SEIGEL, *VIOLENCE WORK*].

53. A notable exception to this tradition is the abolitionist organizer Mariame Kaba, who argues that “when you see a police officer pressing his knee into a Black man’s neck until he dies, that is the logical result of policing in America. When a police officer brutalizes a Black person, he is doing what he sees as his job.” KABA, WE DO THIS ‘TIL WE FREE US, *supra* note 22, at 14. Kaba departs from this tradition by challenging the very notion that the prevailing conception of “police violence” properly captures the scope of policing’s harm. In her view, the term “police violence” is a misnomer because violence is intrinsic to policing. *Id.* This reframing of police work as violence work is in harmony with earlier scholarship by Egon Bittner, who in the 1970s famously described the organizing logic of policing as “coping with problems in which force may have to be used.” Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*, in *THE POTENTIAL FOR REFORM OF CRIM. JUST.* 17, 35 (Herbert Jacob ed., 1974).

54. While the meaning of “police violence” generates scant conversation, it was the focus of a recent law review symposium at Boston University Law School. See generally Symposium, *Beyond Bad Apples: Exploring the Legal Detriments of Police Violence*, 100 B.U. L. REV. 771 (2020), <https://www.bu.edu/bulawreview/volume-100-issue-3-may-2020/> [<https://perma.cc/37XB-K742>].

55. The seminal contribution on this topic comes from Kimberlé Crenshaw in *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist*

maintain a discursive dialogue around an issue, which makes it more difficult to properly address.

Second, and more ambitiously, this Article provides a novel analytic framework for deconstructing the concept of “police violence.” It endeavors to tightly hitch the concept of policing—which has the patina of safety and security, despite the lively controversy surrounding recent spectacles of policing—with the concept of violence.⁵⁶ Here, I analytically depart from past work by grounding this perspective on the recognition that the institutional labor of policing is akin to a tortious assault on class-exploited Black and Brown people, or whom I will refer to in this Article as race-class subjugated people.⁵⁷

Theory and Antiracist Politics, 1989 U. CHI. LEGAL F. 139, 140, 152 (1989) [hereinafter Crenshaw, *Demarginalizing Race and Sex*]. Other insightful works include R. Kelly Garrett, *Protest in an Information Society: A Review of Literature on Social Movements and New ICTs*, 9 INFO. COMM. & SOC’Y 202, 204 (2006) (“Framing processes are strategic attempts to craft, disseminate, and contest the language and narratives used to describe a movement. The objective of this process is to justify activists’ claims and motivate action using culturally shared beliefs and understandings.”) (citation omitted); Gregory Coles, *Emerging Voices: The Exorcism of Language: Reclaimed Derogatory Terms and Their Limits*, 78 COLL. ENG. 424, 425–26 (2016) (discussing reclamation efforts by specifically queer groups, but other traditionally marginalized groups as well, Coles writes that “[m]any scholars of English studies have acknowledged the significance of reclamation” and “some emphasize its role in establishing group solidarity,” while other scholars have “depicted reclamation as a means of battling the patriarchal strategies of containment enacted by derogation,” and “[f]inally, acknowledging the damaging power of oppressive language, scholars like Haig Bosmajian, Patricia Hill Collins, and bell hooks . . . have spoken to the need for marginalized groups to claim the right of self-definition, a move which may be expressed through reclamation”) (citations omitted); Meera E. Deo, *Why BIPOC Fails*, 107 VA. L. REV. ONLINE 115, 118 (2021) [hereinafter Deo, *Why BIPOC Fails*] (arguing for a rethinking of the usage of the term BIPOC on the theory that “centering particular groups only in name ultimately furthers their marginalization because they remain excluded . . . from participation and inclusion”),

56. “Spectacles of policing” is a shorthand for the types of visible uses of force by police that garner widespread coverage, i.e., police shootings and killings. SEIGEL, *VIOLENCE WORK*, *supra* note 52, at 183 (noting that “[p]olice murder is only the most spectacular way police cause premature death, not the most common, certainly not the most insidious”). I use the term “visible” here to delineate publicly recognized conduct from other types of harmful conduct by police that occurs outside of the public gaze, e.g., police sexual violence. The legal scholar Andrea J. Ritchie provides a magisterial account of “police violence” rendered invisible in her book. ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* (2017) [hereinafter RITCHIE, *INVISIBLE NO MORE*]. “Low-level” abuses of force like street stops, though also harmful, do not rise to the level of spectacles and are therefore outside the popular discourse regarding state violence. See RITCHIE, *INVISIBLE NO MORE*; see also KABA, *WE DO THIS ‘TIL WE FREE US*, *supra* note 22, at 10 (“Most often, it’s police shootings and killings that spark urban uprisings. However, the daily indignities and more invisible harms are ever-present and are the foundation of hostilities between young people of color and police. Routine state violence carried out by the police happens outside of public view, under the guise of addressing gun and other forms of violence.”).

57. I will use the term “race-class subjugated people” interchangeably with poor Black and Brown people, borrowing from the term “race-class subjugated communities,” which is what political scientists call sites of concentrated policing in class-exploited Black and Brown neighborhoods. See Joe Soss & Vesla Weaver, *Police Are Our Government: Politics, Political Science, and the Policing of Race-Class Subjugated Communities*, 20 ANN. REV. POL. SCI. 565, 565 (2017) (defining “race-class subjugated communities,” and describing “the ways ‘race-class subjugated communities’ are governed

Broadly speaking, an assault is characterized under tort law as (1) an intent to cause apprehension of an imminent harmful or offensive contact upon another person, (2) an overt act done for this purpose, and (3) reasonable apprehension of such contact by the victim.⁵⁸ Appraising policing in its historical context and acknowledging the continuities between policing today and its colonialist forebears reveals that policing is analogous to a tortious assault on class-exploited Black and Brown people. Consider the intentional removal of Indigenous people from their land by colonial armies, the patrolling of enslaved people in the antebellum South, the police surveillance of Black neighborhoods during the War on Crime, as just a few examples illustrating this dynamic.

Throughout U.S. history and up to the present, policing has been organized around two interrelated, constitutive dynamics: (1) to preserve social and economic hierarchies, by (2) surveilling, controlling, and brutalizing those who are disadvantaged on the basis of race, class, and gender and who present actual or perceived threats to those dominant hierarchies.⁵⁹ This societal arrangement results in spectacles of policing and daily indignities that manifest as victims' persistent recognition of the harm and threat of harm that policing generates.⁶⁰ Indeed, it is telling that *before* the Irish were racialized as "White" in the United States, they were routinely targeted and arrested by police because they were thought to be of a lower racial caste.⁶¹ Though it has ceased today, this practice went on with such intensity "that police vans are still called 'paddy wagons,' a

through coercion, containment, repression, surveillance, regulation, predation, discipline, and violence").

58. RESTATEMENT (SECOND) OF TORTS § 21 (AM. L. INST. 1965).

59. HINTON, *AMERICA ON FIRE*, *supra* note 24, at 16; VITALE, *THE END OF POLICING*, *supra* note 38, at 34. The same logic also informs White vigilante violence against Black Americans. As Elizabeth Hinton notes in *AMERICA ON FIRE*: "In both North and South throughout the twentieth century, [W]hite vigilantes killed Black Americans and bombed Black homes, businesses, and institutions. They faced little if any consequences for their actions because this violence was an accepted way of preserving 'public safety,' meaning reinforcing [W]hite dominion when Black people won political and economic gains." HINTON, *AMERICA ON FIRE*, *supra* note 24, at 92. This should come as no surprise when one considers that there is often a close alliance between law enforcement and White vigilantes. *See, e.g.*, Mary Romero, *Are Your Papers in Order?: Racial Profiling, Vigilantes, and "America's Toughest Sheriff,"* 14 *HARV. LATINX L. REV.* 337, 349–50 (2011). Romero details law enforcement legitimization of anti-immigrant vigilante groups at all levels of government. For example, within these xenophobic movements, Romero notes, "'immigration' has become the new code word for 'race'" and vigilante groups are often motivated by fear that non-white people threaten their cultural existence. *Id.*

60. In a PBS NewsHour-NPR-Marist poll conducted June 2–3, 2020, in response to the question "How much confidence do you have that local police will treat [B]lack and [W]hite people equally," 48 percent of Black Americans replied they have "[v]ery little or no confidence" that police treated people with different skin colors the same, compared to 12 percent for White Americans. Laura Santhanam, *Two-Thirds of Black Americans Don't Trust the Police to Treat Them Equally. Most White Americans Do.*, PBS (June 5, 2020), <https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do> [<https://perma.cc/PJZ5-HDMP>].

61. *See* PURNELL, *supra* note 45, at 10.

derogatory use of the popular Irish name ‘Padraig.’”⁶² This history suggests policing is an institution designed to maintain inequality through direct harmful contact with race-class subjugated groups. The cyclicity and inevitability of policing also implies its object is to create a social contract where expectations of harmful contact with police become part of being a poor, racialized person.

To better appreciate how this conception of policing coheres with the meaning of a tortious assault, consider surveillance as an example. Surveillance, by police and other governmental actors, “is about the prevention and management of risk through predictive or anticipatory means.”⁶³ It is intentional, not random or capricious.⁶⁴ It entails watching from a distance, so the watcher does not actually make contact with the watched. Since Black and Brown people are presumptively lawless and therefore present risks because of our status as members of racialized groups, we are “viewed as justifiably subject to aggressive police surveillance.”⁶⁵ Even if individuals have nothing to hide because they have not engaged in unlawful conduct, or at least have not engaged in conduct that is outside the norm, they legitimately fear aggressive surveillance. That is because surveillance might well lead to the state’s exercise of criminal enforcement and to contact with the criminal legal system, which imposes significant harm.⁶⁶ Thus, given the regularity with which Black and Brown people are disproportionately and unjustifiably the subjects of surveillance, a fact consistently observed in consent decrees addressing police abuses,⁶⁷ a predictable consequence is that Black and Brown people will regularly be aware that they are subject to such harmful and offensive contact. And this

62. *Id.*

63. SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 15 (2015) [hereinafter BROWNE, DARK MATTERS].

64. Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1935, 1937 (2013) [hereinafter Richards, *The Dangers of Surveillance*] (noting that “surveillance is *systematic*; it is intentional rather than random or arbitrary”).

65. Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1606 (2017) [hereinafter Roberts, *Democratizing Criminal Law*].

66. *See infra* notes 295 to 298 (discussing a study by epidemiologist Ernest Druckers, which found both that exposure to the criminal legal system is a disease that ravages communities, and that the impact that the War on Drugs wrought on Black and Brown communities is on scale comparable to the harms of the AIDS epidemic).

67. *See, e.g.*, Consent Decree, United States of America v. Police Department of Baltimore City, No. 1:17-cv-00099-JKB (Jan. 12, 2017), at 2, [hereinafter Baltimore Consent Decree] <https://www.justice.gov/opa/file/925056/download> [<https://perma.cc/B25E-GN4L>] (using the word “pattern” to describe police abuses, which suggests there is a regularity to the conduct); Consent Decree, State of Illinois v. City of Chicago, No. 17-cv-6260 (Jan. 31, 2019), at 1, <https://chicagopoliceconsentdecree.org/wp-content/uploads/2019/02/FINAL-CONSENT-DECREE-SIGNED-BY-JUDGE-DOW.pdf> [hereinafter Chicago Consent Decree] [<https://perma.cc/2DTD-LDU6>].

apprehension is reasonable because as a society we intuit that surveillance is harmful.⁶⁸

The Article has three parts. Part I deconstructs the logic of policing to substantiate the claim that policing intrinsically *is* violence as it relates to Black and Brown people. It first situates the institution of U.S. policing in its historical context. It then draws attention to the essential practices of modern policing in Black and Brown communities to highlight the continuities between policing today and at its inception. With this background in hand, Part II introduces a new gloss on the concept of police violence. It argues that policing functions as a tortious assault on poor Black and Brown people. Part III discusses the normative implications of this tort law framework. In locating policing's harms in the fresh context of a tortious assault, this Article takes its cue from the view of tort law as a vehicle for community-construction "through which communities perpetually reexamine and communicate their values" and articulate which acts constitute wrongs and harmful conduct.⁶⁹

Consider the tort of intentional infliction of emotional distress. Liability depends, to a large degree, on a finding that the defendant acted in a way "utterly intolerable in a civilized community" that would cause "an average member of the community" to exclaim "outrageous!" upon hearing of the conduct.⁷⁰

Now consider abolitionist projects. By the lights of many observers, to speak of abolition is to conjure up the image of dismantling something root and branch, e.g., all police standing down at noon tomorrow.⁷¹ But as Angela Y. Davis explains, abolition is not just a matter of "or not even primarily, about . . . a negative process of tearing down," though it is that, too.⁷² "[I]t is also about

68. Richards, *The Dangers of Surveillance*, *supra* note 64, at 1945 ("As a society, we have an intuitive understanding that public- and private-sector surveillance is potentially bad, but we do not have an articulate explanation of why it is bad. Some of our intuitions stem from literature, such as George Orwell's chilling portrait of Big Brother in *1984*.").

69. Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1320 (2017) (arguing that tort law is "not primarily concerned with efficiency or morality, as the instrumentalists have long contended, but with community").

70. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. L. INST. 1977). I include the qualification "to a large degree" to highlight a difference in how the standard of outrageousness is iterated under the second and third Restatement of Torts. Under Restatement (Third) of Torts § 46 cmt. g, trial judges are urged to play an active role in filtering intentional infliction of emotional distress (IIED) claims to protect against the possibility of community voices running amok. While in theory this might suggest that judges, and not the community, are the arbiters of what makes conduct outrageous, there is no evidence to suggest that judges frequently intervene to overrule communities' assessments of outrageousness. Thus, the articulation of outrageousness under the Restatement (Second) of Torts is functionally controlling.

71. See, e.g., Jessica S. Henry, *What 'Abolish' and 'Defund' the Police Really Mean*, MONTCLAIR STATE UNIV. (July 7, 2020), <https://www.montclair.edu/newscenter/2020/07/07/what-abolish-and-defund-the-police-really-mean/> [<https://perma.cc/M9E3-79FN>] (noting that "there are abolitionists who say abolition, in fact, means . . . an end or elimination of the institution of policing").

72. ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* 73 (2005).

building up, about creating new institutions” to imagine a safer world.⁷³ Abolitionists eschew proposals to “reform the police” on the recognition that policing is a “fundamentally, raced, classed, and gendered project” that cannot be reformed because it is intrinsically violent against these groups.⁷⁴ Abolitionists demand that we respond to harm with localized solutions that involve listening to oppressed communities and placing the power to define harm in their hands.⁷⁵ Indeed, the idea that communities should be centered in constructing definitions of harm is a core feature of power shifting as an abolitionist tool. “*Power shifting* is the underlying principle that the power to define and manage social harm should be . . . democratic. . . .”⁷⁶ Thus, this Article suggests that appreciating policing as a tortious assault on Black and Brown communities is itself a form of power shifting. This framing rearticulates the way “police violence” is constructed by grounding policing in terms of harmful and offensive contact as judged by the standards of the *community*.

Two caveats are warranted here. First, my claim is not that all police officers are violent or otherwise abusive in their daily interactions with communities of color such that their individual conduct is analogous to a tortious assault.⁷⁷ This Article is not an effort to besmirch particular police officers. Many good people work in police departments. Rather, I argue that the *institutional* labor that constitutes U.S. policing is analogous to a tortious assault on Black and Brown people.

Second, I do not intend to suggest that Black and Brown people have a viable tortious assault claim that would be recognized on an individual level in the U.S. legal system by virtue of the mere operation of policing in the United States. While such a reading might be plausibly inferred when my argument is considered against the urgent need for remedies to address the scourge of state-sanctioned violence against people of color, this account would be unmoored from the realities of civil (or criminal) litigation involving police misconduct, which, on the basis of current evidence, appears to be a dead end for most victims. By adding analytic texture to the meaning of “police violence,” the tort law framing the Article advances attempts to enrich the conversation about the desirability of reformist proposals, such as implicit bias training, to address state-

73. *Id.*

74. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 460 (2018) [hereinafter Akbar, *Toward a Radical Imagination of Law*].

75. Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1836–37 (2020) [hereinafter Akbar, *Abolitionist Horizon*] (showing as an example how the Oakland Power Projects “Anti-Policing Health Workers Cohort” experiment was “localized and focused on building community resilience and capacity to decrease reliance on the police for emergency health situations”).

76. Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 28 (2022) (discussing the role that courts play in the abolitionist movement).

77. The term “communities of color” includes Black and Brown communities.

sanctioned violence carried out by police. With a tortious assault framework, the possibility of and justification for a reconceptualization of the role of police and remedies for police violence becomes far easier to understand. These remedies, properly understood, are oriented not toward mere reform of an intrinsically violent system, but toward meaningful steps in abolishing that system.

I.

THE LOGIC OF U.S. POLICING

Part I demonstrates that the organizing logic of policing is directly linked to its infliction of violence on Brown and Black communities. An inquiry into the logic of U.S. policing must begin by recalling its origin story. This Part offers that foundation. It starts in Part I.A by discussing the popular but mistaken belief that U.S. policing was founded to address metropolitan concerns regarding crime.⁷⁸ Parts I.B-C then show that this narrative is an erasure of the colonialist roots of U.S. policing. Part I.D discusses how policing evolved during the Jim Crow era while adhering to its colonialist roots.⁷⁹ With that background in place, Part I.E examines modern policing—after the demise of Jim Crow—in Black and Brown communities to underscore the continuities between the core features of the labor of policing today and its colonialist forebears. In particular, police have historically been enlisted to preserve the social order of White dominion over Black and Brown people by meting out violence on race-class subjugated people.⁸⁰

A. Metropolitan Myth of Policing

Most accounts of the origins of policing in the United States embrace the popular narrative that policing emerged in response to challenges that flowed from metropolitan conditions, such as a perceived need for general crime control.⁸¹ In this framing, Sir Robert Peel's creation of the London Metropolitan

78. See SEIGEL, *VIOLENCE WORK*, *supra* note 52, at 5 (discussing the popular narrative that policing has metropolitan roots).

79. The origins of the term “Jim Crow” can be traced back to Thomas “Daddy” Rice, a White minstrel, in the 1930s. Clad in beggar’s clothes and wearing “[B]lack face,” Rice mimicked an elderly and disabled Black man who had been enslaved by a master named Mr. Crow: “Weel about, and turn about / And do jis so; Eb’ry time I weel about, I jump Jim Crow.” This routine was known as “Jump Jim Crow.” How the term came to be linked with racial segregation remains unclear to historians. See Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 506 n.2 (2006) (citing LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* xiv (1998)).

80. See HINTON, *AMERICA ON FIRE*, *supra* note 24, at 16; VITALE, *THE END OF POLICING*, *supra* note 38, at 34.

81. See, e.g., VITALE, *THE END OF POLICING*, *supra* note 38, at 34–37 (explaining that “most liberal and conservative academics [claim that] the London Metropolitan Police [was] the “original” police force and a model for U.S. cities such as New York and Philadelphia); SEIGEL, *VIOLENCE WORK*, *supra* note 52, at 5 (same).

Police Force in 1829 is the starting point.⁸² Peel pioneered the founding of the London Police in the throes of the British colonial occupation of Ireland.⁸³ As British home secretary, he was “seeking new forms of social control that would allow for continued political economic domination in the face of growing insurrections, riots, and political uprisings.”⁸⁴ But the conventional story regarding the origins of policing does not recognize this control and power aspect in the Peel account and instead focuses on policing as a generally benign institution that emerged as a reasonable response to immigration, urbanization, and the need for service provision.⁸⁵

In 1838, London style police departments made their way across the pond to the United States. Built on the scaffolding Peel had established almost a decade earlier, economic and political leaders in Boston imported the London model to control the social disorder that rose up among the working classes.⁸⁶ Boston was not the only importer of this policing model; it would soon gain traction in the following decade in cities like New York and Chicago.⁸⁷ If you take the popular accounts at their word, the early police forces were “driven by the pressures of crime due to immigration and urbanization, drawing on working-class ethics and with emphasis on social service provision.”⁸⁸ But these explanations obscure the reality that their main objectives were to safeguard property and to quell strikes and other labor efforts.⁸⁹

B. Colonialist Roots

The airbrushed account of the London-model is but one way in which the history of policing has been distorted. In reality, U.S. policing had begun long before the London-model surfaced, expressly driven by a felt need to repress the feared power of people of color.⁹⁰ In the mid-sixteenth century, Spanish colonialists in modern-day Cuba pillaged Indigenous communities and captured Africans who attempted to escape from bondage.⁹¹ The earliest form of policing

82. See VITALE, *THE END OF POLICING*, *supra* note 38, at 35. The term “Bobbies” as a shorthand for British Police Officers is derived from Sir Robert Peel.

83. *Id.*

84. *Id.*

85. *Id.* at 34–37.

86. *Id.* at 36–37.

87. *See id.* at 36–38.

88. SEIGEL, *VIOLENCE WORK*, *supra* note 52, at 5.

89. See VITALE, *THE END OF POLICING*, *supra* note 38, at 36 (discussing how New York’s formation of a police force was in response to strikes and other labor movements).

90. See DAVID CORREIA & TYLER WALL, *POLICE: A FIELD GUIDE* 229 (2018) (observing that the term “cop” likely derives from the Latin term *capere*, meaning to “seize, grasp,” or *capere*, a Middle French term which means “to capture”).

91. PURNELL, *supra* note 45, at 57.

in the United States emerged within the context of the Indian Wars,⁹² well in advance of when Peel established the London Metropolitan Police.⁹³ As colonial expansion took root with the extermination or removal of more than ten million Indigenous people from their territory,⁹⁴ members of settler militias known as the Texas Rangers were enlisted to defend the interests of White colonists.⁹⁵ The Rangers were primarily tasked with tracking down Indigenous populations suspected of attacking White settlers.⁹⁶ Their unmitigated campaign of terror, however, extended far beyond that.⁹⁷

Rangers tortured, killed, and maimed Native Americans who challenged their dominion.⁹⁸ As Andrea J. Ritchie describes in her book, *Invisible No More: Police Violence Against Black Women and Women of Color*, “[m]ilitias engaged in such war crimes had the full endorsement of the state, and throughout the eighteenth and nineteenth centuries, the murder of Indigenous people, deemed subhuman ‘bucks’ and ‘squaws,’ was not a crime at law.”⁹⁹ In time, regular police forces took the place of militias “with the explicit goal of targeting Indigenous people.”¹⁰⁰ For example, a stated goal of the St. Louis, Missouri, police force upon its founding in 1808 was to “protect” locals from Indigenous people.¹⁰¹ Elsewhere, laws outlawing vagrancy authorized police to detain any “Indian found ‘loitering or strolling about’” to be “hired out to the highest bidder for up to four months.”¹⁰² What was true at the local and state level was also true at the federal level. The U.S. War Department labeled “all Indigenous individuals and groups living outside designated federal reservations as

92. The term “Indian” is loaded with fraught racial connotations rooted in European American colonialism, which I should acknowledge here by leaning on the works on Indigenous scholars. As Michael Yellow Bird explains, “[u]nder colonial rule[,] Indigenous Peoples in the United States and Canada were systematically subjugated and oppressed because Europeans and Americans considered them to be an inferior race. Because colonizers regarded Indigenous Peoples as inferior, they felt justified in ignoring individual [T]ribal identities and labeling Indigenous Peoples as one racial group: Indians. To the colonizer this made sense because it was economical, efficient, and required little thinking.” Michael Yellow Bird, *What We Want to Be Called: Indigenous Peoples’ Perspectives on Racial Ethnic Labels*, 23 AM. INDIAN Q. 1, 3 (1999).

93. RITCHIE, *INVISIBLE NO MORE*, *supra* note 56, at 19–20.

94. *Id.* at 20.

95. VITALE, *THE END OF POLICING*, *supra* note 38, at 43; RITCHIE, *INVISIBLE NO MORE*, *supra* note 56, at 20.

96. VITALE, *THE END OF POLICING*, *supra* note 38, at 43.

97. Alex Vitale writes that: “The Rangers also frequently acted as vigilantes on behalf of [W]hites in disputes with the Spanish and Mexican populations. For more than a century they were a major force for white colonial expansion pushing out Mexicans through violence, intimidation, and political interference.” *Id.*

98. *Id.*; RITCHIE, *INVISIBLE NO MORE*, *supra* note 56, at 20.

99. RITCHIE, *INVISIBLE NO MORE*, *supra* note 56, at 21.

100. *Id.* at 24.

101. *Id.*

102. *Id.*

‘fomenters of disturbance.’”¹⁰³ By marking Indigenous people as “an inherent breach of the natural order of things,” the imperative to disappear Native Americans becomes clear.¹⁰⁴ This logic continues to inform everyday interactions between police and Indigenous people.¹⁰⁵

C. *Slave Patrols*

Another form of policing that predated the London model of policing imported into the United States in the early to mid-nineteenth century were slave patrols.¹⁰⁶ Operating in cities including Charleston, South Carolina, and New Orleans, Louisiana, slave patrol members were appointed by justices of the peace and comprised of uniformed individuals paid full-time to prevent uprisings by the enslaved.¹⁰⁷ The Charleston City Guard and Watch, for instance, became professionalized as far back as 1783.¹⁰⁸ Around the time Robert Peel founded the London Metropolitan Police Force in 1829, the Charleston police force already had at least one hundred paid officers in its ranks on around-the-clock duty.¹⁰⁹

Whether in warehouses or workshops, enslaved people usually labored outside the presence of their owners.¹¹⁰ Because of this, it was possible for large groups of enslaved people to travel around the city without their overseers if they had proper documentation.¹¹¹ The enslaved could form fellowships with others, including free Blacks.¹¹² The possibility of enslaved people fraternizing generated social anxiety among Whites.¹¹³ Quoting a Charlestonian in 1845, the historian Richard Wade explains that,

Over the sparsely populated country . . . where gangs of negroes are restricted within settled plantations under immediate control and discipline of their respective owners,” slaves were not permitted “to idle

103. *Id.* (citing ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES’ HISTORY OF THE UNITED STATES 154 (2014)).

104. *See* RITCHIE, INVISIBLE NO MORE, *supra* note 56, at 24–25.

105. *Id.* at 110–11; see, for example, Robynne Neugebauer, *First Nations Peoples and Law Enforcement: Community Perspectives on Police Response*, in CRIMINAL INJUSTICE: RACISM IN THE CRIMINAL JUSTICE SYSTEM 109 (2000), for more on the symbiotic discriminatory treatment against First Nations people by police and that community’s mistrust of police. Neugebauer writes, “[t]he law discriminates against First Nations people by denying them justice[,] . . . [imposing] constant surveillance or over-policing . . . [which are] the result of cultural stereotypes. . . .” She notes further that “First Nations people are arrested for offenses that would otherwise be ignored if committed by non-Aboriginals.” *Id.*

106. VITALE, THE END OF POLICING, *supra* note 38, at 45.

107. *Id.* at 45–46.

108. *Id.* at 46.

109. *See id.*

110. *Id.*

111. *See id.* at 47 (explaining that “heavily armed police regularly inspected the passes of employed slaves and the papers of free [B]lacks”).

112. *Id.* at 46.

113. *Id.*

and roam about in pursuit of mischief . . . [T]he mere occasional riding about and general supervision of a patrol may be sufficient.” But, he continued, “some more energetic and scrutinizing system is absolutely *necessary*” in cities, “where from the very denseness of population and closely contiguous settlements . . . there must be need of closer and more careful circumspection.”¹¹⁴

A professionalized police force was therefore regarded as necessary to thwart any attempts within the Black community to organize a resistance.¹¹⁵

By the mid-eighteenth century, every Southern state had written statutes establishing slave patrols.¹¹⁶ In a move that would foreshadow broken windows policing,¹¹⁷ slave patrols became a constant presence in Black communities and monitored even the most mundane activities—a blanket surveillance tactic vital for tracking their movement.¹¹⁸ Patrol members were deputized to break into Black people’s homes and certify that the enslaved were not reading and writing, sheltering fugitives, or holding meetings.¹¹⁹ An enslaved person recounted the horrors of witnessing his mother being assaulted by a patrol member: “De patrollers wouldn’t allow de slave to hold night services, and one night dey caught me mother out praying. Dey stripped her naked and tied her hands together and . . . dey pulled her up so dad her toes could barely touch de ground and whipped her.”¹²⁰ This vicious treatment was typical. The only constraint on patrol members’ authority was that they could not lawfully kill enslaved people.¹²¹ That power was retained by their slave masters.

114. RICHARD WADE, *SLAVERY IN THE CITIES: THE SOUTH 1820-1860* 80 (1967) (emphasis omitted).

115. See VITALE, *THE END OF POLICING*, *supra* note 38, at 46–47.

116. RITCHIE, *INVISIBLE NO MORE*, *supra* note 56, at 28.

117. Introduced in 1982, broken windows policing is a criminological theory premised on the idea that conditions evidencing social disorder in a community, e.g., the presence of broken windows, create the environment for criminal activity to thrive and that policing low-level offenses and social disorders is an effective mechanism for thwarting serious crimes. See George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, *ATL. MONTHLY* (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<https://perma.cc/BWE6-E3QW>]. Despite no evidence that broken windows policing actually reduced crime, the theory was adopted into practice in urban areas like New York City, leading to the over-policing of economically disadvantaged Black and Brown neighborhoods and more precarious conditions for those communities than before the police intervention. See also, K. Babe Howell, *The Costs of “Broken Windows” Policing: Twenty Years and Counting*, 37 *CARDOZO L. REV.* 1059, 1059–64 (2016).

118. VITALE, *THE END OF POLICING*, *supra* note 38, at 47.

119. *Id.* at 46–47.

120. RITCHIE, *INVISIBLE NO MORE*, *supra* note 56, at 29 (citing FEDERAL WRITERS’ PROJECT OF THE WORKS PROGRESS ADMINISTRATION FOR THE STATE OF OKLAHOMA, *SLAVE NARRATIVES: A FOLK HISTORY OF SLAVERY IN THE UNITED STATES FROM INTERVIEWS WITH FORMER SLAVES*, (Vol. 13, 1941), available at <https://tile.loc.gov/storage-services/service/mss/mesn/mesn-130/mesn-130.pdf> [<https://perma.cc/9CTH-MAS6>]).

121. VITALE, *THE END OF POLICING*, *supra* note 38, at 47.

D. Policing in the Post-Civil War Era (1870s-1960s)

When slavery was eradicated, so too was the system of slave patrols.¹²² In its place emerged newer and “more professional” systems of policing to control Blacks who had become nominally free.¹²³ Whereas slave patrols focused on quelling rebellions, police officers in the post-Civil War environment were preoccupied with the enforcement of Black Codes.¹²⁴ Black Codes were laws enacted to circumscribe the freedom of formerly enslaved people to prevent them from elevating beyond what was deemed to be their station.¹²⁵ Articulating the prevailing wisdom of the time, an editor of a Southern publication complained that while he had come to terms with the reality that the “fiat of war” had ensured the demise of slavery,¹²⁶ the absence of forced labor would deal a fatal blow to the Southern economy. He wondered rhetorically whether “any man in his right senses . . . [would] ever again expect to see clean fields and productive crops” without the Black labor population.¹²⁷ Although the Codes operated in service of the broader project of ensuring that the South continued to be a “[W]hite man’s country,”¹²⁸ the most immediate objective was to reassert control over the Black labor supply.

For instance, a Mississippi Code provided that any Black woman age eighteen or older who was unemployed could be denounced as a vagrant and fined or incarcerated.¹²⁹ As historian Talitha LeFlouria theorizes, Codes such as this were an expression of Southerners’ disapproval of formerly enslaved Black women withdrawing their labor to instead tend to their own families.¹³⁰ Incredibly invidious in effect, “[l]ocal sheriffs would arrest free [B]lacks on flimsy to non-existent evidence, then drive them into a cruel and inhuman criminal ‘justice’ system whose punishments often resulted in death.”¹³¹

Prior to the Civil War, the majority of incarcerated people were not Black.¹³² Nearly all Black people were enslaved, and the legal system was hesitant to deprive the enslaver of the economic value of their property.¹³³ When

122. *Id.*

123. *Id.*

124. *See id.*

125. *See* RITCHIE, *INVISIBLE NO MORE*, *supra* note 56, at 29.

126. THEODORE BRANTNER WILSON, *THE BLACK CODES OF THE SOUTH* 44 (1965) (quoting an editorial from the *Edgefield Advertiser*).

127. *Id.*

128. *See* Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in the Anti-Gang Civil War Injunctions*, 107 *YALE L.J.* 2249, 2260 (1998) (quoting ROBERT CRUDEN, *THE NEGRO IN RECONSTRUCTION* 21 (1969)).

129. TALITHA L. LEFLOURIA, *CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW SOUTH* 14 (2015).

130. *See id.*

131. VITALE, *THE END OF POLICING*, *supra* note 38, at 47.

132. KABA, *WE DO THIS ‘TIL WE FREE US*, *supra* note 22, at 73.

133. *See id.*

enslaved people committed crimes, they were often simply lynched rather than imprisoned.¹³⁴ Because of these circumstances, poor Whites constituted the bulk of the prison population.¹³⁵ When emancipation sounded the death knell of the slave system, “the literal complexion of prisons changed, and Black people became hyper-targets of that system.”¹³⁶ This historical record gestures to a broader dynamic that is precisely the logic that fueled the dramatic expansion of the mass incarceration apparatus when the pillars of Jim Crow began to be eroded in the 1960s: “It wasn’t really about crime; it was about a perception that Black people were inherently criminal, that Black people couldn’t manage freedom . . . and prison became a site for continuing to control Blackness.”¹³⁷

Between the turn of the twentieth century and the heyday of the Civil Rights Movement, slave codes and Black codes were replaced by Jim Crow segregation laws.¹³⁸ Jim Crow was a system of legal apartheid in the South in which Blacks were prohibited by law from associating with Whites in an effort to condemn Blacks to a lower caste.¹³⁹ Of particular concern were societal arrangements in which interracial relations could blossom.¹⁴⁰ This is why legislatures passed laws prohibiting Blacks and Whites from marrying,¹⁴¹ and the races were segregated in broad and varied public forums including schools,¹⁴² beaches,¹⁴³

134. *Id.*

135. *See id.*

136. *Id.*

137. *Id.*

138. RITCHIE, INVISIBLE NO MORE, *supra* note 56, at 31.

139. *See* David Martin, *The Birth of Jim Crow in Alabama 1865-1896*, 13 NAT’L BLACK L.J. 184, 185 n.8 (1993); *see also* Reginal Oh, *Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. DAVIS L. REV. 1321, 1324 (2006) [hereinafter Oh, *Interracial Marriage in the Shadows of Jim Crow*] (“Racial segregation was the lynchpin of Southern Jim Crow society. The systematic physical and social separation of the [W]hite and [B]lack races was fundamental to maintaining a social system of [W]hite supremacy and [B]lack inferiority.”).

140. Oh, *Interracial Marriage in the Shadows of Jim Crow*, *supra* note 139, at 1340.

141. *See* *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that anti-miscegenation statutes violate the Equal Protection and Due Process Clauses to the Fourteenth Amendment to the U.S. Constitution).

142. *See* *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding that the state-sponsored segregation of public schools is unconstitutional under the Fourteenth Amendment to the U.S. Constitution).

143. *See* *Dawson v. Baltimore*, 220 F.2d 386 (4th Cir. 1955) (enjoining racial segregation in public beaches and bathhouses).

restaurants,¹⁴⁴ hotels,¹⁴⁵ pools,¹⁴⁶ and railroad passenger cars.¹⁴⁷ During this period, police officers continued to serve as primary purveyors of violence organized to maintain the systems of inequality erected and fortified by the Jim Crow regime.¹⁴⁸ Trains and buses were particularly contested public sites.¹⁴⁹

Andrea J. Ritchie describes some examples in her book, *Invisible No More*. One situation involved then-fifteen-year-old Claudette Colvin, a woman who has virtually been erased from the historical record.¹⁵⁰

After spending the day reading about Harriet Tubman and Sojourner Truth, fifteen-year-old Claudette Colvin protested when ordered to give up her seat on the bus, citing a finer point of law that allowed her to keep it. The arresting officer, calling her “that thing” and “[B]lack whore,” yanked her out of her seat and kicked her down the aisle as she sobbed in protest. When one of the officers summoned to the scene joked about her breasts and bra size, Claudette said, “I was afraid they might rape me.”¹⁵¹

In another instance that shows the centrality of violence to policing during this period, Fannie Lou Hamer and other women returning from a voter registration drive were arrested, sexually assaulted, and severely beaten for traveling in the section of a Greyhound bus marked for Whites.¹⁵² “You bitch, we going to make you wish you was dead,” one officer shouted at Hamer while others savagely beat her and stripped her naked in front of five men.¹⁵³ The attack left Hamer

144. See *Turner v. City of Memphis*, 369 U.S. 350 (1962) (enjoining racially segregated public restaurants).

145. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that under the Commerce Clause of the U.S. Constitution, the 1964 Civil Rights Act’s anti-discrimination provisions prohibit hotels that host interstate travelers from discriminating against guests on the basis of their race).

146. See, e.g., Steven N. Waller & Jim Bemiller, *Navigating Rough Waters: Public Swimming Pools, Discrimination, and the Law*, 1 INT’L J. AQUATIC RSCH. AND EDUC. (2018).

147. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (enforcing racial segregation in railroad passenger cars).

148. VITALE, *THE END OF POLICING*, *supra* note 38, at 47–48.

149. See generally Kenneth W. Mack, *Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875–1905*, 24 LAW & SOC. INQUIRY 377 (1999) (discussing how railroad segregation contributed to the development of de jure segregation).

150. See Margot Adler, *Before Rosa Parks, There Was Claudette Colvin*, NPR (Mar. 15, 2009), <https://www.npr.org/2009/03/15/101719889/before-rosa-parks-there-was-claudette-colvin> [<https://perma.cc/JN8A-NG77>] (reporting that “[m]ost people know about [Rosa] Parks and the Montgomery, [Alabama] bus boycott that began in 1955, but few know that there were a number of women who refused to give up their seats on the same bus system,” and that “[m]ost of the women were quietly fined, and no one heard much more,” and that “Colvin was the first to really challenge the law”).

151. RITCHIE, *INVISIBLE NO MORE*, *supra* note 56, at 34.

152. *Remembering 1963: Fannie Lou Hamer Arrested and Beaten in Winona, Mississippi*, EQUAL JUSTICE INITIATIVE (June 8, 2018), <https://eji.org/news/remembering-1963-fannie-lou-hamer-arrested-and-beaten-winona-mississippi/> [<https://perma.cc/3BKD-3TAW>].

153. RITCHIE, *INVISIBLE NO MORE*, *supra* note 56, at 34.

permanently blind in one eye.¹⁵⁴ She also suffered irreparable kidney damage,¹⁵⁵ which contributed to her early death in 1977 at age fifty-nine.¹⁵⁶

E. Modern Policing (1960s-Present)

Despite the police violence exacted on activists like Fannie Lou Hamer and Claudette Colvin, a surge of support for the Civil Rights Movement crested in the 1960s. Policing became more repressive in response.¹⁵⁷ The range of violent police activities was so expansive that in the South, the police were regarded as the frontline for suppressing the Civil Rights Movement.¹⁵⁸ “They denied protest permits, threatened and beat demonstrators, made discriminatory arrests, and failed to protect demonstrators from angry mobs and vigilante actions, including beatings, disappearances, bombings, and assassinations.”¹⁵⁹ Police conduct was shaped by the desire to preserve entrenched systems of discrimination and economic exploitation.¹⁶⁰ Two developments during this period stand out as vital to the increasingly violent trajectory of police work.

One is the establishment of the federal Office of Public Safety (OPS) in the early 1960s. The agency was an international initiative operated by the U.S. government and staffed by U.S. police executives to train the police forces of allied foreign nations.¹⁶¹ While areas of the Cold War conflict were initially the targeted sites of intervention,¹⁶² OPS had expanded its operations to nearly fifty countries throughout the globe by the time Congress disbanded the operation in 1974.¹⁶³ During its twelve years of operation, the agency “distributed \$200 million in arms and equipment to police forces in forty-seven countries, trained over 7,500 senior officers at its academy and other US schools, and sent nearly 1,500 advisors to train over one million rank-and-file policemen.”¹⁶⁴ Its tenure was marred by “allegations that it did not improve democratic policing. It was accused of teaching torture and practicing political policing.”¹⁶⁵ Official

154. EQUAL JUSTICE INITIATIVE, *supra* note 152.

155. *Id.*

156. *Id.*

157. VITALE, THE END OF POLICING, *supra* note 38, at 48.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 49 (stating that “from 1962 to 1974, the U.S. government operated a major international police training initiative, staffed by experienced American police executives, called the Office of Public Safety”); SEIGEL, VIOLENCE WORK, *supra* note 52, at 25 (“Office of Public Safety, a federal agency established in the early 1960s to provide allied foreign nations with training for their police.”).

162. VITALE, THE END OF POLICING, *supra* note 38, at 49 (noting that OPS “worked closely with the CIA to train police in areas of Cold War conflict, including South Vietnam, Iran, Uruguay, Argentina, and Brazil”).

163. SEIGEL, VIOLENCE WORK, *supra* note 52, at 29.

164. *Id.*; VITALE, THE END OF POLICING, *supra* note 38, at 49.

165. SEIGEL, VIOLENCE WORK, *supra* note 52, at 29.

documents show that there was something to the allegations.¹⁶⁶ In places where OPS had operated, it was not uncommon for OPS officers to engage in human rights violations, including extrajudicial killings and torture.¹⁶⁷

Meanwhile, as clashes between civil rights activists and police intensified in the United States, the notion that political protests were linked to crime began to work its way into the hearts and minds of the U.S. public.¹⁶⁸ Police Chief Thomas Reddin of the Los Angeles Police Department articulated a typical sentiment: “The present Negro movement is just as subversive as the past Communist movement or just as dangerous as the organized crime movement.”¹⁶⁹ Reddin went so far as to assert that police should engage in “overkill—kill the butterfly with a sledgehammer.”¹⁷⁰ The logical outgrowth of this assessment was that police should escalate the state-sanctioned, repressive violence that was at the core of their mission of policing. This was a call that OPS was prepared to answer. “In working with the police in various countries we have acquired a great deal of experience in dealing with violence ranging from demonstrations and riots to guerilla warfare,” OPS director Byron Engle testified before the Kerner Commission on Civil Disorders.¹⁷¹ “Much of this experience may be useful in the US.”¹⁷² In this environment, “the sense that it was appropriate to transfer techniques between foreign and domestic settings nourished the emergent tough-on-crime consensus, supplying authority and expertise to lawmakers bent on enlarging the [U.S. criminal legal system].”¹⁷³

The second development that marked a major shift in law enforcement’s escalation of violence was the Crime Control and Safe Streets Act of 1968, signed by President Johnson as the so-called War on Crime was taking root.¹⁷⁴ Two interlocking forces provoked the War on Crime under President Johnson. The first was the rise in demonstrations to secure civil rights protections for Black Americans in the 1960s.¹⁷⁵ The second was the linking of those

166. See VITALE, *THE END OF POLICING*, *supra* note 38, at 49 (“According to internal documents, the training emphasized counterinsurgency, including espionage, bomb making, and interrogation techniques.”).

167. *Id.* (“In many parts of the world these officers were involved in human-rights abuses including torture, disappearance and extrajudicial killings.”).

168. SEIGEL, *VIOLENCE WORK*, *supra* note 52, at 38–39.

169. *Id.* at 38–39 (citing REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 9 (1967)).

170. Edward J. Escobar, *The Dialectics of Repression: The Los Angeles Police Department and the Chicano Movement, 1968-1971*, 79 J. AM. HIST. 1483, 1495 (Mar. 1993) (citations omitted).

171. VITALE, *THE END OF POLICING*, *supra* note 38, at 50 (citing Byron Engle, Statement, (Sept. 20, 1967), series 1, *Civil Rights During the Johnson Administration, 1963-1969*, Part V: Records of the NACCD (Kerner Commission) online (CRDJ, 001346-003-0256, 1328–35)).

172. *Id.*

173. SEIGEL, *VIOLENCE WORK*, *supra* note 52, at 39.

174. See Elizabeth Hinton, “*A War Within Our Own Boundaries*”: Lyndon Johnson’s *Great Society* and the Rise of the Carceral State, 102 J. AM. HIST. 100, 100–02 (2015).

175. *See id.*

demonstrations to the increase in crime rates.¹⁷⁶ Confronted with these developments, President Johnson signed the Crime Control and Safe Streets Act, which gave law enforcement greater authority to pursue more violent tactics to control Black communities.¹⁷⁷ This new national crime control strategy targeted communities of color as sites for opening neighborhood police precincts which would surveil and control those communities.¹⁷⁸ Housing projects, long deemed “problem areas” due to their high rates of concentrated poverty and reported crime, became sites of escalated policing.¹⁷⁹ Law enforcement thus saw the shift in policing strategy as an entry point “to make themselves a continuous presence” in the projects.¹⁸⁰ From their perspective, they were dutybound to make as much contact with Black residents as possible.¹⁸¹ “The message was simple: Black people should get used to the police being part of their pickup basketball games, walks home from work, and family barbeques.”¹⁸² As James Baldwin related the situation with deep concern, the police moved through Black ghettos “like an occupying soldier in a bitterly hostile country.”¹⁸³

The Pyramid Courts housing projects in Cairo, Illinois, is one example that illuminates the precarity that befell Black housing project residents at the time.¹⁸⁴ A former police officer recalled a colleague boasting that, “[w]e’re going to go out to Pyramid Courts and what we should do is bomb them all out or blow them all up.”¹⁸⁵ One might think that such proclamations are mere puffery. That is, U.S. police would not premeditatedly bomb civilians in a residential neighborhood on U.S. soil. But this is precisely what happened on May 13, 1985, in Philadelphia, Pennsylvania. Police flew a helicopter over the roof of a house occupied by a Black liberation group called MOVE and dropped a bomb that flattened several city blocks.¹⁸⁶ Police had already emptied thousands of rounds of ammunition into the residence before initiating this form of warfare.¹⁸⁷ The Kerner Commission warned in its 1968 report on civil disorders that “[e]quipping civil police with automatic rifles, machine guns, and other weapons of massive and indiscriminate lethality is not warranted by the evidence

176. *See id.*

177. *See id.* at 102.

178. *See* HINTON, *AMERICA ON FIRE*, *supra* note 24, at 32.

179. *Id.* at 54.

180. *See id.*

181. *Id.* (stating that “[l]aw enforcement saw everyday contact with Black residents as their duty”).

182. *Id.*

183. *Id.* at 44 (citing James Baldwin, *Fifth Avenue, Uptown: A Letter from Harlem*, *ESQUIRE*, (July 1, 1960), <https://www.esquire.com/news-politics/a3638/fifth-avenue-uptown/> [<https://perma.cc/4W5G-UGPR>]).

184. *Id.* at 52.

185. *Id.*

186. Heather Ann Thompson, *Saying Her Name*, *THE NEW YORKER* (May 16, 2021), <https://www.newyorker.com/news/essay/saying-her-name> [<https://perma.cc/48WS-43RL>].

187. *Id.*

Weapons which are designed to destroy, not to control, have no place in densely populated urban communities.”¹⁸⁸ But like many of the Commission’s recommendations, this remedial prescription has not been heeded.¹⁸⁹ And so it was the case that police in Pyramid Courts drove into the housing projects with armored vehicles and shot into residences with machine guns.¹⁹⁰ Hinton explains that residents shot out “streetlights and boarded up their homes” as a means of protecting themselves from harm.¹⁹¹ Some slept in their bathtubs, “where they were less likely to be hit by a bullet from the outside forces.”¹⁹²

The escalation in policing during this period resulted in a steady climb in the number of Black men age twenty-five and younger killed by police,¹⁹³ and the fatality rate for this demographic was ten times greater than for White and Latinx men in that age group.¹⁹⁴ Data from the Centers for Disease Control and Prevention (CDC) reveal that police killings of Black people ages twenty-five-years old or younger reached a highpoint in the late 1960s and early 1970s, with approximately one hundred murdered by police each year.¹⁹⁵ To put those numbers in perspective, between 1968 to 1974, one in four people killed by police were Black. From 1975 to 1985, the proportion was about one in seven; today, that ratio is about one in ten.¹⁹⁶

By the late 1980s, Democrats and Republicans had coalesced around the idea that it was permissible for poor Black and Brown communities to be saturated with police officers.¹⁹⁷ The defeat of Democrat candidate Michael Dukakis in the 1988 U.S. presidential race was the catalyst. Lamenting Dukakis’s “soft on crime” political disposition, “Democrats came to fully embrace [a “tough on crime”] strategy as well.”¹⁹⁸ This led to “Bill Clinton’s 1994 Crime Bill, which added tens of thousands of additional police and

188. HINTON, *AMERICA ON FIRE*, *supra* note 24, at 35 (citing REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 9 (1967)).

189. *See generally* Alice George, *The 1968 Kerner Commission Got It Right, but Nobody Listened*, SMITHSONIAN MAG. (Mar. 1, 2018), <https://www.smithsonianmag.com/smithsonian-institution/1968-kerner-commission-got-it-right-nobody-listened-180968318/> [<https://perma.cc/8ES7-JD3LJD3L>].

190. HINTON, *AMERICA ON FIRE*, *supra* note 24, at 52–53.

191. HINTON, *AMERICA ON FIRE*, *supra* note 24, at 55.

192. *Id.* at 53.

193. *Id.* at 102.

194. *Id.*

195. *Id.*

196. *Id.* at 102–03.

197. *See generally* JAMES FORMAN JR., *LOCKING UP OUR OWN* (2017) (explaining the complicated dynamics that led Democrats and Black Americans to demand more policing in Black and Brown neighborhoods).

198. VITALE, *THE END OF POLICING*, *supra* note 38, at 51.

expanded the drug and crime wars.”¹⁹⁹ The roll call of victims of state violence offers a painful reminder that we continue to bear the scars of the past.²⁰⁰

II.

POLICING AS A TORTIOUS ASSAULT

With this historical context, this Part sets forth an alternative framework for understanding policing as violence work. This account of police violence focuses on the potentiality of physical injury (not actual physical injury), a dynamic that is captured under the tort of assault. It argues that for communities subjugated by race and class, policing is akin to a tortious assault. Recognizing that the contributions here were not developed on a blank slate, this Part begins in Part II.A by reviewing existing works that have suggested we toggle away from the term “police violence” because policing *is* violence. The work of antiviolence organizer Mariama Kaba and historian Micol Seigel stand out.²⁰¹ After three decades of activism against state violence, Kaba has retired the term police brutality because it is meaningless since “violence is inherent to policing.”²⁰² In Seigel’s hands, “violence is visited upon those who might disrupt aggregations of capital and privilege” through the “carefully circumscribed notion of *police*.”²⁰³ Part II.B moves to the doctrinal tenets of a claim for tortious assault. With this background in place, Part II.C applies the tortious assault concepts to the novel context of policing.

To be clear, I am not positing that the mere existence of American policing in the United States means that race-class subjugated people hold a tortious assault claim that would be judicially cognizable in our current legal system. Rather, by thinking about policing from the perspective of the communities of those who are most often subjected to policing and how these communities *reasonably* understand what is being done to them, it permits us to have a more holistic, and indeed, more comprehensive understanding of policing as violence work. Moreover, attention to the experiences of these communities shows that policing is an activity that is imminently harmful even when it does not involve making actual physical contact with the policed.

199. *Id.*

200. “We do this for Marissa! We do this for Rekia! We do this for Tanisha! We do this for Islan! We do this for Aiyanna! We do this for Mya! We do this for Malissa! We do this till we free us!” Demonstrators chant these names to protest the state violence against Black women and girls. *See* RITCHIE, *INVISIBLE NO MORE*, *supra* note 56, at 203.

201. Among other commentators who have made the connection linking violence and policing as inextricably intertwined is Adam Serwer. *See* Adam Serwer, *The Authoritarian Instincts of Police Unions*, *THE ATL.* (June 21, 2021), <https://www.theatlantic.com/magazine/archive/2021/07/bust-the-police-unions/619006/> [<https://perma.cc/3ZJM-GP2D>] (noting that “the defining work of police is violence”).

202. RITCHIE, *INVISIBLE NO MORE*, *supra* note 56, at xv (Foreword).

203. SEIGEL, *VIOLENCE WORK*, *supra* note 52, at 188 (emphasis in original).

To treat policing as a tortious assault is thus to recognize a vision of what constitutes harm and offense based on the norms and expectations of the communities most subjected to policing. This conception of police violence is in harmony with abolitionists' praxis, such as power shifting. Power shifting centers the development of community-based projects to address the scourge of police-inflicted harm.²⁰⁴ In Part II.C, the tortious assault framing suggests that effectively reducing police-inflicted harm cannot be achieved by merely adopting reforms such as police-worn body cameras. Rather, this subpart points the way toward shrinking the footprint of policing to achieve a more egalitarian and safer society.

A. *Policing as Violence Work*

To her outsized credit, Mariame Kaba, a prominent activist and organizer who has been at the forefront of grassroots antiviolence campaigns for more than thirty years, has attempted to disrupt the framework around the term "police violence." The works of Kaba and Seigel provide the theoretical scaffolding for understanding the logic of policing, which informs the tortious assault framework I suggest below for understanding policing.

Recall that commentators usually deploy the term "police violence" in reference to purportedly aberrant spectacles of policing such as police shootings and killings.²⁰⁵ One problem with prevailing conceptions of police violence, Kaba observes, is that it conditions observers to think antiviolence agendas are concerned only with "the *excess*."²⁰⁶ That is, these conceptions suggests that "the spectacles—dead Black bodies lying in the streets or a Black teenager ambushed by several police officers in military gear, automatic weapons drawn"—are the only forms of police-inflicted harm.²⁰⁷ This conception of police violence erases "mundane" violations occurring on a daily basis. The failure to capture other forms of abuse, in turn deters reporting and rubber-stamps policing practices.

Even though the problem extends beyond the excess, Kaba laments that "one gets the sense that the only way to generate a modicum of concern or empathy for Black people is to raise the stakes and to emphasize the extraordinary nature of the violations and the suffering. To circulate repeatedly the spectacular in hopes that people consider the everyday."²⁰⁸ Consistent with this observation, Seigel cautions that "[t]o see homicides as the primary category of police-inflicted harm is to misunderstand that damage dramatically. Police murder is only the most spectacular way police cause premature death, not the

204. See *supra* note 75 and accompanying text.

205. See *supra* note 53.

206. KABA, WE DO THIS 'TIL WE FREE US, *supra* note 22, at 84.

207. *Id.*

208. *Id.* at 85.

most common, certainly not the most insidious.”²⁰⁹ In Kaba’s reckoning, the term “police violence” therefore should be deconstructed so that it collapses to apply to mundane interactions between police and Black and Brown communities.²¹⁰

Kaba offers another normative critique of the term “police violence” that hints at the idea of abandoning the term altogether. In her account, “there is not a single era in U.S. history in which the police were not a force of violence against Black people.”²¹¹ Hence, “when you see a police officer pressing his knee into a Black man’s neck until he dies, that’s the logical result of policing in America.”²¹² Andrea Ritchie describes the logic of policing in similar terms. She argues that “violence is inherent to policing.”²¹³ Thus, the term “police violence” is redundant, improperly suggesting that only an aberrant subset of police activity is violent.

Another important thinker about these issues is Micol Seigel. In *Violence Work: State Power and the Limits of Police*,²¹⁴ Seigel redefines policing as “violence work.” She posits that “the violence meted out by police is sometimes hard to see, and many people understand it as exceptional. They think police use violence only in extreme cases or when cops go bad, as in the wrongful use of force.”²¹⁵ But in her view, that perspective misses the forest for the trees. “*Potential* violence [] is the essence of [police] power,”²¹⁶ Siegel points out. “The violence of the police is often latent or withheld, but it is functional precisely because it is suspended. It often need not be made manifest, because people fear it and grant it legitimacy, in direct extension of the legitimacy they grant to state violence”²¹⁷ Seigel acknowledges that her conception of policing as “violence work” and police officers as “violence workers” is a “more disturbing term than euphemisms such as ‘law enforcement.’”²¹⁸ Indeed, “we should be disturbed,” she recognizes, but it “effectively conveys the full panoply of people whose work rests on a promise of violence.”²¹⁹

209. SEIGEL, *VIOLENCE WORK*, *supra* note 52, at 183.

210. KABA, *WE DO THIS ‘TIL WE FREE US*, *supra* note 22, at 86–87.

211. *Id.* at 14.

212. *Id.*

213. RITCHIE, *INVISIBLE NO MORE*, *supra* note 56, at xv (Foreword).

214. SEIGEL, *VIOLENCE WORK*, *supra* note 52, at 12.

215. *Id.* at 9.

216. *Id.* There is a parallel here between the essence of police power and domestic violence abusers that warrants acknowledgement. *Potential* violence is also the essence of domestic violence because the abusive tactics employed often render violence unnecessary to achieve the goal of controlling one’s intimate partner. *See, e.g.*, Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107 (2009).

217. SEIGEL, *VIOLENCE WORK*, *supra* note 52, at 9.

218. *Id.* at 12.

219. *Id.*

B. Doctrinal Foundations

I should flag here that tort concepts are no stranger to the evaluation of remedies involving policing. In *Monroe v. Pape*,²²⁰ the Supreme Court suggested in dicta that the “tort liability that makes a man responsible for the natural consequences of his actions” should serve as the backdrop in cases brought under 42 U.S.C. § 1983 (section 1983), the chief litigation tool for addressing police misconduct.²²¹ Thus, when reckoning with police-inflicted harm, tort law is a natural home.

According to the Restatement of Torts, an actor is subject to liability to another for assault if: “(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension.”²²² To focus the analysis that follows, it is important to unpack with some precision the terms used by the Restatement. “Harmful” or “offensive” contact is that which would “offend[] a reasonable sense of personal dignity” in the context of the “social usages prevalent at the time and place at which it is inflicted.”²²³ Thus construed, whether contact is “offensive” may yield a different answer when identical conduct occurs in different communities.²²⁴

The Restatement uses the term “intent” to connote that the actor desires the result of their conduct (e.g., *A means to hit B in the face*).²²⁵ This sort of purposiveness was the hallmark of the traditional understanding of intent under intentional tort doctrine.²²⁶ Modern courts have adopted a more expansive

220. *Monroe v. Pape*, 365 U.S. 167, 187 (1961). In 1874, Congress revised the Ku Klux Klan Act of 1871, which codified the earliest version of Section 1983. The revisers modified the statute to provide a private cause of action for rights secured by the Constitution and laws, expanding the statute’s protection to include rights enshrined by legislation. Rev. Stat. § 1979. See Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 396–402 (1982). The current version of Section 1983 was initially Section 1979, which is how the law is referenced in *Monroe*. *Monroe*, 365 U.S. at ____.

221. Section 1983 provides:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress
42 U.S.C. § 1983 (2012).

222. RESTATEMENT (SECOND) OF TORTS § 21 (1) (AM. L. INST. 1965). See also JOHN C. P. GOLDBERG, LESLIE KENDRICK, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 707 (5th ed. 2021) (noting that “Actor A is subject to liability to other person P for assault if: acts, intending to cause in P the apprehension of an imminent harmful or offensive contact with P; and A’s act causes P reasonably to apprehend such a contact”).

223. RESTATEMENT (SECOND) OF TORTS § 19 cmt. a. (AM. L. INST. 1965).

224. Tilley, *supra* note 69, at 1386.

225. RESTATEMENT (SECOND) OF TORTS § 8 cmt. a. (AM. L. INST. 1965).

226. GOLDBERG ET AL., *supra* note 222, at 702.

definition of intent. This definition sweeps in cases where the actor might lack the *desire* to contact the specific victim but believes or should believe such a result is substantially certain to occur.²²⁷ Consider the following scenario. B and D run into each other at a subway platform and enter the same crowded train. B wants to take the last available seat on the train. D claims to have priority. B and D get into a fiery argument. B takes out an umbrella and wildly swings it at D. Standing two feet away is G, who may be apprehensive that they too will be hit. B should be able to foresee that given G's location, G may be in apprehension of being struck when B intentionally and wildly swings an umbrella in a crowded train near G, regardless of B's intent as to G.

Another Restatement term that requires definition is the term "apprehension." Apprehension refers to a reasonable expectation that the threatened contact will occur, meaning that the apprehension must be one that would develop in the mind of a reasonable person. As with the meaning of "harmful" and "offensive," reasonableness is a question of fact to be judged in the eyes of the community. Would the apprehension of harmful contact form in the mind of the average member of the community, not in one who harbors heightened (or lessened) sensibilities to the threatened harm? Whether the perpetrator is reasonably perceived as having the ability to carry out the threatened harm is important in determining if an individual reasonably apprehended imminent, harmful contact.²²⁸ A well-known example is set forth in *Western Union Telegraph Co. v. Hill*.²²⁹ The case concerned a confrontation at a Western Union where the plaintiff went to have a clock repaired.²³⁰ The plaintiff alleged that Sapp, an agent of Western Union who was stationed behind an office counter, had been drinking and tried "to put his hand on the person of plaintiff's wife coupled with a request that she come behind the counter in defendant's office, and that, if she would come and allow Sapp to love and pet her, he 'would fix her clock.'"²³¹ Western Union produced evidence claiming that it would have been impossible for Sapp to make physical contact with Mrs. Hill, the plaintiff's wife, at the time of the incident. Mrs. Hill disagreed. The trial court found that because of Sapp's height and the measurements of the counter, Sapp was positioned to reach over the counter and touch Mrs. Hill. The facts thus raised an issue for the jury. In the court's view, to establish a claim for assault,

[t]here must be an intentional, unlawful, offer to touch the person of another in a rude or angry manner under such circumstances as to create

227. *Id.*

228. *Id.* at 713 (explaining that "[n]ot all apprehensions caused by the intentional act of another count as assaults. Rather, as with respect to offensive-contact batteries, social norms play an important role in determining the circumstances under which an individual is justified in apprehending imminent harmful contact").

229. 150 So. 709 (Ala. Ct. App. 1933).

230. *Id.* at 710.

231. *Id.*

in the mind of the party alleging the assault a well-founded fear of an imminent battery, coupled with the apparent present ability to effectuate the attempt, if not prevented.²³²

Hence, returning to the train hypothetical described above, whether B could have completed the threatened harm in the eyes of the reasonable person is significant.

The Restatement's Reporter provides additional color on the meaning of apprehension:

It is not necessary that the other believe that the act done by the actor will be effective in inflicting the intended contact upon him. It is enough that he believes that the act is capable of immediately inflicting the contact upon him unless something further occurs. Therefore, the mere fact that he can easily prevent the threatened contact by self-defensive measures which he feels amply capable of taking does not prevent the actor's attempt to inflict the contact upon him from being an actionable assault.²³³

Thus, there would be an assault even if G happened to be a professional stuntperson and could have dodged the blow with little or no effort.

Finally, there remains a question of what makes the apprehension imminent. Turning again to the Restatement, "[t]he apprehension created must be one of imminent contact, as distinguished from any contact in the future. 'Imminent' does not mean immediate, in the sense of instantaneous contact, as where the other sees the actor's fist about to strike his nose. It means rather that there will be no significant delay."²³⁴ Some courts have interpreted this proposition to mean that conditional or indeterminate threats of harmful contact cannot give rise to an assault.²³⁵ Hence, referencing again the above scenario, if B told D that "if you take my seat, one of these days I may swing my umbrella at you," B would likely not be liable for an assault on D.

C. *A New Understanding of "Police Violence"*

1. *The Corporeal Existence of Policing*

There is a threshold question of whether an institution properly may be considered a person for the purposes of supporting the tortious assault framework which I propose. As shown, a natural person's actions directed towards a natural person (e.g., B to D) may constitute a tortious assault. To my knowledge, the tort of assault does not reach the conduct of an institution toward a person. That is, suppose that C was the conductor of the train in the above-referenced scenario. And on the day D boarded the train, C intentionally delayed pulling the stopping

232. *Id.*

233. RESTATEMENT (SECOND) OF TORTS § 24 cmt. b (AM. L. INST. 1965).

234. *Id.* § 29(1) cmt. b.

235. *See, e.g.,* Brooker v. Silverthorne, 99 S.E. 350, 352 (S.C. 1919).

brakes at the station. This delay caused D to be knocked off their feet into another passenger. Could the Transit Authority—as the institution that oversees and employs the train conductor—commit a tortious assault on D, assuming *arguendo* that D was put in reasonable apprehension of imminent harmful contact and the other elements of the claim are satisfied? To be sure, a court may hold the Transit Authority vicariously liable for C’s conduct under *respondeat superior*.²³⁶ But that is not the same as saying the Authority itself, as an institution, tortiously assaulted C. Thus, what do I mean by my claim that the *institution* of policing operates in a way that is analogous to a tortious assault? Without a resolution to this puzzle, the analogy I attempt here will not take off.

This puzzle can be solved by importing a section 1983 analysis into the framework. Section 1983 is a Reconstruction-era statute enacted to bring to account perpetrators of unlawful state violence.²³⁷ A helpful starting point for untangling this doctrinal knot is to consider the Supreme Court’s municipal liability cases, specifically, *Monell v. Department of Social Services*.²³⁸ In *Monell*, a class of females employed by New York City’s Department of Social Services and Board of Education sued under section 1983, claiming “that the Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons.”²³⁹ A section 1983 plaintiff must allege that a *person* has deprived them of a federal right while acting under color of state law.²⁴⁰ On the theory that municipalities were not “person[s]” within the meaning of section 1983, the Court had held that municipalities could not be sued under the statute prior to *Monell*.²⁴¹ But a fresh analysis of section 1983’s legislative history changed the Court’s thinking.

Writing for the majority in *Monell*, Justice William J. Brennan determined that the Reconstruction Congress “did intend municipalities and other local government units to be included among those persons to whom § 1983 applies.”²⁴² In so doing, the Court elevated municipalities, which are enduring institutions, to the status of persons for the purpose of assigning responsibility for civil rights violations under section 1983. So, too, does it make sense to

236. See GOLDBERG ET AL., *supra* note 222, at 16 (“Plaintiffs who sue entities such as corporations often are able to recover from them because of a longstanding substantive rule of tort law called *respondeat superior* (literally, ‘let the master answer [for the wrongs of the servant]’). Under that rule, an employer is held *vicariously liable* for wrongful acts of its employees committed within the scope of their employment. This responsibility attaches even if the employer (i.e., the firm’s managers) were careful in supervising the employee’s job performance.”).

237. See *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

238. 436 U.S. 658 (1978).

239. *Id.* at 660–61.

240. See *supra* note 221.

241. See *Monroe*, 365 U.S. at 191 (1961) (overruled by *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978)).

242. *Monell*, 436 U.S. at 665, 690.

recognize police departments—and, indeed, the institution of policing—as the sort of actors who can commit civil rights torts. The reasoning in *Monell* supports an argument that it is logical to treat the institution of U.S. policing as if it was a natural person with the ability to inflict harm, and the moral and legal responsibility to avoid doing so.

2. *Policing Is Intended to Cause Harmful or Offensive Contact*

With this explanation in hand, we can better appreciate how the institution of policing constitutes a tortious assault on Black and Brown communities. The evidence I have summarized in Part I demonstrates that policing is a vehicle through which violence is legitimized in service of protecting the economic and social interests of groups currently perceived as White.

On this logic, modern policing naturally and inevitably imposes harmful contact upon Black and Brown communities, who quite reasonably are put in apprehension of such contact. Generations of policing now inform habits of “surveilling, monitoring, and capturing people, especially Black and Indigenous peoples, who disproportionately suffer police arrests, killings, and imprisonment.”²⁴³ The enduring legacy of violent, discriminatory policing manifests into both spectacles of particularly violent policing, and also into “mundane” encounters that are harmful but often fall to the margins of conversations about police-inflicted harm. This large body of history and reality present a strong argument that policing fits within the first element of a tortious assault—intentional, harmful, or offensive contact—because it is intentional conduct that causes objectively harmful or offensive contact (or, at the least, contact that is harmful or offensive to the community at which it is directed).

3. *Black and Brown People Are Imminently Apprehensive of Policing*

The more complex question is whether Black and Brown people are imminently apprehensive of the harmful or offensive nature of policing. This is a more difficult question to answer because Black and Brown people in the United States (or anywhere) are of course not a monolith. U.S. society racializes all Black and Brown people as criminal and thus presumptively rightful targets of policing.²⁴⁴ Despite this unifying thread, people of color have varied beliefs about policing and reactions to its operation. These reactions depend on age, geography, class, and other indexes of privilege.²⁴⁵ Some people of color view

243. PURNELL, *supra* note 45, at 61–62.

244. BROWNE, DARK MATTERS, *supra* note 63, at 20 (noting that the “mere presence of [B]lackness gets coded as criminal,” which provides an entryway for surveillance).

245. *Id.*

policing in a favorable light,²⁴⁶ suggesting that these individuals might not be imminently apprehensive of the institution. Providing insight into this view, James Forman, Jr. has emphasized that class dynamics shape how people of color experience the larger carceral apparatus, including policing. In his book, *Locking Up Our Own: Crime and Punishment in Black America*,²⁴⁷ Forman observes there is a class divide in attitudes about policing among Black Americans. “Elite” Black Americans, who tend not to be heavily policed in comparison to Black people in lower economic classes, generally think of policing in a favorable light.²⁴⁸

Canvassing the historical record, one could draw an inference that these same elites are not imminently apprehensive of policing because they understand that class influences interactions with policing. Thus, to enjoy class privilege is to be spared from the brunt of policing.²⁴⁹ Former U.S. Attorney General Eric Holder proves exemplary of the interplay of class and privilege in shaping beliefs about policing. Acknowledging that the “people who will be stopped will be young [B]lack males, overwhelmingly,” Holder launched Operation Ceasefire while serving as U.S. Attorney for the District of Columbia.²⁵⁰ Operation Ceasefire gave Washington D.C. police near carte-blanche to conduct traffic stops to search motorists for guns.²⁵¹ Given the long tradition of fatal traffic encounters involving police and motorists of color, it is not hard to see why such

246. Aaron Ross Coleman, *How Black People Really Feel About the Police, Explained*, VOX (June 17, 2020), <https://www.vox.com/2020/6/17/21292046/black-people-abolish-defund-dismantle-police-george-floyd-breonna-taylor-black-lives-matter-protest> [https://perma.cc/UEV6-G54XG54X] (reporting that “Black people are not a monolith . . . [t]heir opinions vary by age, gender, and class”). This includes people who identify police racism as a problem.

247. See FORMAN, *LOCKING UP OUR OWN*, *supra* note 197, at 13 (“Understanding African American attitudes and actions on matters of crime and punishment requires that we pay careful attention to another topic that is often overlooked in criminal justice scholarship: class divisions within the [B]lack community. Although mass incarceration harms [B]lack America as a whole, its most direct victims are the poorest, least educated [B]lacks. While the lifetime risk of incarceration skyrocketed for African American male high school dropouts with the advent of mass incarceration, it actually decreased slightly for [B]lack men with some college education.”).

248. See *id.* at 209–10 (discussing a 1996–1997 study wherein the sociologist Ronald Weitzer observed that class was a determining factor of Black Americans’ attitude toward police, and that Black Americans in the middle-class neighborhood studied were “generally pleased with their local police and reported few instances of unjustified stops”).

249. See *id.* at 211 (explaining the interplay of race and class in attitudes about the criminal legal system by highlighting that the middle-class Blacks in Ronald Weitzer’s study, e.g., physicians, attorneys, and politically connected people, “knew that their status influenced their interactions with law enforcement” for the better).

250. Jennifer Senior, ‘*Locking Up Our Own*,’ *What Led to Mass Incarceration of Black Men*, N.Y. TIMES (Apr. 11, 2017), <https://www.nytimes.com/2017/04/11/books/review-locking-up-our-own-james-forman-jr.html> [https://perma.cc/P45V-LBXBLBXX].

251. *Id.*

a move was problematic.²⁵² People like Holder are able to indulge state violence against Black people because their class privilege largely insulates them from suffering this violence themselves. In staking out this position, Holder, like many Black elites, understood that even among racialized groups the brunt of policing is not experienced similarly along class lines. He knew that the policing tactic he championed would spare affluent communities and “instead exact its toll in places that, if anything, seemed more thoroughly depressed and permanently abandon[ed] than they had been under Jim Crow.”²⁵³ And the data bears this out. About 50 percent of those who are arrested and incarcerated more than once in a year have less than \$10,000 in household income, are out of work, and are likely to lack a high school diploma.²⁵⁴

At the very least, young people of color in lower social economic classes are imminently apprehensive of policing. Elizabeth Hinton reminds us that in the context of the War on Crime, the Johnson administration directed the full force of policing in predominantly Black and Brown communities experiencing concentrated poverty and that police precincts were strategically established in economically impoverished areas.²⁵⁵ The story of Cairo, Illinois, is one example of the oversaturation of police in poor neighborhoods and the response it generates from those most subjected to such harm. In Cairo, residents preemptively shot out streetlights and boarded up their homes to protect against the police violence. They did so with the understanding that police moved through their neighborhood like an occupying force.²⁵⁶

In cities like New York, Chicago, and Baltimore, current experiences of young people of color in race-class subjugated communities are also instructive. Policing in these communities becomes “self-reinforcing, independent of ‘crime rates,’”²⁵⁷ and the dominion integral to the routine and everyday nature of modern policing causes residents in race-class subjugated communities to be imminently apprehensive of policing.²⁵⁸ Consider the case of Freddie Gray. On April 12, 2015, twenty-five-year-old Gray made eye contact with a Baltimore

252. See, e.g., Rosa Sanchez, Morgan Winsor, Kiara Alfonseca & Ivan Pereira, *Officer Who Fatally Shot Daunte Wright During Traffic Stop Meant to Use Taser, Police Chief Says*, ABC NEWS (Apr. 13, 2021), <https://abcnews.go.com/US/minnesota-police-officer-fatally-shoots-driver-traffic-stop/story?id=77013068> [<https://perma.cc/YJ2F-BW7KBW7K>].

253. See FORMAN, LOCKING UP OUR OWN, *supra* note 197, at 208–09.

254. *Id.*

255. Elizabeth Hinton, *From “War on Crime” to War on the Black Community*, BOSTON REV. (June 21, 2016), <https://www.bostonreview.net/articles/elizabeth-hinton-kenner-commission-crime-commission/> [<https://perma.cc/7BFB-M6VV>].

256. See *supra* notes 174–182 and accompanying text.

257. Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 806 (2021).

258. See VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS 81 (2011) [hereinafter RIOS, PUNISHED] (describing the interactions of poor Black boys and police as involving “a crafty cat-and-mouse game in which the boys remained in constant fear of being humiliated, brutalized, or arrested”).

police officer. Like Timothy Thomas, he took off running.²⁵⁹ Three officers pursued and eventually caught Gray.²⁶⁰ They frisked him.²⁶¹ A small knife was uncovered.²⁶² Gray was cuffed and hauled to a nearby police van and left shackled and unbuckled.²⁶³ For almost an hour, the officers took Gray on a “rough ride,” shorthand for when police drive recklessly to intentionally injure people in their custody who are handcuffed and thus cannot protect themselves from being tossed around the inside of the van.²⁶⁴ Gray suffered a severed spine and died a week later from the injuries.²⁶⁵

The official police report of the encounter noted that Gray “fled unprovoked.”²⁶⁶ The official report is not easy to reconcile with what is foundational to interactions between law enforcement and economically exploited Black and Brown people: police weaponize state power against the darkest and poorest people in the United States to protect the interest of propertied Whites.²⁶⁷ Indeed, James Baldwin would have recognized this dynamic. Writing in his classic essay “Fifth Avenue, Uptown: A Letter from Harlem,” Baldwin lamented that the organizing logic of modern policing was “to keep the [B]lack man corralled up here, in his place,” and “the only way to police a ghetto is to be oppressive.”²⁶⁸ Thus, to say that Gray “fled unprovoked” is to dismiss centuries of evidence on policing.²⁶⁹ As Derecka Purnell pointed out, “Freddie Gray probably ran because he trusted the police to be exactly what they have been for the entirety of their existence as an institution: violent.”²⁷⁰ He

259. See *supra* note 25.

260. See Office of Public Affairs, *Federal Officials Decline Prosecution in the Death of Freddie Gray*, U.S. DEPT. OF JUST. (Sept. 12, 2017), <https://www.justice.gov/opa/pr/federal-officials-decline-prosecution-death-freddie-gray> [https://perma.cc/7M4R-M2CV].

261. *Id.*

262. Justin Fenton, *Video Shows Officer Operating the Knife Recovered from Freddie Gray*, THE BALTIMORE SUN (Oct. 31, 2016), <https://www.baltimoresun.com/news/investigations/bs-md-ci-freddie-gray-knife-video-20161028-story.html> [https://perma.cc/H9HH-WJYZ].

263. Merrit Kennedy, *Officer Who Drove Van in Freddie Gray Case Found Not Guilty of Murder*, NPR (June 23, 2016), <https://www.npr.org/sections/thetwo-way/2016/06/23/483227430/officer-who-drove-van-in-freddie-gray-case-found-not-guilty-of-murder> [https://perma.cc/UZN5-7GU8].

264. Libby Nelson, *Baltimore's 'Rough Rides': The City Has Paid Out Millions to People Injured in Police Vans*, VOX (Apr. 28, 2015), <https://www.vox.com/2015/4/28/8509065/freddie-gray-baltimore-riots> [https://perma.cc/PB4N-YFWW].

265. *Id.*

266. Gray Charging Documents, <https://www.documentcloud.org/documents/2071377-gray-charging-documents.html> [https://perma.cc/ZPV4-7TUF].

267. Stewart Chang, Frank Rudy Cooper & Addie C. Rolnick, *Race and Gender Policing*, 21 NEV. L.J. 885, 903 (2021) (explaining that “the subject of protection has always been [W]hite persons and [W]hite property, and the object of policing has always been [B]lack bodies”).

268. James Baldwin, *Fifth Avenue, Uptown: A Letter from Harlem*, ESQUIRE (Oct. 16, 2007), <https://www.esquire.com/news-politics/a3638/fifth-avenue-uptown/> [https://perma.cc/4W5G-UGPR].

269. See *supra* note 266; see also *supra* note 267.

270. PURNELL, *supra* note 45, at 72.

probably ran because he was imminently apprehensive of harmful and offensive contact manifested by policing. And his fear was plainly amply justified.

Indeed, consent decrees following police abuses provide evidence of policing creating imminent apprehension of harmful and offensive contact.²⁷¹ Consent decrees serve as popular remedial tools to address policing issues. These decrees are court-approved agreements that commit state or local government agencies to reform how they operate because courts have found that they violated state or federal law.²⁷² As one former senior Justice Department employee put it, “the ability to conduct exhaustive investigations and reform police departments by negotiating consent decrees allows an administration to produce a public airing of the systemic failures that produce excessive force and to work with jurisdictions to make meaningful comprehensive changes,” thereby distinguishing consent decrees from other remedial instruments such as legislation.²⁷³

As the police killings of Freddy Gray in Baltimore, Michael Brown in Ferguson,²⁷⁴ Rekia Boyd in Chicago,²⁷⁵ and other young class-exploited Black and Brown people struck a national chord, the Obama administration’s Department of Justice (DOJ) fervently pursued consent decrees to spur change in police departments.²⁷⁶ In 2017, a little over a year after Baltimore police killed Freddy Gray, the DOJ, City of Baltimore, and Baltimore Police Department (BPD) entered into a consent decree. The basis of the decree was that “BPD engages in a *pattern* or practice of conduct that violates the Constitution and federal law, including . . . using enforcement strategies that produce severe and unjustified disparities in both the rates of Stops [] and Arrests of’ Black people, as well as disparities in being subjected to excessive force by police.²⁷⁷ The decree was intended to ensure that the City and BPD did not abuse Black and Brown people and instead adopted policies to “promote public safety in a manner

271. See, e.g., Robert Klemko & John Sullivan, *The Push to Remake Policing Takes Decades, Only to Begin Again*, WASH. POST (June 10, 2021), <https://www.washingtonpost.com/investigations/interactive/2021/police-reform-failure/> [<https://perma.cc/HJE5-NTMQ>] (reporting that in response to police abuses in Pittsburgh, the city “became the first to enter into a federal consent decree” and under that decree, “officers were taught . . . [to] understand why Black people might fear them”).

272. Katie Benner, *Justice Dept. Restores Use of Consent Decrees for Police Abuses*, N.Y. TIMES (Apr. 16, 2021), <https://www.nytimes.com/2021/04/16/us/politics/justice-department-consent-decrees.html> [<https://perma.cc/SB8S-WHUC>].

273. *Id.*

274. Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. TIMES (Aug. 10, 2014), <https://www.nytimes.com/2014/08/11/us/police-say-mike-brown-was-killed-after-struggle-for-gun.html> [<https://perma.cc/KXG2-33SJ>].

275. Monica Davey, *Chicago Pays \$5 Million to Family of Black Teenager Killed by Officer*, N.Y. TIMES (Apr. 15, 2015), <https://www.nytimes.com/2015/04/16/us/chicago-pays-5-million-to-family-of-black-teenager-killed-by-officer.html> [<https://perma.cc/H33A-UUUZ>].

276. Benner, *supra*, note 272.

277. Baltimore Consent Decree, *supra* note 67, at 2 (emphasis added).

that is fiscally responsible and responsive to community priorities.”²⁷⁸ Importantly, the decree reflected “the broad input received by the Parties from the diverse communities that make up the City of Baltimore.”²⁷⁹

Also in 2017, the City of Chicago, Chicago Police Department (CPD), and the DOJ entered into a consent decree. The decree alleged that “CPD violates the Constitution, and state and federal laws, by engaging in a *pattern* of using excessive force, including deadly force, in a manner that disproportionately harms Chicago’s African American and Latino residents.”²⁸⁰ The Decree was also said to be guided by “input from the diverse communities that make up the City of Chicago.”²⁸¹ Recall that imminent apprehension means that the individual reasonably believes that the threatened harm will occur without significant delay.²⁸² Since the decrees describe the violations as consisting of “patterns” of police abuses, it suggests that the threat of the harmful contact is not indeterminate. The disproportionate number of police in those communities and the heightened degree of surveillance suggests there is a cyclicity and inevitability to the threat. And that this dynamic reasonably induces Black and Brown communities to believe that the threat is likely to manifest without significant delay.

For Black and Brown people, especially young people in the poorest neighborhoods across the country, the internalized belief that police are agents who are likely to inflict harm at any moment has become so routine that it is “part of the social contract, a tax paid in exchange for the right to move in public spaces,” it is a “part of growing up.”²⁸³ This is why Kaba worriedly notes that “the young people in my community who come into contact with the police can recite their names and badge numbers. Those are unforgettable to them; the stuff of their nightmares.”²⁸⁴ The situation Kaba describes is reminiscent of the constant surveillance that Black people were subjected to under the slave system. Then, the surveillance was motivated by the threat of enslaved people organizing a revolt. Current surveillance occurs under the pretext of crime control. The connecting theme is that the surveillance “is never neutral.”²⁸⁵ Rather, it is

278. *Id.* at 1.

279. *Id.* at 3.

280. Chicago Consent Decree, *supra* note 67, at 1.

281. *Id.* at 2.

282. See RESTATEMENT (SECOND) OF TORTS §29 (1), cmt. b (AM. L. INST. 1964).

283. FORMAN JR., LOCKING UP OUR OWN, *supra* note 197, at 171.

284. KABA, WE DO THIS ‘TIL WE FREE US, *supra* note 22, at 7.

285. *Id.* at 89.

“situationally weaponized”²⁸⁶ and explicitly justified on controlling narratives that have historically motivated “discriminatory legal architectures.”²⁸⁷

The police see criminality as inscribed in the body of people like Freddie Gray and reason that they “need to be corralled, controlled, damaged, or destroyed.”²⁸⁸ Again, Kaba is instructive: from the perspective of police, either people like Freddie Gray are “in the process of committing a crime or [have] the intention to commit crime [or are] escaping from having committed a crime, or [they] can be recruited to crime. Regardless, [they are] assumed criminal.”²⁸⁹ Even if individuals have nothing to hide, they fear that surveillance may well lead to the state’s exercise of criminal enforcement, including temporary physical detention or even greater contact with the criminal legal system—contact that is undoubtedly harmful. The sociologist Victor Rios explains that incarceration is social death, the “systematic process by which individuals are denied their humanity.”²⁹⁰ People who experience social death—what ethnic studies scholar describes as “the political and organizational logic of the prison”²⁹¹—are alive in the flesh.²⁹² But they are “socially isolated, violated, and prevented from engaging in social relations that affirm their humanity.”²⁹³ Other scholars have underscored the harms of incarceration by linking it to public health.²⁹⁴

One well-respected study by epidemiologist Ernest Drucker offered a damning account.²⁹⁵ Drucker considered the population of people in the criminal legal system (prison, jail, parole, and probation) and their families, including twenty-five million children “exposed” to the disease by having a parent removed to a prison cell.²⁹⁶ Using the public health metric of “years of life lost”

286. *Id.*

287. Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop-and-Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2456 (2017) (describing the logic that informed the racially targeted practices of stop-question-and-frisk and pointing out that people of color disproportionately bore the brunt of the intrusive, harmful practices because of their skin color).

288. RESMAA MENAKEM, *MY GRANDMOTHER’S HANDS: RACIALIZED TRAUMA AND THE PATHWAY TO MENDING OUR HEARTS AND BODIES* 116 (2017) [hereinafter MENAKEM, *MY GRANDMOTHER’S HANDS*].

289. KABA, *WE DO THIS ‘TIL WE FREE US*, *supra* note 22, at 89; Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043, 1045–46 (explaining that “[t]oday, pigmentation regrettably remains for many people a de facto a proxy for criminality” and Black and Brown people are presumed criminal).

290. RIOS, *PUNISHED*, *supra* note 258, at 159.

291. *Id.* (quoting ethnic studies scholar Dylan Rodriguez).

292. *Id.*

293. *Id.*

294. See ERNEST DRUCKER, *PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA* (2013); SEIGEL, *VIOLENCE WORK*, *supra* note 52, at 185 (explaining that to appreciate the violence of prison, “truly incriminating numbers are not those related to deaths in custody, but to custody, period”).

295. DRUCKER, *supra* note 294, at 44.

296. *Id.*

to calculate prison's damage, Drucker found that New York's draconian Rockefeller drug laws alone were thrice as harmful as the September 11 attacks.²⁹⁷ Imprisonment on drug-related charges was equally as deadly as the scourge of the AIDS epidemic.²⁹⁸ Thus, since Black and Brown people are routinely surveilled, their imminent apprehension of harmful contact, i.e. incarceration, is a natural and reasonable consequence. And people like Gray in return develop a keen awareness of the harm or threat of harm that comes with that controlling narrative.²⁹⁹

4. *Black and Brown People Are Reasonably Apprehensive of Policing*

Consider an objection to my argument. It proceeds as follows: to constitute assault the would-be victim must be objectively (i.e., reasonably) apprehensive of the imminent harmful contact. Apprehension is not judged on the perception of those with heightened sensibilities to the threatened harm such as, it might be suggested, young Black and Brown men in impoverished communities. Instead, it is judged in the eyes of the reasonable person, a standard that is informed by what the "ordinary" person in the community perceives. Thus, if we consider again the case of *Western Union Telegraph Co.*, Mrs. Hill could not base her argument on any idiosyncratic fear of strangers. She could not argue that her fear, even if genuine, defines the reasonableness of her apprehending imminent harmful contact by the Western Union employee. But my argument has thus far focused on how class-exploited Black and Brown people, who are sensitized to policing, respond to policing. This challenge is generative to my claim rather than constraining to it.

To begin with, we must recognize the role played by the reality that police officers have a near monopoly on the lawful use of force through state sanction. Police carry service weapons on display while on duty. As the Supreme Court recognized in *McLaughlin v. United States*, merely displaying a gun creates fear in the average person.³⁰⁰ Thus the public display of armament that is pervasive with policing creates a reasonable apprehension of immediate offensive contact. Similarly, cases such as *Price v. State*, in which the court held that the defendant's display of a gun handle was sufficient to create in the victim a reasonable apprehension of offensive contact.³⁰¹

Nevertheless, it is important to observe that a plaintiff can establish a prima facie case of assault without having to show that they were fearful that they were

297. *Id.* at 71–72.

298. *Id.* at 73.

299. See KABA, WE DO THIS 'TIL WE FREE US, *supra* note 22, at 89.

300. *McLaughlin v. United States*, 476 U.S. 16, 17–18 (1986) (“[T]he display of a gun instills fear in the average citizen.”). It would not be unreasonable, however, to suggest that the Court would take a different position today given the prevalence of “open carry” laws, permitting individuals to carry and display guns in public.

301. *Price v. State*, 289 Ga. App. 763 (Ga. Ct. App. 2008).

about to suffer a harmful or offensive contact. It suffices that they were *aware* that such contact might imminently happen. Thus, if A testifies to their awareness that B had tried in vain to punch them in the face, A does not have to show that they were afraid for their physical safety to establish a *prima facie* case of assault.³⁰²

Moreover, consent decrees for police abuses also demonstrate that the apprehension experienced by Black and Brown people is in fact reasonable. Consent decrees acknowledge that policing exposes Black and Brown people to harmful contact. Because the decrees are informed by diverse community members with presumably varying degrees of tolerance for policing—not just poor people of color who are acutely weary of policing—this tells us that class-exploited young Black and Brown people are reasonable in their apprehension of policing.

To the extent poor Black and Brown people are unusually situated, it is not that their fear is unreasonably heightened above that of a purportedly typical or objectively reasonable person. It is that a typical, reasonable person *put into the position of a Black or Brown person encountering the police* would fully recognize the likely imminent, harmful contact.

III.

NORMATIVE IMPLICATIONS: DEFINITION SHIFTING AS “POWER SHIFTING”

If policing is analogous to a tortious assault on class-exploited Black and Brown people, what are the normative implications of this position? I argue in this Part that the tort law framework complements abolitionists’ proposals concerning policing because characterizing policing as a tortious assault is a form of power shifting.

A. *Community Construction as a Pillar of Tort Law*

When commentators discuss the objectives and conceptual foundations of tort law, the system of torts is often treated as law that is principally about loss allocation.³⁰³ A tort is committed and the legal system responds by imposing civil liability on the defendant, shifting the cost of the loss to promote deterrence,³⁰⁴ economic efficiency, or corrective justice and fairness,³⁰⁵ so goes the typical accounts. At a more basic level, tort scholar Christina Tilley has argued that the instrumentalists view of tort law is misguided, and that tort law is primarily concerned about community:

302. GOLDBERG ET AL., *supra* note 222, at 712.

303. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918–20 (2010) [hereinafter Goldberg & Zipursky, *Torts as Wrongs*].

304. DAN B. DOBBS, *THE LAW OF TORTS* § 2.2, 19 (2000).

305. Alex Stein, *The Domain of Torts*, 117 COLUM. L. REV. 535, 535 (2017).

A linguistic study of the Restatement of Torts reveals that [tort] doctrine alludes to community more frequently and more comprehensively than it does to any other justificatory concept. Specifically, throughout the Restatement's discussion of negligence, strict liability, and intentional wrongs, doctrine disfavors stating interpersonal duties in positive terms, preferring to let them float with community values. Consequently, tort operates as a vehicle through which communities perpetually reexamine and communicate their values³⁰⁶

In tort, Tilley argues, "community" should be understood as a referent to a "sociological unit of organization separate and apart from the political unit of organization represented by the state."³⁰⁷ Communities form to fill gaps in the ordering of private behavior that the state cannot plug because the state "is too large, too complex, too bureaucratized, and altogether too aloof."³⁰⁸

Tort law's deference to "community" to set normative expectations can be glimpsed by reference to the Restatement of Torts. In determining whether an actor created apprehension of "harmful" or "offensive" contact in an assault, the Restatement directs the decisionmaker to explore whether the contact would "offend a reasonable sense of personal dignity" in the context of the "social usages prevalent at the time and place at which it is inflicted."³⁰⁹ The reasonableness inquiry requires evaluating what members of the relevant community would consider offensive.³¹⁰ Thus, as previously noted, conduct that is "offensive" in one community may not be offensive in another.³¹¹ Law and power are properly understood by reference to objectively reasonable perceptions within a particular community.

The Restatement also explains that "negligence is a departure from a standard of conduct demanded by the community for the protection of others against unreasonable risk."³¹² It spells out that negligence liability may attach if an actor is ignorant of the qualities of things "in so far as they are matters of common knowledge at the time and in the community."³¹³ Thus, when a New Jersey court recently concluded that A may be liable if A texts B knowing that B is driving and B causes an accident after being distracted by A's text, it was "import[ing] the increasingly common knowledge in the national community that phones (things) distract drivers . . . at the wheels of speeding automobiles."³¹⁴

306. Tilley, *supra* note 69, at 1320.

307. *Id.* at 1347.

308. *Id.* at 1349 (quoting DENNIS E. POPLIN, COMMUNITIES: A SURVEY OF THEORIES AND METHODS OF RESEARCH 7 (1979)).

309. RESTATEMENT (SECOND) OF TORTS § 19 cmt. a (AM. L. INST. 1965).

310. GOLDBERG ET AL., *supra* note 222, at 713.

311. Tilley, *supra* note 69, at 1386.

312. RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (AM. L. INST. 1965).

313. *Id.* § 290.

314. Tilley, *supra* note 69, at 1377 (citation omitted).

We might further unpack the community-focused orientation of tort doctrine by imagining that the above-referenced car itself contained a defect that contributed to the injury (e.g., it projected incoming texts onto the car's windshield even when the car was in motion). In that scenario, one way to assess the reasonableness of the danger posed by the defect would be to look at the "ordinary knowledge common to the community" as to the car's features.³¹⁵ To take the example a step further, if a person, C, had been setting off fireworks and injured D standing nearby, the Restatement would consider whether setting off fireworks is an activity carried on "by many people in the community" before finding C strictly liable.³¹⁶ And, taking the tort of intentional infliction of emotional distress as yet another example, liability depends on a finding that the defendant acted in a way "utterly intolerable in a civilized community" that would cause "an average member of the community" to exclaim "outrageous!" upon hearing of the conduct.³¹⁷ This demonstrates that although tort law is considered private law in the sense that it is concerned with remedying private wrongs,³¹⁸ it is also true that our system of torts is "in many ways public."³¹⁹ An underappreciated aspect of tort law's public law gloss is that it centers community-based perspectives (not the perspective of an individual victim whose private right of action is the basis of the suit) in defining what makes conduct harmful. In this connection, the tortious assault framework enables us to understand the harms of policing from the perspective of the communities most subjected to it. This approach is harmonious with abolitionist frameworks to address police-inflicted harm.

B. Abolition as a Tool to Address Police Violence

As already noted, one vision in the deep reservoir of proposals to address police-inflicted harm is the abolitionist framework. Abolition is a theory and

315. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (AM. L. INST. 1977).

316. *Id.* § 520 cmt. d.

317. *Id.* § 46 cmt. d.

318. Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 303, at 918 ("As its name indicates, tort law is about *wrongs*. The law of torts is a law of wrongs and recourse—what Blackstone called 'private wrongs.'"); see 3 William Blackstone, Commentaries 2 (defining "private wrongs" as "an infringement or deprivation of the private or civil rights belonging to individuals"). Goldberg and Zipursky explain that "tort is private in two basic senses. It defines duties to refrain from injuring (or to protect from injury) that are owed by certain person to others: duties that, when breached, constitute *wrongs to those others*, as opposed to wrongs to the world. Second, precisely because torts are private wrongs, they provide the basis for a private response. For a wrong to be a tort it must in principle generate for its victim a *private right of action*: a right to seek recourse through official channels against the wrongdoer." Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 303, at 918 (footnotes omitted).

319. Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 303, at 918 (explaining that tort law is public law because "[i]t sets generally applicable standards of conduct," because "[i]t is developed and applied by officials who may have in mind various policy concerns as they render judgments in particular cases," and because "its operation can advance or interfere with the operation of other public institutions") (footnotes omitted).

practice that “strives toward a society where racialized punitive systems of legal control and exploitation are no longer a component of the way we deal with criminalized social harms and problems, such as substance use disorders, mental illness, theft, assault, and even murder.”³²⁰ It posits that when viewed from a historical and contemporary perspective, policing is a purveyor of White supremacy, capitalism, and patriarchy.³²¹ The abolitionist vision recognizes that when the system of policing emerged, it did not even pretend to conceal its designs as a “fundamentally, raced, classed, and gendered project.”³²² Though in subtler forms, this legacy underwrites the logic of modern policing. Hence why abolitionists are not satisfied with “reforming the police.” For the abolitionist, a reformist approach is miscalculated because it overlooks that there “is no neutral *a priori* in which to return.”³²³ Indeed, “[t]he state must be transformed, the law must be transformed, the police must be eliminated, or at least the social and fiscal footprint of police must be considerably diminished, if not eliminated.”³²⁴

The abolitionist vision also recognizes policing as part of the problematic, larger carceral state.³²⁵ Policing cannot be understood without prisons. Indeed, as Anna A. Akbar reminds us, the two institutions are co-constitutive.³²⁶ The state has prioritized policing and mass incarceration over adequate housing, education, health care, and employment for class-exploited Black and Brown communities.³²⁷ This combination of policy choices is a form of racialized violence rooted in the desire to maintain a racial hierarchy in our society. The abolitionist vision seeks to shrink the policing footprint by subtracting from the police and the carceral state and redistributing those resources to community-based projects that “transform our political, economic, and social order to achieve broader social provision for human needs.”³²⁸ As W. E. B. Du Bois articulated in coining the phrase “abolition-democracy,” abolition requires positive investments in the oppressed.³²⁹

320. Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 25 (2022).

321. See Akbar, *Toward a Radical Imagination of Law*, *supra* note 74, at 460.

322. *Id.*

323. *Id.* at 461.

324. *Id.* at 460 (footnote omitted).

325. See *id.* at 463–64.

326. *Id.* at 461.

327. Akbar, *Abolitionist Horizon*, *supra* note 75, at 1787.

328. *Id.*

329. Du Bois observes that:

[T]here arose in the United States a clear and definite program for the freedom and uplift of the Negro, and for the extension of the realization of democracy . . . [T]he abolition of slavery meant not simply abolition of legal ownership of the slave; it meant the uplift of slaves and their eventual incorporation into the body civil, politic, and social, of the United States.

W. E. BURGHARDT DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880* 189 (Russell & Russell, 1956) (1935).

To get a better sense of the difference between the abolitionist vision of policing and the reformist approach, consider the presence of so-called school resource officers (SROs) primarily seen at minority schools.³³⁰ The notion of “school resource officer” entered the mainstream picture in the 1950s as part of an effort to nest police in community environments.³³¹ In the mid-1970s, just 1 percent of schools in the United States reported that police officers were stationed in their schools.³³² As the mass incarceration apparatus gained steam, the number of SROs ballooned. By 2009, New York City schools had more than 5,000 SROs and 191 armed police officers on their payrolls roaming school hallways.³³³ Those numbers alone would make the New York City school district the fifth largest police district in the nation.³³⁴ As Alex Vitale explains, more than 40 percent of “all schools now have police officers assigned to them, 69 percent of whom engage in school discipline enforcement rather than just maintaining security and enforcing the law.”³³⁵ The saturation of schools with police officers has predictably led to an explosion in student arrest rates. This does not augur well for educational outcomes and turns schools into an arm of the carceral state, greasing the wheels of what is known as the school-to-prison pipeline.³³⁶

The uprisings that followed the killing of Michael Brown in Ferguson led to³³⁷ a DOJ report on the investigation into the Ferguson Police Department. The Department found that police arrested and abused students of color for conduct such as “play fighting.”³³⁸ Incidents of officers pushing, arresting, and tasing students for minor slights like refusing to comply with directives to go to the principal’s office fill up the pages of the report.³³⁹ In response to these abuses, the DOJ recommended reformist interventions such as training of police officers to “build positive relationships with youth from a young age and to support

330. Akbar, *Toward a Radical Imagination of Law*, *supra* note 74, at 463 (using the saturation of police in schools with predominantly racialized groups as a tool to analyze the distinction between the goals of abolition and reform).

331. VITALE, *THE END OF POLICING*, *supra* note 38, at 55.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 56.

337. On the events leading to the killing of Michael Brown by officer Darren Wilson, *see, e.g., What Happened in Ferguson*, N.Y. TIMES (Aug. 10, 2015), <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html> [<https://perma.cc/4ENL-LDLY>].

338. *See* UNITED STATES DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 25–26 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/NE97-J42L>].

339. *Id.*

strategies to keep students in school and learning.”³⁴⁰ These purportedly remedial measures “usually” entail increasing police funding which redounds to a larger policing footprint.³⁴¹ Moreover, the interventions lend legitimacy to the idea that police can operate helpfully by standing outside the threat of violence, and that the issue of police violence can be reduced to the misconduct of a few “bad apples” or to “implicit bias.”³⁴² At best, the DOJ recommended interventions simply paper over “bullet wounds.”³⁴³ At worst, they “simply increase corporate state power and make it easier for the state to devalue and destroy our communities.”³⁴⁴

Contrast this response with the abolitionist approach. The abolitionist framework would begin by demanding that the criminalization of Black youth in all its forms, including zero-tolerance school policies, be put to an end.³⁴⁵ It would then urge that police be removed from schools and the funds that sustain so-called school resource officers be redirected to restorative efforts in the community.³⁴⁶ In contrast to the DOJ recommendations, the abolitionist approach does not have police reform as an end goal. Rather, the objective is “to

340. *Id.* at 94.

341. To take a fresh example, the House of Representatives recently passed the *Invest to Protect Act*, a bipartisan statute to “increase funding for local police departments.” Annie Karni & Stephanie Lae, *House Passes Police Funding Bills, with Democratic Rifts on Vivid Display*, N.Y. TIMES (Sept. 22, 2022), <https://www.nytimes.com/2022/09/22/us/politics/house-passes-police-funding-bills.html> [https://perma.cc/MP5M-ZBNA]. Revealing its remedial objective, the “funds could be used for purchasing body cameras and conducting de-escalation training.” *Id.* But as one of the Act’s original co-sponsors Congressman Jared Golden (ME-02) noted, the money would be directed to the “recruitment of new officers,” or differently stated, increasing the policing footprint in small police departments. Jared Golden, *Press Release – House Passes Golden-Backed Invest to Protect Act to Dramatically Increase Federal Funding for Small Police Departments* HOUSE.GOV (Sept. 22, 2022), <https://golden.house.gov/media/press-releases/house-passes-golden-backed-invest-to-protect-act-to-dramatically-increase-federal-funding-for-small-police-departments#:~:text=The%20Invest%20to%20Protect%20Act%20contains%20important%20provisions%20that%20prioritize,%2C%20retain%2C%20and%20train%20officers> [https://perma.cc/68H7-NUUK].

I use quotation marks around “usually” to reflect the unique circumstances surrounding the police killing of George Floyd and the subsequent uprising, which prompted cities to slash police budgets in response to calls for accountability. See Char Adams, *Cities Vowed in 2020 to Cut Police Funding – But Budgets Expanded in 2021*, CBS NEWS (Dec. 28, 2021), <https://www.nbcnews.com/news/nbcblk/cities-vowed-2020-cut-police-funding-budgets-expanded-2021-rcna9864> [https://perma.cc/58NE-8UGJ]. It is worth noting, however, that many cities have since replenished the pockets of their police departments. See J. David Goodman, *A Year After ‘Defund,’ Police Departments Get Their Money Back*, N.Y. TIMES (Oct. 10, 2021), <https://www.nytimes.com/2021/10/10/us/dallas-police-defund.html> [https://perma.cc/K6BK-RNTF].

342. Akbar, *Toward a Radical Imagination of Law*, *supra* note 74, at 464–65.

343. *Id.* (citing *About Us*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/about-us/> [https://perma.cc/JJG2-HASR]).

344. *Id.*

345. *Id.*

346. *Id.* (footnote omitted).

remove and to disinvest from [policing] altogether³⁴⁷ and, in its stead, give space and resources to creative alternatives to preventing and responding to social harms. These potential alternatives are directed by the praxis of power shifting,³⁴⁸ disinvestment and reinvestment, and transformation.³⁴⁹ At the core of the abolitionists approach is “the reorganization of the state through the redistribution of power and resources into Black [and Brown] communities, as self-determined” by these communities.³⁵⁰

Since the advent of the Black Lives Matter movement in 2013, which emerged to demand justice and accountability for the senseless killing of eighteen-year-old Trayvon Martin in Florida,³⁵¹ the movement—consisting of actors with a variety of organizing strategies yet harmonized in their pursuit of making the system less punitive and less discriminatory—has led the charge for racial justice. In the nascent years of the movement, abolitionists’ visions were relegated to the margins in favor of reformist approaches such as indictment, conviction, and incarceration for the particular police officers involved in killings, increasing the use of police-worn body cameras, hiring more diverse police officers, and other such reformist policies.³⁵² However, this attitude has faded since the state-sanctioned murder of George Floyd broadcasted globally the house-on-fire crisis of police killing unarmed Black people in the United States. Abolitionist demands have become more recognized in the public sphere³⁵³ and are nested with the core objectives of the Black Lives Matter movement.³⁵⁴

347. *Id.* (footnotes omitted).

348. Clair & Woog, *Courts and the Abolition Movement*, *supra* note 320, at 28 (“*Power shifting* is the underlying principle that the power to define and manage social harm should be . . . democratic.”); *See also* Simonson, *supra* note 257, at 803 (discussing power shifting as constituting “shifting power away from the police and toward the populations who are policed, people who are often poor and Black, Latinx, or Indigenous”).

349. Clair & Woog, *Courts and the Abolition Movement*, *supra* note 320, at 32 (defining transformation as a guiding principle of abolitionist work that recognizes the “practical necessity of partial abolitions, or non-reformist reforms that transform existing, punitive state institutions in ways that reduce their power and harm”).

350. Akbar, *Toward a Radical Imagination of Law*, *supra* note 74, at 469.

351. HINTON, *AMERICA ON FIRE*, *supra* note 24, at 291 (“At the forefront of the new generation of activists and organizations is the Black Lives Matter movement, which formed in July 2013 after George Zimmerman was acquitted for the senseless killing of seventeen-year-old Black high school student Trayvon Martin.”).

352. *See* Akbar, *Toward a Radical Imagination of Law*, *supra* note 74, at 405–09.

353. Clair & Woog, *Courts and the Abolition Movement*, *supra* note 320, at 28 (explaining that the “[c]ontinued protests throughout . . . renewed many movement activists’, lawyers’, and scholars’ commitments to the politics and possibilities of abolition”).

354. *Id.* (observing that “[g]iven the limits of liberal reform visions, the Black Lives Matter movement has taken up the mantle in articulating and building alternatives to police and prisons” after “witnessing the limits of liberal reform visions as well as liberals’ political miscalculations in relation to intransigent conservative lawmakers under the Obama Administration”).

There are organizations throughout the country “practicing abolition every day . . . by creating the local projects and initiatives that offer alternative ideas and structures for mediating conflicts and addressing harms without relying on police or prisons.”³⁵⁵ In Oakland, California, for example, the abolitionist organization Critical Resistance Oakland established the Oakland Power Projects (OPP) to cultivate “practices, relationships, and resources that build community power and wellbeing . . . without relying on the cops.”³⁵⁶ Similarly, the abolitionist initiative Creative Intervention describes its mission as designed to provide “tools and resources to help anyone and everyone create *community-based*, collective responses” to ending violence without police intervention.³⁵⁷ These abolitionists projects insist on focusing attention on communities and their desires, and on the importance of building solidarity within communities to improve human needs.³⁵⁸

C. *Characterizing Policing as a Tortious Assault Is a Form of Powershifting*

At the core of the abolitionist principle of power shifting is that the power to define harm should be in the hands of everyday people and the communities in which they live.³⁵⁹ One benefit of wresting the power to define harm from state-driven processes to the hands of the oppressed is that it brings the communities who live in the shadows of the carceral state into the democratic fora. The project of “democratization” (though the meaning of the term itself is contested³⁶⁰) generally “aims to increase opportunities for ordinary citizens to participate in, deliberate about, and ultimately influence criminal justice policymaking and adjudication.”³⁶¹ It shores up the democratic standing of the policed, who are more likely to be squeezed out of the beneficence of the

355. Mariame Kaba, *Take No Prisoners*, in *How to Repair the Criminal Justice System*, VICE (Oct. 5, 2015), <https://www.vice.com/en/article/vdxpp4/mending-our-ways-0000775-v22n10> [<https://perma.cc/59UK-UKUF>].

356. Akbar, *Abolitionist Horizon*, *supra* note 75, at 1835–36 (citing Critical Resistance Oakland, *The Oakland POWER Projects: Decoupling Policing from Health Services: Empowering Healthworkers as Anti-Policing Organizers*, 27 *Abolitionist* 1, 7 (Spring 2017)).

357. CREATIVE INTERVENTIONS, (emphasis added) <https://www.creative-interventions.org/> [<https://perma.cc/G9KT-PLPK>].

358. Akbar, *Abolitionist Horizon*, *supra* note 75, at 1837.

359. Clair & Woog, *Courts and the Abolition Movement*, *supra* note 320, at 28–29 (explaining that in seeking “[t]o contradict and critique the existing [W]hite supremacist, capitalist and patriarchal system], many abolitionists seek to shift power away from elites and toward everyday people and communities”) (footnote omitted).

360. See, e.g., John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 722 (2020) [hereinafter Rappaport, *Doubts About Democratizing*] (observing that the concept of democratization is incredibly contested); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1378 (2017) (stating that “democracy . . . is a profoundly contested concept”).

361. Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, *supra* note 360, at 722.

democratic experiment because of exclusionary mechanisms such as laws that restrict access to the franchise.³⁶²

Much scholarly attention to date has focused on power shifting tactics as a tool for expanding democratic participation for the powerless.³⁶³ An example of this is “court watching.” Court watching is an effort rooted in solidarity in which everyday people observe and document court proceedings in their local courtrooms—sentencings, plea agreements, arraignments, and more—involving members of their communities and reporting to the public their own observations.³⁶⁴ It is a contestation of the ordinarily exclusionary machinations of courtrooms whereby judges “conduct short, routine court appearance at inaudible volumes and in inscrutable language, masking the important decisions and policies” that generate White supremacist criminal legal outcomes.³⁶⁵

To appreciate this point, it is important to recall that in the United States, crime and law breaking are defined with entirely plausibly conscious but veiled anti-Black bias.³⁶⁶ As Dorothy Roberts has argued, for example, anti-Black racism criminalized pregnant Black women and “was critical to turning the public health problem of drug use during pregnancy into a crime.”³⁶⁷ Because society perceived Black women as biological threats to their own children, “[p]rosecutors concocted newfangled interpretations of homicide, assault, child neglect, and drug distribution laws to punish [B]lack women’s childbearing and blame [B]lack mothers for the disadvantages their children suffered owing to structural racism.”³⁶⁸ In some instances, officers arrested Black women within hours of giving birth³⁶⁹ and processed them in the criminal legal system where they inevitably appeared before judges in courtrooms that replicated the same White supremacist and patriarchal forces. Court watching groups, in their storytelling and through their presence, would have attempted to bend this

362. Clair & Woog, *Courts and the Abolition Movement*, *supra* note 320, at 29 (footnote omitted).

363. *See, e.g., id.* at 28–31 (discussing power shifting in the criminal law context); Simonson, *Contestation and Resistance*, *infra* note 364, at 1621–23; Simonson, *Police Reform Through a Power Lens*, *supra* note 257, at 778.

364. Clair & Woog, *Courts and the Abolition Movement*, *supra* note 320, at 34–35; *see also* Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1618 (2017) [hereinafter Simonson, *Contestation and Resistance*] (“Court watching groups help define the proceedings through their presence, reminding courtroom players that each individual case is connected to larger aggregate harms to families and neighborhoods.”) (footnote omitted).

365. Simonson, *Contestation and Resistance*, *supra* note 364, at 1617.

366. *See, e.g.,* Roberts, *Democratizing Criminal Law*, *supra* note 65, at 1599; KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 187 (2011).

367. Roberts, *Democratizing Criminal Law*, *supra* note 65, at 1599.

368. *Id.*

369. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 166 (1999) (“Police arrested some patients within days or even hours of giving birth and hauled them off to jail in handcuffs and leg shackles.”).

trajectory by articulating different conceptions of crime and harm and exposing the everyday violence that permeates criminal proceedings.³⁷⁰

In some respects, Professor Tilley's account of the expressive function of tort law is consistent with the same power shifting infrastructure that guides the abolitionist project. Across large swaths of tort doctrine sketched above in Part III.A, when a factfinder is assessing whether an actor should be held liable, the factfinder is directed to conceptions of harm that are grounded in community understanding, and in so doing, "reliev[ing] [the state] of law-promulgating and law-enforcing obligations" that the state is either too bureaucratic or incompetent to perform.³⁷¹ To say that an action is a tortious assault is thus to articulate a vision of harm and offensiveness that is rooted in a community's appraisal of its values and norms. In this reading, appreciating policing as a tortious assault on race-class subjugated communities is itself a form of power shifting because it rearticulates the way police violence is understood within the ecosystem of the communities upon whom it is most often imposed.

D. Characterizing Policing as a Tortious Assault Clarifies the "Police Violence" Issue

1. The Importance of Sharpening the Meaning of "Police Violence"

Progressive thinkers about race posit that how terms are defined and operationalized is important to attaining rights-protective measures for marginalized groups.³⁷² Issues on antiviolence agendas must be defined at the outset by using labels that match "our data, priorities, and conclusions."³⁷³ Foregoing definitional clarity cultivates a discursive environment that obscures the issue and invites regressive outcomes. Kimberlé Crenshaw provides a leading analysis of definitional inaccuracy creating disparities.

Writing in the context of lawsuits involving antidiscrimination claims, Crenshaw cautions that one of the pitfalls of a "single-axis analysis" is the analysis elevates the experiences of people who enjoy race and class privilege at the expense of those who do not.³⁷⁴ For example, she notes that "the equation of

370. Clair & Woog, *Courts and the Abolition Movement*, *supra* note 320, at 34–35.

371. Tilley, *Tort Law Inside Out*, *supra* note 69, at 1350.

372. *See supra* note 55.

373. Deo, *Why BIPOC Fails*, *supra* note 55, at 119.

374. Crenshaw observes:

With Black women as the starting point, it becomes more apparent how dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis. I want to suggest further that this single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group. In other words, in race discrimination cases, discrimination tends to be viewed in terms of sex- or class-

racism with what happens to the Black middle-class or to Black men, and the equation of sexism with what happens to [W]hite women” leaves persons at multiple axes of identity with inadequate remedies.³⁷⁵ These single-axis frameworks permeate legal doctrine by “facilitat[ing] a jurisprudence in which relatively vulnerable and socially marginalized minorities persistently lose out” because of “courts’ ability to opportunistically (re)characterize their claims in multiple ways—each time assigning the label that ensures a loss.”³⁷⁶ As a solution to this problem, Crenshaw advocates for an analytical framework that focuses attention on ways in which conceptions of race and sex discrimination are operationalized and centered on the experiences of those who are most disadvantaged.³⁷⁷

We can extract Crenshaw’s lesson about the importance of attending to how language³⁷⁸ is operationalized by applying it to the broader context of social movements, such as the movement to reduce or eliminate police-inflicted harm. To see this, take first Kaba’s suggestion that the term “police violence” functions to flatten the multidimensionality of the ways in which state violence is exacted. This is not just a theoretical concern. The Cato Institute reports that sexual misconduct complaints closely trail complaints of excessive force as the most frequently reported form of police misconduct.³⁷⁹ Moreover, Andrea Ritchie observes that when one carefully analyzes incidents of police sexual violence, a pattern emerges:

The targets of reported sexual violence are overwhelmingly women, and typically women of color who are or are perceived to be involved in the drug or sex trades, or using drugs or alcohol, as well as people with prior arrest records, immigrants, people with limited English proficiency, people with disabilities, and people who have previously been targeted for police sexual violence.³⁸⁰

This demonstrates that police typically target victims who are members of socially marginalized groups. The police targeting is buoyed by the sense that their socially disempowered victims will be less likely to hold them accountable.

privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women.

Demarginalizing Race and Sex, *supra* note 55, at 140.

375. *Id.* at 152.

376. Aziz Z. Huq, *The Double Movement of National Origin Discrimination*, 87 U. CHI. L. REV. 2397, 2406 (2020).

377. Crenshaw, *Demarginalizing Race and Sex*, *supra* note 55, at 140 (explaining that the “focus on the most privileged group members marginalizes those who are multiply-burdened”).

378. By language, I am referring to the labels used to identify the interests at stake or stakeholders.

379. RITCHIE, *INVISIBLE NO MORE*, *supra* note 56, at 109. Sites of police sexual violence range from alleys, to police detention facilities, to police cars. *Id.*

380. *Id.* at 112 (citation omitted).

Accordingly, commentators theorize that police consider those they victimize sexually to be “police property.”³⁸¹

Adding a layer to further illuminate the pattern Ritchie delineates, the behavior does not merely reflect instances of misconduct by so-called “bad apples.” The term “bad apples” in the context of policing is a shorthand used by defenders of police practices to suggest that police misconduct can be isolated to the actions of a few, aberrant officers.³⁸² Importantly, it is an apologia which says that police misconduct is not the product of forces systemic to police departments³⁸³ and is usually accompanied with the refrain that “99 percent” of officers are good cops.³⁸⁴ The term bubbled to the surface of national dialogue in the aftermath of the videotaped beatings of Rodney King by Los Angeles Police Department officers.³⁸⁵ Then, as now, the phrase “bad apples” is used in a way that obfuscates more than enlightens, as Elizabeth Hinton explains:

The original twelfth-century proverb from which the term is derived—“A rotten apple quickly infects its neighbor”—warns that bad apples cannot exist in isolation; in fact, the ripening agent apples emit will quickly spoil the entire barrel if they are not removed in time Rather than treating bad apple cops as an indication that the entire force was compromised, the bad apple argument of the late twentieth and early twenty-first centuries presents police violence as a problem in a select few individuals who happen to be cops, foreclosing any critique of an aggressive policing culture and of systemic racism that devalues Black lives and that is violent to the core.³⁸⁶

Indeed, according to Penny Harrington, the first woman to serve as chief of a major police department in the United States,³⁸⁷ police sexual violence is endemic to law enforcement. Harrington notes that “[t]here is this culture in law enforcement . . . you don’t tell on your buddies You get so bought into this police culture . . . you don’t see anything wrong with it. It’s like [] a badge of honor, how many women in the community you can have sex with, and the younger the better.”³⁸⁸ By focusing on the perspective of the communities upon whom the brunt of policing is experienced, and not the subset of police activity

381. *Id.*

382. HINTON, *AMERICA ON FIRE*, *supra* note 24, at 125.

383. *Id.*

384. *Id.* at 126.

385. *Id.* at 125.

386. *Id.*

387. Timothy Williams & Caitlin Dickerson, *Rarity of Tulsa Shooting: Female Officers Are Almost Never Involved*, N.Y. TIMES (Sept. 24, 2016), <https://www.nytimes.com/2016/09/25/us/rarity-of-tulsa-shooting-female-officers-are-almost-never-involved.html> [<https://perma.cc/XZ39-DVNS>] (“Penny Harrington . . . [is the] first female police chief of a major city.”).

388. Steven Yoder, *Officers Who Rape: The Police Brutality Chiefs Ignore*, AL-JAZEERA AMERICA (Jan. 19, 2016), <http://america.aljazeera.com/articles/2016/1/19/sexual-violence-the-brutality-that-police-chiefs-ignore.html> [<https://perma.cc/5QU7-8E93>].

that involves the dominant conception of what constitutes police violence—e.g. “spectacles” of policing like police killings and shootings—a tortious assault framework invites us to think more critically about the types of harms that are left out of the overarching account of police violence such as police sexual violence.

2. *Limitations of Current Dialogue About “Police Violence”*

Despite the pervasive character of sexual violence exacted by police, it is not the conception of police-inflicted harm that orients public discussions about police misconduct and accountability.³⁸⁹ The consequences of this narrow view of “police violence” can be explained as follows. While demands for justice are advanced under the banner of reducing or eliminating “police violence,” the dominant conceptions of “police violence” only capture a narrow sliver of harmful contact. In reality, the harmful contact is considerably broader in scope. This means that typical proposals to remedy what is commonly understood as “police violence” have serious limitations. For example, what use is a police-worn body camera to an injury like police sexual violence that is rendered invisible? How might the oversight bodies contemplated by community control of policing provide relief to victims of sexual violence who are socially disempowered, because they are in the sex or drug trade, including by their *own* community members?³⁹⁰ If we train our attention myopically to the dominant conception of police violence, we fail to capture the full range of harms exacted by police. This result all but ensures that the remedies fall short of rectifying the full extent of the problem, and that society will underappreciate the frequency and severity of the problems and thus put a lower priority on any solutions.

We might also see the importance of specifying the term “police violence” by analyzing Kaba’s suggestion that the term is a misnomer, because policing intrinsically *is* violence. Consider again the justification for this position to which I adverted in the introduction of this Article and developed in Part I. Though varying in how it has been expressed throughout U.S. history, policing has repeatedly been driven by two aims: (1) the felt need to defend wealthy

389. RITCHIE, *INVISIBLE NO MORE*, *supra* note 56, at 109. Ritchie goes on to underscore the pervasiveness of police sexual violence and stress that the reported accounts are only the tip of the iceberg: “Even when a woman takes the risk to lodge a complaint, there is the question of whether it will be recorded, taken seriously, and covered by the media, particularly given that officers are known to target individuals whose credibility will be challenged. By its very nature, sexual violence is hidden away from public view, witnesses, and cop-watching cameras, making it more likely that complaints will be deemed unsubstantiated.” *Id.* at 110.

390. See, e.g., KABA, *WE DO THIS ‘TIL WE FREE US*, *supra* note 22, at 110–18 (describing strategies for advocating in support of justice-involved people and other marginalized groups and explaining that they are sometimes “targeted by [their] own communities”). For an extended discussion on the challenges faced by marginalized groups with respect to their community integration, see Edward E. Rhine & Anthony C. Thompson, *The Reentry Movement in Corrections: Resiliency, Fragility, and Prospects*, 47 *CRIM. L. BULL.* 177 (Spring 2011).

Whites to preserve systems of inequality where poor Black and Brown people are relegated to a seemingly permanent underclass, and (2) to surveil and restrain communities of color that might resist. “In other words, the more unequal are social relations, the more violence is required to preserve social hierarchies, and a cycle of exacerbated inequality and correspondingly greater violence can ensue as elites attempt to keep other people from leaving or revolting.”³⁹¹

In the colonialist period and up to the Jim Crow era, the state authority that certified police work was more honest about the designs of policing. People of color were rendered disposable in the interest of preserving White dominion.³⁹² Police were instrumental in maintaining that social order. Since the Civil Rights Era, we have seen this lethality play out under the aegis of crime containment,³⁹³ wherein controlling narratives of people of color as inherently criminal are widely circulated to further that lethality.³⁹⁴ This rhetoric of policing as a mechanism for crime containment persists despite a large body of evidence showing the contrary:

[C]riminal law enforcement is something that most police officers do with the frequency located somewhere between virtually never and very rarely. . . . That less than a third of time spent on duty is on crime-related work; that approximately eight out of ten incidents handled by patrols by a range of different police departments are regarded by the police themselves as non-criminal matters; that the percentage of police effort devoted to traditional criminal law matters probably does not exceed 10 percent; that as little as 6 percent of a patrol officer’s time is spent on incidents finally defined as ‘criminal.’³⁹⁵

The organizing logic of policing, it seems, is better understood through the analytic framework set forth by thinkers such as Kaba and Seigel. The tort law framework I deploy here contributes to this dialogue by sharpening the idea that policing *is* violence, when properly measured against the reasonable understanding of the community in which it most often operates. Thus

391. SEIGEL, *VIOLENCE WORK*, *supra* note 52, at 182.

392. See MENAKEM, *supra* note 288, at 72–74.

393. SEIGEL, *VIOLENCE WORK*, *supra* note 52, at 5 (explaining that the concept of “police” has attracted relatively little attention even in critical commentary because of myths that legitimize policing and noting that “[c]rime is probably the most important myth legitimizing the police” but “police actually spend quite a small amount of their time dealing with what they call crime” and “[a]s researchers and practitioners alike acknowledge, crime-related tasks are a tiny portion of a police officer’s daily labor”).

394. See, e.g., Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 *DUKE L.J.* 1043, 1045–46 (2019) (explaining that “[s]ince the turn of the twentieth century, public arguments about criminality have been entangled, often invidiously, with generalizations about race and the putative criminality of racial minorities . . . [p]olice respond to [B]lack and [W]hite suspects in different ways . . . [and] [p]artly as a result of these dynamics, roughly one in three [B]lack men (and one in five Latino men) will be incarcerated during their lifetime”) (citations omitted).

395. SEIGEL, *VIOLENCE WORK*, *supra* note 52, at 7 (MARK NEOCLEOUS, *A CRITICAL THEORY OF POLICE POWER: THE FABRICATION OF THE SOCIAL ORDER* 92–93 (2000)).

understood, the framework provides a more holistic account of policing that clarifies its object as designed to maintain dominant hierarchies in society, through the surveillance, control, and brutalization of those who lack race, class, and gender privilege and who pose actual or perceived threats to those hierarchical arrangements.³⁹⁶

3. *The Importance of Naming Policing as Violence Work*

If it is true that policing *is* violence, what are the normative implications of this position? A significant implication relates to the recent Supreme Court decision in *Caniglia v. Strom*.³⁹⁷ In *Caniglia*, a unanimous Court held that the “community caretaking” exception to the Fourth Amendment’s warrant requirement does not extend to the home for purposes of preventing a person from dying by suicide.³⁹⁸ But several concurring Justices observed that the community caretaking exception makes room for exigent circumstances. Chief Justice Roberts and Justice Breyer, for example, noted that the Court’s holding did not apply to circumstances “when there is ‘a need to assist persons who are seriously injured or threatened with such injury.’”³⁹⁹ Justice Kavanaugh thought that warrantless entries are “perfectly constitutional” in cases “involving unattended young children inside a home.”⁴⁰⁰ Other examples are available.⁴⁰¹ If we take the argument that policing is violence seriously, it suggests that police cannot respond effectively to some of the exigent circumstances contemplated by the Justices in *Caniglia*, because their response is likely to result in application of violence rather than any actual furtherance of public safety. One might even say that the Justices’ ruminations in approval of warrantless wellness checks invite harm. The following real-world examples demonstrate that when police are called upon to engage in community caretaking, they are likely to operationalize the violent logic of policing and its unwarranted exercise of power and dominion.

396. See HINTON, *AMERICA ON FIRE*, *supra* note 24, at 16; VITALE, *THE END OF POLICING*, *supra* note 38, at 34.

397. *Caniglia v. Strom*, 141 S. Ct. 1596, 1600 (2021).

398. The “community caretaking” function describes activities “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute,” such as instances when an officer has contact with a civilian whose vehicle is disabled or who has been involved in an accident without violating a criminal statute. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). The Court held in *Cady v. Dombrowski* that warrantless searches of vehicles in the course of such functions does not run afoul of the Fourth Amendment. *Id.* at 446.

399. *Caniglia*, 141 S. Ct. at 1600 (Roberts, J., concurring) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006)).

400. *Caniglia*, 593 S. Ct. at 1605 (Kavanaugh, J., concurring).

401. Justice Alito noted that elderly people who become incapacitated due to a fall or other occurrence may not have the luxury of being able to wait for a warrant before an officer enters their home. *Id.* at 1602 (Alito, J., concurring). Justice Kavanaugh noted that fighting a fire and investigating its cause or preventing the imminent destruction of evidence also qualify as exigent circumstance exceptions. *Id.* at 1603 (Kavanaugh, J., concurring).

In 2016, officers with the New York Police Department's elite Emergency Services Unit responded to sixty-six-year-old Deborah Danner's Bronx apartment after a neighbor reported that she had been "acting erratically."⁴⁰² Danner was found in her room with scissors in her hands.⁴⁰³ And, since she was battling mental illness like many victims of police-inflicted harm, she was considered a threat to her own wellbeing.⁴⁰⁴ Reports indicate that the responding officers had instructed her to put the scissors down.⁴⁰⁵ She obliged.⁴⁰⁶ But Danner then picked up a bat and tried to swing it at an officer at the scene.⁴⁰⁷ This prompted the officer to shoot her twice, killing her.⁴⁰⁸ Movingly, Danner lamented in an essay four years before she was killed that, "[w]e are all aware of the all too frequent news stories about the mentally ill who come up against law enforcement instead of a mental health professionals and end up dead."⁴⁰⁹

Similar events took place in White Plains, New York, in 2011. A sixty-eight-year-old Black former marine named Kenneth Chamberlain, Sr. accidentally set off a medical alert pendant.⁴¹⁰ He had been issued the device because he suffered from a severe heart condition.⁴¹¹ Police arrived at the scene before medical emergency workers and broke down the door to his home.⁴¹² Moments later, Chamberlain Sr. lay dying on the floor from two shots fired by responding officers. Events between their arrival on the scene and the shooting is disputed. Police claimed he had attacked them with a butcher knife.⁴¹³ Neighbors and eyewitnesses refuted this account.⁴¹⁴ Another recent case involved the murder of Atatiana Jefferson, a twenty-eight-year-old Black woman

402. Eli Rosenberg & Ashley Southall, *In Quick Response, de Blasio Calls Fatal Shooting of Mentally Ill Woman 'Unacceptable'*, N.Y. TIMES (Oct. 19, 2016), <https://www.nytimes.com/2016/10/20/nyregion/nypd-sergeant-fatal-shooting-bronx-woman.html> [https://perma.cc/M5HQ-U8BR].

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. *Living with Schizophrenia*, N.Y. TIMES (Oct. 19, 2016), <https://www.nytimes.com/interactive/2016/10/19/nyregion/document-Living-With-Schizophrenia-by-Deborah-Danner.html> [https://perma.cc/4W97-TJUV] (citing DEBORAH DANNER, *LIVING WITH SCHIZOPHRENIA* (2012)).

410. CNN Wire Staff, *New York Shooting of Elderly Man Draws Parallels to Trayvon Martin Case*, CNN (Apr. 16, 2012), <https://www.cnn.com/2012/04/16/justice/new-york-chamberlain-death/index.html> [https://perma.cc/8LNL-ZU5E].

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

who was shot and killed by police after her neighbor made a wellness check request to her home.⁴¹⁵

As these examples suggest, it would seem that even “when there is ‘a need to assist persons who are seriously injured or *threatened* with such injury,’” violence remains part of the labor of policing.⁴¹⁶ And while White people—particularly, impoverished White people—are not exempt from this treatment,⁴¹⁷ there is little doubt that Black and Brown people are acutely vulnerable.⁴¹⁸ Indeed, as the psychotherapist Resmaa Menakem explains in the *New York Times* best-selling book *My Grandmother’s Hands*, the police see “Black bodies as often dangerous and disruptive It feels charged with controlling and subduing Black bodies by any means necessary—including extreme force.”⁴¹⁹

Some might argue that in many of the crisis situations that have led to fatal police encounters, before the moment police had engaged in violence, the victims had in some sense threatened the safety of the officers. Even if true, it is simply beside the point. First, if the police had not arrived and broken down doors without announcing their presence or had not unnecessarily exerted dominion and power over someone suffering from mental health issues, the victims would not have been pushed into taking actions that police perceived as threatening. Moreover, those actions were not likely genuinely threatening, if measured from the perspective of a reasonable member of the community rather than someone trained to escalate violence in response to any hint of resistance. If we take the case of sixty-six-year-old Deborah Danner as an example, it cannot be said with any confidence that the threat she may have posed legitimized the use of lethal force by thirty-two-year-old Sergeant Hugh Barry. Then-New York City Mayor Bill DeBlasio and then-NYPD Commissioner James P. O’Neill said as much.⁴²⁰

415. Stephanie Hegarty, *Atatiana Jefferson: ‘Why I Will No Longer Call the Police,’* BBC (June 16, 2020), <https://www.bbc.com/news/stories-53052917> [<https://perma.cc/VYY8-3QG5>].

416. *Caniglia v. Strom*, 141 S. Ct. 1596, 1600 (2021) (Roberts, J., concurring) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006)) (emphasis added).

417. *E.g.*, Erik Ortiz, *Family of Kansas Teen Fatally Shot by Police During Wellness Check Blasts Investigation*, NBC NEWS (Apr. 30, 2021), <https://www.nbcnews.com/news/us-news/family-kansas-teen-fatally-shot-police-during-wellness-check-blasts-n1265881> [<https://perma.cc/L268-N6FQ>].

418. Although police-inflicted harm impacts all Americans, people of color are particularly vulnerable targets. A recent study found that Black men are about 2.5 times more likely to be killed by police over their lives than are White men. Likewise, Black women are about 1.4 times more likely to be killed by police than are White women. Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PNAS 16793, 16794 (2019), available at <https://www.pnas.org/content/116/34/16793> [<https://perma.cc/HHU4-ZEWE>].

419. MENAKEM, *MY GRANDMOTHER’S HANDS*, *supra* note 288, at 28.

420. Matt Stevens & Joseph Goldstein, *New York City Agrees to Pay \$2 Million to Family of Mentally Ill Woman Killed by Police*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/nyregion/deborah-danner-settlement.html> [<https://perma.cc/HV34-PKAV>] (reporting that the “shooting drew swift condemnations from Mayor Bill de Blasio and James P. O’Neill . . . who said Sergeant Barry had failed to follow protocols”).

Nevertheless, the outcome should not surprise—it may be more accurate to say it was predictable.⁴²¹

Why? The emergence of “suicide by cop” offers an explanation. In the case of suicide by cop, “suicidal individuals arm themselves with toy guns or other harmless devices in hopes that they will be sufficient to provoke a deadly response by police.”⁴²² Whether or not police perceive the threat as real, they routinely oblige.⁴²³ The scenario is made possible because the suicidal person reasonably understands that police officers will respond armed and ready to kill, even when a reasonable person in the community would not be in apprehension of sufficient imminent violence to justify deadly force.⁴²⁴ By international comparison, this dynamic plays out differently in most other countries.⁴²⁵ In the United Kingdom, for example, “[p]olice use less lethal means to manage” people who pose a serious threat to themselves or others.⁴²⁶ Consider the case of Nicholas Salvador, who had “paranoid schizophrenia, beheaded a neighbor and went on a rampage in his London Neighborhood.”⁴²⁷ Salvador was initially encountered by unarmed local police who “rescued nearby children while engaging him verbally.”⁴²⁸ He was later confronted by armed police who subdued him with taser shocks.⁴²⁹ Think for a moment about how this scenario would have transpired in the United States. It is not hard to infer that it probably would have resulted in Salvador’s killing by police.⁴³⁰

The reluctance of domestic violence survivors to call police because they anticipate police engaging in violence against their partners or themselves is also instructive.⁴³¹ Even among those who contact police, 28 percent were afraid the

421. Also at work here is the fact that people with mental illnesses (PMI) are 16 times more likely to be killed by police than those who do not suffer from mental impairments. VITALE, *THE END OF POLICING*, *supra* note 38, at 77 (citation omitted). As Alex Vitale explains in detail, “[t]he killings of PMI take a few general forms. In some cases, police arrive on the scene and encounter someone with something they perceive to be a weapon, such as a screwdriver or kitchen implement. That person refuses to drop the object and sometimes threatens the officer or others, prompting police to open fire.” *Id.*

422. *Id.* at 79.

423. *Id.*

424. *See id.*

425. *See, e.g., id.* at 78 (explaining that in the United Kingdom and other places where police are less likely to be armed, this dynamic is less common).

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *See* Meg Aprill, *Why Domestic Violence Survivors Fear Turning to the Police*, DAY ONE (Aug. 5, 2020), <https://www.dayoney.org/blog/2020/8/5/why-domestic-violence-survivors-fear-turning-to-the-police> [<https://perma.cc/JPS6-URM6>].

police would be violent.⁴³² Dorothy Roberts observes the same dynamic in the regulation of poor Black and Brown families in the child welfare system. Roberts explains that parents are “extremely unlikely to call the police” when trouble is afoot, because the mere presence of police may seed violence.⁴³³ There is a lesson here about how we might expect U.S. police to function in their “community caretaking” capacity when people in their homes are “threatened with [serious] injury.”⁴³⁴ We might expect violence, enabled by what Justice Sonia Sotomayor in *Kisela v. Hughes* called a “shoot first and think later” mentality.⁴³⁵

Indeed, the fact that the carveouts to the community caretaking exception identified in *Caniglia* might presage violence is not an idle observation. Recent events in which police kill people in crisis situations have prompted cities across the country to rethink the role played by police in such situations.⁴³⁶ For example, in San Francisco, California, the policing footprint has shrunk to primarily criminal matters in recognition of the lethality of policing.⁴³⁷ Eugene, Oregon, follows a similar plan,⁴³⁸ as does the city of Denver, Colorado.⁴³⁹ Considering

432. TK LOGAN & ROBERTA VALENTA, THE NATIONAL DOMESTIC VIOLENCE HOTLINE, WHO WILL HELP ME? DOMESTIC VIOLENCE SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES 4–8 (2015), available at <http://www.thehotline.org/wp-content/uploads/sites/3/2015/09/NDVH-2015-Law-Enforcement-Survey-Report.pdf> [<https://perma.cc/B93R-RE9J>].

433. DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 262 (2022).

434. *Caniglia v. Strom*, 141 S. Ct. 1596, 1600 (2021) (Roberts, J., concurring) (emphasis added) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006)).

435. *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). In *Kisela*, Officer Andrew Kisela shot Amy Hughes four times less than two minutes after arriving at the scene of a 911 distress call where a woman with a kitchen knife was alleged to have been behaving erratically. Kisela claimed his actions were justified because Hughes was threatening the safety of her roommate, Sharon Chadwick, who was found nearby. Chadwick had a different perspective on the situation. “[S]he was never in fear of Hughes and ‘was not the least bit threatened by the fact that [Hughes] had a knife in her hand.’” *Id.* at 1156 (Sotomayor, J., dissenting). As with many victims of police-inflicted harm, it was later determined that Hughes suffered from mental illness and frequently had episodes “in which she acts inappropriately.” *Id.* at 1151.

436. Christina Maxouris, *These Mental Health Crises Ended in Fatal Police Encounters. Now, Some Communities Are Trying a New Approach*, CNN (Oct. 10, 2020), <https://www.cnn.com/2020/10/10/us/police-mental-health-emergencies/index.html> [<https://perma.cc/WG7X-K5WG>].

437. Maura Dolan, *London Breed Pushes San Francisco Reforms: Police No Longer Will Respond to Noncriminal Calls*, L.A. TIMES (June 12, 2020), <https://www.latimes.com/california/story/2020-06-12/san-francisco-police-reforms-stop-response-noncriminal-calls> [<https://perma.cc/EPG7-PPJL>].

438. Anna V. Smith, *There’s Already an Alternative to Calling the Police*, HIGH COUNTRY NEWS (June 11, 2020), <https://www.hcn.org/issues/52.7/public-health-theres-already-an-alternative-to-calling-the-police> [<https://perma.cc/GMX4-LK3L>].

439. Angela Ufheil, *The STAR Van Offers an Alternative to Police*, 5280 (June 17, 2020), <https://www.5280.com/2020/06/the-star-van-offers-an-alternative-to-police/> [<https://perma.cc/WLX2-H85G>].

these accounts and the arguments of Kaba, Seigel, and others, it seems all but logical that one might understand the institution of U.S. policing to be organized around targeted violence. Further, given the compelling reasons to believe that policing *is* violence, reconceiving the nature of policing through the lens of the primarily affected Brown and Black communities, as suggested by the tort of assault, helps to broaden the scope of possible remedies to violence imposed by police. These remedies, properly understood, are oriented not toward mere reform of an intrinsically violent system, but toward meaningful steps in abolishing that system.

CONCLUSION

“Police violence” is a fixture of national dialogue in the United States. Many peg the murder of George Floyd as the flashpoint for national attention on the issue. But some seven years before that, the Movement for Black Lives emerged to bring attention to the roll call of victims of police-inflicted harm and to spark reform. In the 1990s and throughout the first few years of the twenty-first century, cities erupted in protest over “police violence.”⁴⁴⁰ A generation before, the civil rights victories provoked heightened policing in Black and Brown communities. The result? More violence. Given this history, the term “police violence” has been a reliable staple of dialogue in the United States. But what, precisely, does “police violence” mean?

While there are of course exceptions, the term “police violence” is often used without reflection. Thus, the perception that police killings and shootings constitute the full range of harms that are captured by the term has prevailed,

440. Ritchie describes some examples in her book *INVISIBLE NO MORE*.

In 1994, New Orleans exploded in outrage when police officer Len Davis put a hit out on Kim Groves, a Black mother of three, and had her killed after she filed a complaint against him for pistol-whipping a young man in her neighborhood. Chicagoans took to the streets of the city’s South Side in 1999, chanting, ‘It’s a cell phone, not a gun! Police training 101!’ after LaTanya Haggerty was shot in 1999—the same year Amadou Diallo was killed. In LaTanya’s case, officers claimed to have mistaken her cell phone for a gun, whereas in Diallo’s, they claimed to have mistaken his wallet for a gun. Also in 1999, residents of Riverside, California, held weekly protests at a city hall and the district attorney’s office after Tyisha Miller, a nineteen-year-old Black Woman, was shot twenty-two times by officers who had been called for help because she was found unconscious and having a seizure. In 2003, New Yorkers once again protested when Alberta Spruill, a fifty-seven-year-old Black woman described as a devout churchgoer and hardworking city employee, died of a heart attack after police threw a concussion grenade into her apartment during a drug raid conducted at the wrong address. The same year, hundreds of members of the Vietnamese community and immigrant rights activists held protests and vigils after Bich-Cau Thi Tran, a Vietnamese mother of two who had been diagnosed with schizophrenia, was shot and killed by San Jose, California, police as she was pointing a vegetable peeler at the door to a locked bedroom.

RITCHIE, *INVISIBLE NO MORE*, *supra* note 56, at 215–16 (citations omitted).

along with the accompanying understanding that “police violence” is limited to unusual, aberrant acts rather than to the intrinsic enterprise of policing as it currently exists in impoverished, Black and Brown communities. This Article has suggested that a broader dialogue about the meaning of the term, and the reality underlying the term, would be productive to further a critical appreciation of the ways in which dominant conceptions of the term flatten the multidimensionality of police-inflicted harms. It has offered a novel theoretical framework for conceptualizing “police violence” as a tortious assault. Likewise, this Article has also demonstrated that what is at stake here is not merely theoretical. Rather, it has consequences for the scope of normative goals usually pitched by public lawyers. By carefully parsing the concept of “police violence,” it enables us to cultivate a better appreciation of the desirability of reforms and of abolitionist proposals to address the scourge of state violence.