

ARTICLES

ANTI-SEGREGATION POLICING

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Conversations about police reform in lawmaking and legal scholarship typically take a narrow view of the multiple, complex roles that policing plays in American society, focusing primarily on their techniques of crime control. This Article breaks from that tendency, engaging police reform from a sociological perspective that focuses instead on the noncriminal functions of policing. In particular, it examines the role of policing in the daily maintenance of racial residential segregation, one of the central strategies of American racial inequality. Unlike previous work that touches on these issues, this Article argues that police reformers and police leaders should adopt an anti-segregation approach to policing. It also offers legal frameworks and policy prescriptions that flow from an anti-segregation ethic in police governance.

This Article begins by setting forth a rich account of residential segregation, clarifying the distinction between easily measurable proxies for segregation and the type of segregation with which law and policy should be concerned: the spatial separation that confines, subordinates, and dominates. It then identifies and illustrates six mechanisms through which American policing perpetuates residential segregation, drawing from sociological research, including qualitative narratives collected in Dallas County, Texas; Cuyahoga County, Ohio; and Baltimore, Maryland. Next,

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the Article sketches the architecture of anti-segregation policing, offering legal frameworks based on fair housing law and federal and state consent decrees, as well as a non-exhaustive set of practical approaches police departments could take to advance an anti-segregation agenda. Finally, the Article engages a fundamental question central to police transformation movements today: Is meaningful police reform, including anti-segregation policing, possible in a society that is structured through race?

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INTRODUCTION

Baltimore, Maryland. Buffalo, New York. Cleveland, Ohio. Chicago, Illinois. Cincinnati, Ohio. Columbus, Ohio. Detroit, Michigan. East Haven, Connecticut. Ferguson, Missouri. Highland Park, Illinois. Los Angeles, California. Miami, Florida. Montgomery County, Maryland. Mount Prospect, Illinois. New Orleans, Louisiana. Newark, New Jersey. Orange County, California. Pittsburgh, Pennsylvania. Prince Georges County, Maryland. Suffolk County,

New York. Villa Rica, Georgia. Warren, Ohio. Washington, D.C. Yonkers, New York.

These municipalities are united by at least three common threads. One is that they were or are part of some of America's oldest and most prominent metropolitan areas. Another is that their police departments have all been party to U.S. Department of Justice (DOJ) 42 U.S.C. § 14141 investigations, settlement agreements, or consent decrees for having a pattern or practice of violating people's constitutional rights,¹ representing a significant portion of seventy instances where police departments have gone through the Section 14141 process.² A third is that they are located in metropolitan areas where Blacks and Whites, and Latinx Americans and Whites, are highly geographically "segregated" as defined in standard quantitative social science research on residential segregation.³ Indeed, based on analysis of 2010 U.S. Census data, eight of the nation's ten most Black-White separated and segregated metropolitan areas are represented in the above list.⁴

¹ See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401(a), 108 Stat. 1796, 2071 (codified at 34 U.S.C. § 12601) (formerly codified at 42 U.S.C. § 14141).

² U.S. DEP'T OF JUSTICE, THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT 3, 41-48 (2017) [hereinafter CIVIL RIGHTS DIV., PATTERN AND PRACTICE], <https://www.justice.gov/crt/file/922421/download>. There have been forty reform agreements across forty-two geographic areas: The Cleveland and Prince Georges County Police Departments have each been under reform agreements twice, and three entities in Missoula, Montana were under two separate reform agreements. Meanwhile, Colorado City, Arizona and Hildale, Utah are two separate jurisdictions but are part of the same investigation. Both the Los Angeles Police Department and the Los Angeles County Sheriff's Office have been under consent decree at different times. The Trump Administration has explicitly rejected the consent decree process. Former Attorney General Jeff Sessions even issued a parting memo that restricted the availability of consent decrees. See Memorandum from Jefferson B. Sessions III, Att'y Gen., U.S. Dep't of Justice, to Heads of Civil Litigating Components & U.S. Att'ys 1, 3 (Nov. 7, 2018), <https://www.justice.gov/opa/press-release/file/1109681/download>. Thus, these numbers, released at the close of the Obama Administration, remain relatively accurate.

³ That measure is the "dissimilarity index" or "Duncan and Duncan dissimilarity score" ("DI"), which measures how evenly distributed two groups are across geographic space. In the case of Black-White DI, the score stands for the relative number of Blacks and Whites who would have to move to be evenly distributed in the geographic space of reference—here, a metropolitan area. See, e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 75 (1993); Douglas S. Massey & Jonathan Tannen, *A Research Note on Trends in Black Hypersegregation*, 52 *DEMOGRAPHY* 1025, 1027 (2015). Duncan and Duncan are credited with developing this measure. See generally Otis Dudley Duncan & Beverly Duncan, *A Methodological Analysis of Segregation Indexes*, 20 *AM. SOC. REV.* 210 (1955).

⁴ JOHN R. LOGAN & BRIAN J. STULTS, *THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS* 6 (2011), <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf>. The consent decrees in East Haven, Connecticut and Suffolk County, New York related specifically to their treatment of Latinx

To be sure, as the adage goes, association is not causation. There are myriad reasons that some cities enter the consent decree process and others do not.⁵ To date, only forty-six of the nation's more than 18,000 law enforcement agencies have been under consent decree.⁶ Yet, this Article starts with the view that the relationship between very high Black-White residential segregation and unconstitutional and unjust policing is not coincidental or spurious. Various practices of urban policing—some unconstitutional, some constitutional-but-unjust, and some perfectly aligned with urban policing “best practices”—are both consequences of and contributors to residential segregation.⁷

The lack of interracial residential proximity in these places is not and has never been benign, and it is neither a product of residential freedom nor positive intraracial solidarity. A fourth common thread uniting these municipalities is that several are among those known to have aggressively used residential segregation as a tool to create and reinforce racial caste.⁸ It might even be possible to predict which

Americans, not Blacks. *See* Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, to Joseph Maturo, Jr., Mayor, East Haven, Conn. 3 (Dec. 19, 2011), https://www.justice.gov/crt/about/spl/documents/easthaven_findletter_12-19-11.pdf (describing evidence supporting the DOJ’s belief “that [East Haven Police Department] officers intentionally target Latinos for disparate traffic enforcement and treatment because of their race, color, or national origin”); Letter from Jonathan M. Smith et al., U.S. Dep’t of Justice, to Steve Levy, Exec., Suffolk Cty., N.Y. 2 (Sept. 13, 2011), https://www.justice.gov/crt/about/spl/documents/suffolkPD_TA_9-13-11.pdf (describing police department policies that DOJ suggested changing because of their impact on Latinx Suffolk County residents).

⁵ *E.g.*, STEPHEN RUSHIN, FEDERAL INTERVENTION IN AMERICAN POLICE DEPARTMENTS 113–26 (2017) (examining how the DOJ has utilized its power to begin a federal intervention under Section 14141).

⁶ U.S. DEP’T OF JUSTICE, *supra* note 2, at 1, 41–48. Most experts believe the Section 14141 consent decree process is underinclusive of police departments that routinely violate individuals’ constitutional rights. *See, e.g.*, RUSHIN, *supra* note 5, at 106–07; Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1408, 1417–18 (2000); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 4 (2009); Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 494, 516–17 (2008).

⁷ *Cf., e.g.*, Aldina Mesic et al., *The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the State Level*, 110 J. NAT’L MED. ASS’N 106, 113 (2018) (finding an association between racial residential segregation and Black-White disparities in fatal police shootings of unarmed victims).

⁸ *See generally, e.g.*, ANNA BLATTO, P’SHIP FOR THE PUB. GOOD, A CITY DIVIDED: A BRIEF HISTORY OF SEGREGATION IN BUFFALO 8–17 (2018), https://ppgbuffalo.org/files/documents/data-demographics-history/a_city_divided__a_brief_history_of_segregation_in_the_city_of_buffalo.pdf (describing the roles of public housing policy, real estate steering, blockbusting, White flight, highway construction, and redlining in entrenching residential segregation in Buffalo); ALAN MALLACH, THE DIVIDED CITY: POVERTY AND PROSPERITY IN URBAN AMERICA 1–12 (2018) (describing urban processes of inequality in several

police departments might be subject to the next consent decrees under a new presidential administration.⁹ Will it be Milwaukee?¹⁰ Memphis?¹¹ Birmingham?¹²

postindustrial “legacy cities,” including Baltimore, Buffalo, Cleveland, Flint, Milwaukee, New Haven, Pittsburgh, and St. Louis); TODD M. MICHNEY, *SURROGATE SUBURBS: BLACK UPWARD MOBILITY AND NEIGHBORHOOD CHANGE IN CLEVELAND, 1900–1980* (2017) (explaining how Cleveland’s Black middle class fought back against structural segregation forces); ANTERO PIETILA, *NOT IN MY NEIGHBORHOOD: HOW BIGOTRY SHAPED A GREAT AMERICAN CITY*, at ix (2010) (discussing tools of discrimination, including “restrictive covenants, redlining, blockbusting, [and] predatory lending,” in Baltimore); THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (Princeton Classic ed. 2005) (describing how racialized residential segregation persisted in northern cities like Detroit despite court challenges, legislation, and supposed liberal mores).

⁹ See, e.g., POLICE EXEC. RESEARCH FORUM, *CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED* 4–8 (2013) (describing common issues the DOJ has identified in its investigations of police entities, including racial or ethnic bias); Harmon, *supra* note 6, at 3–5 (discussing how the DOJ currently decides which departments to target for Section 14141 enforcement and suggesting the institutionalization of policies that would raise the probability of investigation for the worst police departments in the country); *Conduct of Law Enforcement Agencies*, U.S. DEP’T OF JUSTICE (Sept. 14, 2017), <https://www.justice.gov/crt/conduct-law-enforcement-agencies> (summarizing steps taken by the DOJ Special Litigation Section to investigate state and local police and sheriff’s departments in order to address problems of discriminatory policing).

¹⁰ As of 2010, Milwaukee was one of the nation’s most statistically Black-White separated areas, tied for “first” (or last) with Detroit with a DI of 79.6. LOGAN & STULTS, *supra* note 4, at 6. The Milwaukee Police Department has also been the subject of discussion for its cases of alleged misconduct numerous times over the years. See, e.g., Matthew Desmond, Andrew V. Papachristos & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOC. REV. 857, 860–61 (2016) (describing the beating of Frank Jude, a Black man, by a group of Milwaukee police officers); Mary Bowerman, *Why Milwaukee Had All the ‘Ingredients’ to Become Ferguson*, USA TODAY (Aug. 15, 2016, 4:38 PM), <https://www.usatoday.com/story/news/nation-now/2016/08/15/black-lives-matter-victims-no-one-perfect-milwaukee-protests-michael-brown/88764050> (describing unrest in the city of Milwaukee after the killing of Sylville Smith by a police officer); Ivan Moreno, *Milwaukee Council OKs \$2.3M for Family of Man Killed by Cop*, U.S. NEWS & WORLD REP. (May 31, 2017), <https://www.usnews.com/news/best-states/wisconsin/articles/2017-05-31/milwaukee-council-oks-23m-for-family-of-man-killed-by-cop> (describing the killing of and settlement with the family of Dontre Hamilton and other recent settlements Milwaukee has paid for police misconduct).

¹¹ See Complaint for Enforcement of Order, Judgment and Decree, Damages and Other Relief at 4–7, *Blanchard v. City of Memphis*, No. 2:17-cv-2120-JPM-dky, 2017 WL 4547169 (W.D. Tenn. Feb. 22, 2017) (alleging that the Memphis Police Department violated the Court’s 1978 consent decree).

¹² On the campaign trail leading up to Birmingham’s 2017 mayoral election, Birmingham’s new mayor expressed frustration with then-police chief A.C. Roper’s policing philosophies and approaches, pledging to put more uniformed officers on Birmingham’s streets because he believed this “unorthodox” approach would stem rising violent crime in the city. Sam Prickett, *Police Chief A.C. Roper Retires as Mayor Woodfin Looks to Make Personnel Changes at City Hall*, BIRMINGHAMWATCH (Nov. 29, 2017), <https://birminghamwatch.org/police-chief-c-roper-retires-mayor-woodfin-looks-make-personnel-changes-city-hall>; see Erin Edgemon, *Birmingham Police Chief A.C. Roper Stepping Down*, AL.COM (Nov. 29, 2017), <https://www.al.com/news/birmingham/index.ssf/>

The most obvious stories that would emerge from this association are that segregation and unconstitutional policing are independent consequences of societal racism, or that segregation contributes to illegal and brutal police behavior.¹³ But there is a mutually constitutive relationship between daily practices of urban policing and residential segregation, a relationship of mutual reproduction. This is not the same as saying that policing practices on their own cause segregation, but rather that policing is one of many mechanisms that reinforce segregation, mechanisms that segregation reinforces in turn.¹⁴ While some other scholars have hypothesized about such a co-constitutive relationship,¹⁵ this Article offers a systematic exposition of how policing contributes to the reproduction of residential segregation, relying primarily on evidence from sociological research. This Article also, in a departure from previous scholarship on the topic, offers a new paradigm for metropolitan policing.

Despite longstanding recognition that police officers occupy multiple social roles, including one as street-level bureaucrats who fundamentally shape daily life in certain communities,¹⁶ legal institutions and legal scholarship focus almost exclusively on police in their crime

2017/11/birmingham_police_chiefs_emplo.html; see also NAT'L INITIATIVE FOR BLDG. CMTY. TRUST & JUSTICE, BIRMINGHAM 2017 INTERIM STATUS REPORT (2017), https://nnscommunities.org/wp-content/uploads/2019/09/National_Initiative_2017_Interim_Status_Report_Birmingham.pdf (describing Birmingham's involvement in an Obama DOJ-funded national policing procedural justice pilot program).

¹³ See, e.g., Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1491–95 (2016) (describing some of the reasons “why racial segregation renders African-Americans vulnerable to repeated police interactions”); Gene Demby, *How Segregation Shapes Fatal Police Violence*, NPR: CODE SWITCH (Mar. 2, 2018, 9:04 AM), <https://www.npr.org/sections/codeswitch/2018/03/02/589483471/how-segregation-shapes-fatal-police-shootings>.

¹⁴ For more explication of the causal mechanisms approach in sociology and how it differs from narrow “X causes Y” types of causal arguments, see Peter Hedström & Petri Ylikoski, *Causal Mechanisms in the Social Sciences*, 36 ANN. REV. SOC. 49, 61 (2010) (“[S]cientific knowledge expands by adding items to or improving upon items already present in the toolbox of possible causal mechanisms.”).

¹⁵ See, e.g., I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 60–72 (2009); Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. ONLINE 33 (2017); see also Jeffrey A. Fagan, *Policing and Segregation*, N.Y.U. FURMAN CTR.: THE DREAM REVISITED (July 2017), <http://furmancenter.org/research/iri/essay/policing-and-segregation> (“Research to make these connections is still new.”).

¹⁶ See MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 3–4 (30th Anniversary ed. 2010) (“The ways in which street-level bureaucrats deliver benefits and sanctions structure and delimit people’s lives and opportunities.”); JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW & ORDER IN EIGHT COMMUNITIES 140–226 (1968) (describing how, in some situations, police “act as if order maintenance rather than law enforcement were their principal function”).

control capacity.¹⁷ Policymakers and the public have been locked into the “everyday understanding of police (as law enforcement).”¹⁸ Narrow visions of the role of policing in society have meant that most of our insights into how best to transform policing, too, have been narrow.¹⁹

One group of reformers tends to focus their policy ideas on the police in their criminal legal capacity. In this view, police officers and departments can, largely within their own siloes, via internal changes, make significant progress toward building police-community trust.²⁰ Recently, much energy has gone toward decreasing police bias and increasing procedurally just behavior, efforts that largely intend to improve direct interactions between police and members of the community.²¹ Yet, those reforms are not designed to address deeper structural problems in municipalities, even though those structural problems virtually guarantee the failure of transformation efforts.²² The police are only one part of a much larger ecosystem of racial subordination, all of which must be dismantled to bring about racial justice.²³ Residential segregation is a part of that structural ecosystem that is urgently important to recognize and change.

¹⁷ See, e.g., Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 795–816 (2012); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2196–220 (2014); see also Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2015 (2017) (describing how, in response to the police professionalization movement, judges gradually began deferring to police claims of crime control expertise beginning in the 1960s).

¹⁸ Mathieu Deflem, *Bureaucratization and Social Control: Historical Foundations of International Police Cooperation*, 34 LAW & SOC'Y REV. 739, 774 (2000) (calling for a more expansive scholarship of policing).

¹⁹ For examples of work that has taken a more expansive view of police governance, see John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1542–45 (2017) (discussing police liability insurance); Seth W. Stoughton, *Moonlighting: The Private Employment of Off-Duty Officers*, 2017 U. ILL. L. REV. 1847 (discussing the employment law of policing); Tracey L. Meares, *Policing: A Public Good Gone Bad*, BOS. REV. (Aug. 1, 2017), <https://bostonreview.net/law-justice/tracey-l-meares-policing-public-good-gone-bad> (describing the police as a potential public good, like “highways, street lighting, and clean water”).

²⁰ See, e.g., PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 1–4 (2015) (describing the Task Force's six pillars for reform, all of which are directed within the policing sphere).

²¹ See *id.* at 44–46.

²² See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017).

²³ See, e.g., FERGUSON COMM'N, FORWARD THROUGH FERGUSON: A PATH TOWARD RACIAL EQUITY (2015), http://3680or2khmk3bzkp33juiea1.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/101415_FergusonCommissionReport.pdf (describing racial equity as key to reform, not centering policing); THE MOVEMENT FOR BLACK LIVES, A VISION FOR BLACK LIVES: POLICY DEMANDS FOR BLACK POWER, FREEDOM, & JUSTICE, <https://neweconomy.net/sites/default/files/resources/20160726-m4bl-Vision-Booklet-V3.pdf> (last visited Feb. 18, 2020).

Police reformers of liberal and radical persuasions often acknowledge the problem of segregation, but mostly as an unfortunate and perhaps insurmountable background condition.²⁴ Police reform proposals usually omit direct discussion of residential segregation, given that it can seem almost impossible to unravel.²⁵ Although there have been substantial declines in residential separation and segregation over the past fifty years, the story of American urban neighborhoods is more a tale of stability than change.²⁶ Getting a police department to behave differently might seem like a reasonable ambition, with faster and surer returns, compared to getting a cluster of municipalities to fundamentally reorganize city and neighborhood life. Idealistically, some reformers seem to believe that, with enough effort, police-community relations can be positive and bias-free even if the community itself is racially marked and under-resourced. While it might be nonideal to have good policing in a high-poverty and racially isolated community, the story goes, it still might be possible.

Even those who observe and lament the relationship between place, housing, and harsh policing may see *segregation* as a side issue, a topic for a bygone era, or an entrée into a troubling, potentially assimilationist agenda.²⁷ For example, the Movement for Black Lives' "A Vision for Black Lives" document makes a broad range of important demands, none of which mention segregation of neighborhoods or schools.²⁸ Instead of pushing explicitly against segregation, the Movement advocates for community control, reparations, investment in the health and safety of Black communities (along with divestment

²⁴ See, e.g., Carbado, *supra* note 13, at 1491–95; Craig B. Futterman, Chaclyn Hunt & Jamie Kalven, *Youth/Police Encounters on Chicago's South Side: Acknowledging the Realities*, 2016 U. CHI. LEGAL F. 125, 133–36; Richard Rothstein, *From Ferguson to Baltimore: The Fruits of Government-Sponsored Segregation*, 24 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 205, 209 (2015) ("Without suburban integration . . . ghetto conditions will persist, giving rise to aggressive policing and the riots that inevitably ensue.").

²⁵ See Ronald Weitzer, *Theorizing Racial Discord over Policing Before and After Ferguson*, 34 JUST. Q. 1129, 1134–35 (2017) (postulating that although police reforms can reduce misconduct and perhaps improve opinions of the police, police reform does not amount to "making fundamental changes in entire modes of existence for millions of people" (quoting DAVID H. BAYLEY & HAROLD MENDELSON, *MINORITIES AND THE POLICE: CONFRONTATION IN AMERICA* 204 (1969))).

²⁶ See ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* 103–07 (2012) (describing the durability of racial segregation in Chicago neighborhoods); PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* 33–46 (2013) (discussing multigenerational neighborhood poverty and the persistence of disadvantage for Black families since the 1970s).

²⁷ See *infra* notes 137, 175; see also Michelle Adams, *Radical Integration*, 94 CALIF. L. REV. 261, 267–68 (2006).

²⁸ See THE MOVEMENT FOR BLACK LIVES, *supra* note 23.

from crime control apparatuses), more egalitarian economic policies, and redistribution of political power.²⁹

The wide-ranging report of the Ferguson Commission, *Forward Through Ferguson*, is one of few police reform-related documents that explicitly discuss segregation as a contributing factor to unjust police policies and practices in Ferguson.³⁰ The report identifies several reform priorities in housing policy. However, even these proposals focus squarely on affordable housing, not meaningfully desegregated housing,³¹ even though the housing problem is not just one of affordability. Forced separation and concentration of communities of color for the purpose of subordination and domination is a problem that affordable housing will not directly resolve. Segregation rots community life at the root. Ignoring it will make meaningful police reform extremely unlikely, if not impossible to achieve and sustain. Because racial segregation lays the groundwork for unjust policing across space, and because policing strategy then contributes to the maintenance of racial segregation, the police reform agenda should directly contend with racial residential segregation.

Part I of this Article therefore clears ground by offering a brief account of segregation in the context of the urban United States. It distinguishes segregation from mere separation and explains that segregation consists of the externally motivated concentration of disadvantage, subordination of Black and Brown communities, and harmful domination by Whites.

Part II draws upon social science research to explain various pathways through which urban policing contributes to segregation. In addition to others' social scientific research, I also draw upon several research-derived narratives to illustrate some of these pathways.³²

Part III attends to practical matters, proposing that police departments adopt an *anti-segregation ethic and approach*. Local dynamics

²⁹ *Id.*; Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 469–72 (2018).

³⁰ See FERGUSON COMM'N, *supra* note 23, at 62, 78, 158 (positioning segregation in the Commission's racial equity lens).

³¹ *Id.* at 55, 147.

³² Importantly, I use the narratives in Part II not as evidence to show the prevalence of any particular mechanism in these study samples—or in any population, as qualitative research is poorly suited to that task. Rather, the narratives are used as critical cases to illustrate how people on the receiving end of law enforcement interactions may experience these mechanisms. See SARA LAWRENCE-LIGHTFOOT & JESSICA HOFFMANN DAVIS, *THE ART AND SCIENCE OF PORTRAITURE*, at xv–xvii (1997) (describing the “social science portraiture” method of qualitative inquiry); Mario Luis Small, ‘How Many Cases Do I Need?': *On Science and the Logic of Case Selection in Field-Based Research*, 10 ETHNOGRAPHY 5, 24–27 (2009) (explaining the distinction between case study and sampling approaches to data).

and community-controlled processes should ultimately determine precise prescriptions. However, this Part offers six frameworks advocates and leaders could use to put this approach into action, marshalling fair housing law, harm recognition and reckoning, police redistricting, strategic nonresponse, and structural reform litigation as potential tools and policy approaches. The Article then concludes with brief reflections on the possibility and urgency of anti-segregation policing.

I

THE PERSISTENCE OF RESIDENTIAL SEGREGATION IN AMERICA

This Part grounds the Article by first establishing what segregation means. It is important to establish that segregation is much more substantial than official *de jure* segregation, but it is also not mere separation. Much scholarship that examines segregation uses statistical separation as a proxy,³³ which means that the processes by which segregation is reproduced may be incompletely understood. In contrast, this Article discusses residential segregation through the lens of four analytic frames—separation, concentration, subordination, and domination. Segregation entails uneven geographic distribution of ethnic groups across a coherent geographic area (separation), and the movement of marginalized ethnic groups into identifiable and stigmatized enclaves (concentration), in order to establish and reproduce hegemonic racial hierarchy (subordination), to control and economically exploit disadvantaged groups, and hoard social and political opportunity for advantaged groups (domination). This Article also contends that, of the many consequences of segregation, one oft-overlooked harm is legal estrangement, the systematic collective legal exclusion of marginalized social groups, coupled with pervasive subjective perception of that exclusion.³⁴

Current conversations in law and policy fundamentally misunderstand what segregation entails. Conservatives functionally equate the demise of official segregation and the existence of fair housing law with segregation's end, assuming that persistent statistical separation is evidence of free choice and "self-segregation."³⁵ Some liberals fail

³³ See *supra* note 3 and accompanying text.

³⁴ See Bell, *supra* note 22, at 2085–87 (defining and discussing legal estrangement).

³⁵ See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 116 (1995) (Thomas, J., concurring) ("The continuing 'racial isolation' of schools after *de jure* segregation has ended may well reflect voluntary housing choices or other private decisions."); see also STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 224–30 (1997) (arguing that there is a "strong preference of blacks for living in neighborhoods that are at least half black"); Angela Onwuachi-Willig, *Just Another*

to see that even though separation appears to be reduced in some areas by traditional measures, forced separation persists through seemingly neutral practices and difficult-to-detect strategies that reinforce racialized power dynamics.³⁶

For purposes of measurability and convenience, social scientists often calculate racial separation alone to identify segregation.³⁷ That reasonable methodological compromise has evolved, for some, into a conceptual statement about what residential segregation truly *is*. Yet, properly understood, racial separation by race is more like a miner's canary, warning us that much more sinister mechanisms of racial hierarchy maintenance are likely lurking.³⁸ As Richard Ford explained twenty-six years ago, American residential segregation "continues to play the same role it always has in American race relations: to isolate, disempower, and oppress."³⁹

Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity, 90 IOWA L. REV. 931, 944–45 (2005) (describing how Black conservatives, including Justice Thomas, have adopted Malcolm X's views on Black self-reliance); Stephen F. Smith, *Clarence X?: The Black Nationalist Behind Justice Thomas's Constitutionalism*, 4 N.Y.U. J.L. & LIBERTY 583, 601–07 (2009). *But see* Maria Krysan & Reynolds Farley, *The Residential Preferences of Blacks: Do They Explain Persistent Segregation?*, 80 SOC. FORCES 937, 969–70 (2002) (finding that, to the extent Black people prefer living in areas that are at least fifty percent Black, the reason is fear of White hostility, and that many would move to predominantly White areas as long as there is a visible Black presence).

³⁶ Cf. Vincent J. Roscigno, *Power, Revisited*, 90 SOC. FORCES 349, 355–64 (2011) (describing relational power that dynamically reinforces hierarchy, *despite* law and bureaucratic policies forbidding such exercises of power, including through discursive practices).

³⁷ See discussion *infra* Section I.A.

³⁸ See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 11 (2002). Spatial separation, as the weakest modality of residential segregation, is somewhat like Guinier's and Torres's canary, an indicator of calamitous racial politics at work or on the horizon.

³⁹ Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844 (1994); see also Richard T. Ford, *Urban Space and the Color Line: The Consequences of Demarcation and Disorientation in the Postmodern Metropolis*, 9 HARV. BLACK LETTER J. 117, 117 (1992) (arguing that segregation entails social control through spatial organization that operates along "social, political, psychological, and economic vectors"). Ford was reacting to a revitalized focus on urban segregation, spurred in part by Massey and Denton's now-classic 1993 book, *American Apartheid*. But for decades before *American Apartheid*, segregation had slipped from the American public's consciousness, thought even then to be a conversation of a bygone era. MASSEY & DENTON, *supra* note 3, at 1–2 ("[Most Americans] view segregation as an unfortunate holdover from a racist past, one that is fading progressively If racial residential segregation persists, they reason, it is only because civil rights laws . . . have not had enough time to work or because many blacks still prefer to live in black neighborhoods."). Their assessment, nearly three decades old, seems an accurate characterization of some corners of American society today.

A. Separation

In 2012, economists Ed Glaeser and Jacob Vigdor caused a stir by publishing *The End of the Segregated Century*, a report that declared, “[t]he most standard segregation measure shows that American cities are now more integrated than they’ve been since 1910.”⁴⁰ William Frey, a renowned demographer at the Brookings Institution, titled his 2015 book, *Diversity Explosion: How New Racial Demographics are Remaking America*.⁴¹ Frey reports on the “sheer scope of racial change that came to light with the 2010 census,” the coming demographic change that will “allow the country to face the future with growth and vitality as it reinvents the classic American melting pot for a new era,” and so forth.⁴² His words anticipate the nation’s approach to a point where, because people of color “assume positions of responsibility, exert more political clout, exercise their strength as consumers, . . . demonstrate their value in the labor force. . . . [And as they] become integral to the nation’s success, their concerns will be taken seriously.”⁴³ Reynolds Farley, a highly influential demographer of segregation, published a paper that imagined “The Waning of American Apartheid.”⁴⁴ To underscore its optimism, it begins by invoking the Obamas—at time of publication, still in their first term in the White House.⁴⁵ John Iceland, Gregory Sharp, and Jeffrey M. Timberlake, also careful and well-respected demographers, describe a decline in Black residential segregation between 1970 and 2009, especially in southern and western states.⁴⁶

One widely accepted fact is that statistical racial separation in America has declined overall since enactment of the Fair Housing Act

⁴⁰ EDWARD GLAESER & JACOB VIGDOR, MANHATTAN INST., *THE END OF THE SEGREGATED CENTURY: RACIAL SEPARATION IN AMERICA’S NEIGHBORHOODS, 1890–2010* (2012). Note that Glaeser and Vigdor’s title in itself makes the conceptual slip of equating separation and segregation, assuming that reduced aggregate separation indicates “the end of” forced separation. *Id.*

⁴¹ WILLIAM H. FREY, *DIVERSITY EXPLOSION: HOW NEW RACIAL DEMOGRAPHICS ARE REMAKING AMERICA* (rev. & updated ed. 2018).

⁴² *Id.* at 3.

⁴³ *Id.* at 5.

⁴⁴ Reynolds Farley, *The Waning of American Apartheid?*, 10 *CONTEXTS* 36, 36 (2011) (“[W]hile black-white segregation remains high in many metropolises, there are reasons to be optimistic that ‘apartheid’ no longer aptly describes urban America.”).

⁴⁵ *See id.*

⁴⁶ John Iceland, Gregory Sharp & Jeffrey M. Timberlake, *Sun Belt Rising: Regional Population Change and the Decline in Black Residential Segregation, 1970–2009*, 50 *DEMOGRAPHY* 97 (2013). As some scholars have noted, the West and Southwest had their own versions of Jim Crow that operated against Mexican Americans and Chinese Americans in addition to Black Americans. *See* Ariela J. Gross, *“The Caucasian Cloak”: Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 *GEO. L.J.* 337, 354–60 (2007).

(FHA) in 1968. However, the initially slow departure of middle-class Blacks from urban cores and “inner-ring” suburbs seems to have sped up in more recent years,⁴⁷ and the increase in urban gentrification means that more Whites have relocated into places that were previously more heavily Black.⁴⁸ The numbers alone do not reveal which processes are driving these outcomes. However, most would agree that they convey the fact that racial groups are much less residentially separated than they were forty years ago, though separation is still pronounced in the largest cities where Blacks are a sizable portion of the population.⁴⁹ Economic separation has drastically increased, with the well-off corraling themselves into enclaves of increasingly concentrated affluence.⁵⁰

⁴⁷ See, e.g., Karyn Lacy, *The New Sociology of Suburbs: A Research Agenda for Analysis of Emerging Trends*, 42 ANN. REV. SOC. 369, 370–71 (2016); see also BERNADETTE HANLON, *ONCE THE AMERICAN DREAM: INNER-RING SUBURBS OF THE METROPOLITAN UNITED STATES* 36 (2010) (defining “inner-ring suburbs” as “contiguous suburbs adjacent to one another and to the central city, where more than half the housing stock was built prior to 1969”). Although the 1970s and 1980s saw a slow departure of middle-class Blacks from the urban core, the suburban destinations they could inhabit without facing White violence were often afflicted with concentrated poverty and its correlates. See MASSEY & DENTON, *supra* note 3, at 69–70; WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 7 (1987) (offering the classic account of the “exodus” of middle-class Blacks from central city neighborhoods—although it is difficult to confirm that the departure was quite so substantial).

⁴⁸ Some research suggests that the places that were more likely to gentrify were neighborhoods with high proportions of non-Black immigrants, not areas that were heavily Black, due in part to the durability of neighborhood stigma. See, e.g., ANDREW DEENER, *VENICE: A CONTESTED BOHEMIA IN LOS ANGELES* 44–85 (2012) (describing racial transformation in a formerly Black neighborhood in Los Angeles); Jackelyn Hwang, *Gentrification in Changing Cities: Immigration, New Diversity, and Racial Inequality in Neighborhood Renewal*, 660 ANNALS AM. ACAD. POL. & SOC. SCI. 319 (2015) (discussing gentrification and immigration patterns in Chicago and Seattle). *But see* DEREK HYRA, *RACE, CLASS, AND POLITICS IN THE CAPPUCCINO CITY* 75–104, 149–51 (2017) (describing the gentrification of Washington, D.C.’s historically Black Shaw neighborhood, which relied on “Black branding” and an experience of “living the wire” that appealed to White Millennials); BRANDI THOMPSON SUMMERS, *BLACK IN PLACE: THE SPATIAL AESTHETICS OF RACE IN A POST-CHOCOLATE CITY* 113–17 (2019) (describing the role of an “authentic” Black aesthetic in the gentrification of D.C.’s H Street Corridor).

⁴⁹ See *infra* fig.1. Many of these reports of segregation’s demise begin by reporting aggregate DI scores, but these aggregate scores are challenging to experientially interpret given that only about eleven percent of the American population is Black. Aggregate DI scores envision a world in which Black Americans are spread evenly across the entire country, a vision that makes little sense statistically or normatively. See Danielle Allen, *Integration, Freedom, and the Affirmation of Life, in TO SHAPE A NEW WORLD: ESSAYS ON THE POLITICAL PHILOSOPHY OF MARTIN LUTHER KING, JR.* 146, 150–51 (Tommie Shelby & Brandon M. Terry eds., 2018) (pointing out the “problem of math” in Martin Luther King, Jr.’s articulation of integration).

⁵⁰ See Rachel E. Dwyer, *Expanding Homes and Increasing Inequalities: U.S. Housing Development and the Residential Segregation of the Affluent*, 54 SOC. PROBS. 23, 42 (2007) (describing the concentration of the affluent in metropolitan areas where there was

If readers looked more closely at these reports, they would find these declarations of racial segregation's demise premature. Glaeser and Vigdor acknowledge—after declaring the “end” of a century of segregation—that “the typical urban African-American lives in a housing market where more than half the black population would need to move in order to achieve complete integration,” and “[t]he average African-American lives in a neighborhood where the share of population that is black exceeds the metropolitan average by roughly 30 percentage points.”⁵¹ Frey cautions readers not to confuse declines in statistical Black-White separation with an end in separation: “The recent widespread reduction in black-white segregation should not in any way be confused with its elimination. Segregation levels in the 50 to 60 range, found in many large metropolitan areas, are still substantial by any standard.”⁵² Others also tempered their headline-grabbing claims, recognizing the real complexity of the data.⁵³ Iceland, Sharp,

increased new housing development); John R. Logan, *The Persistence of Segregation in the 21st Century Metropolis*, 12 CITY & COMMUNITY 160, 160–61 (2013); Douglas S. Massey, Jonathan Rothwell & Thurston Domina, *The Changing Bases of Segregation in the United States*, 626 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 81–85 (2009).

⁵¹ GLAESER & VIGDOR, *supra* note 40, at 4; see also Jacob L. Vigdor, *Weighing and Measuring the Decline in Residential Segregation*, 12 CITY & COMMUNITY 169, 170 (2013) (“[T]he decline in segregation is less dramatic when examining only the degree of black separation from non-Hispanic whites.”). Glaeser and Vigdor were widely criticized for the misleading framing of their report. One of the oddest features of their calculations is that they used Black–non-Black DI (measuring Black dispersion across all groups) rather than the more typically used Black–White DI. While Black–White DI leaves out other substantial ethnic groups, Black–non-Black DI obscures material distinctions between neighborhoods where Whites, Latinxs, Asians, Native Americans, and other groups live. See Ray Sin & Maria Krysan, *What is Racial Residential Integration? A Research Synthesis, 1950–2013*, 1 SOC. RACE & ETHNICITY 467, 467 (2015).

⁵² FREY, *supra* note 41, at 176. Importantly, in forty of the fifty metropolitan areas with the largest Black populations in 2010, the “segregation level” (read: DI) was higher than fifty. Six of the remaining ten metropolitan areas are in the South, which for the most part never had especially high DIs because of the micro-level organization of Southern residential segregation and the classic Southern preference for social segregation over spatial segregation. DIs are a particularly inapt way of thinking about Southern race relations. See JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 81 (2d ed. 2018); LOGAN & STULTS, *supra* note 4, at 6–7 (reporting 1980–2010 Black-White DIs in the fifty metropolitan areas with the largest Black populations as of 2010); Angelina Grigoryeva & Martin Ruef, *The Historical Demography of Racial Segregation*, 80 AM. SOC. REV. 814, 833–34 (2015) (describing the organization of racial residential segregation in the South).

⁵³ For example, Frey has more recently explained that “black-white neighborhood segregation varies widely across metropolitan areas, and has declined only modestly since the beginning of this century.” William H. Frey, *Black-White Segregation Edges Downward Since 2000, Census Shows*, BROOKINGS: THE AVENUE (Dec. 17, 2018), <https://www.brookings.edu/blog/the-avenue/2018/12/17/black-white-segregation-edges-downward-since-2000-census-shows>; see also Farley, *supra* note 44, at 37–38 (noting that in nine of twelve selected American metropolises, Black-White DIs were at least sixty in 2010); Iceland, Sharp & Timberlake, *supra* note 46, at 97, 98, 118–19 (clarifying that the decline in

and Timberlake acknowledge that “segregation remains a daily reality for many African Americans in the United States.”⁵⁴

Looking at the same data, other scholars see evidence of persistent neighborhood dispossession and racial segregation. For example, Douglas Massey concludes from the dissimilarity scores (DIs) and other indices that “more than half” of Black Americans who lived in metropolitan areas were living in areas that are statistically classified as highly segregated,⁵⁵ and approximately one-third were living in areas of “hypersegregation.”⁵⁶ Moreover, scholars of ecological disadvantage and neighborhoods find, using spatial data, that despite apparently substantial urban change in recent decades, the racialized American “ghettoes” of yesteryear, created through housing law and policy, are still the racialized “ghettoes” of the twenty-first century.⁵⁷ The experience and effects of living in high-poverty neighborhoods accrue intergenerationally to Black Americans. Patrick Sharkey finds that 66% of Black children born between 1985 and 2000 grew up in neighborhoods with at least 20% poverty, and about half of those children (31%) grew up in neighborhoods with at least 30% poverty. Meanwhile, just 1% of Whites born in that period grew up in neighborhoods with poverty rates above 30%, and 6% of Whites grew up in neighborhoods with poverty rates above 20%. More than 60% of

aggregate Black-White segregation is primarily taking place in regions that were already less statistically separated in the 1970s, the South and the West, and that the Northeast and Midwest, which have been most residentially separated, saw more modest declines between 2000 and 2010).

⁵⁴ Iceland, Sharp & Timberlake, *supra* note 46, at 119.

⁵⁵ Douglas S. Massey, *Why Death Haunts Black Lives*, 114 PROC. NAT’L ACAD. SCI. 800, 800 (2017). “High segregation” means that the metropolitan area, defined by the U.S. Census Bureau as a “metropolitan statistical area” (MSA), has a Black-White DI of sixty or greater. *Id.*

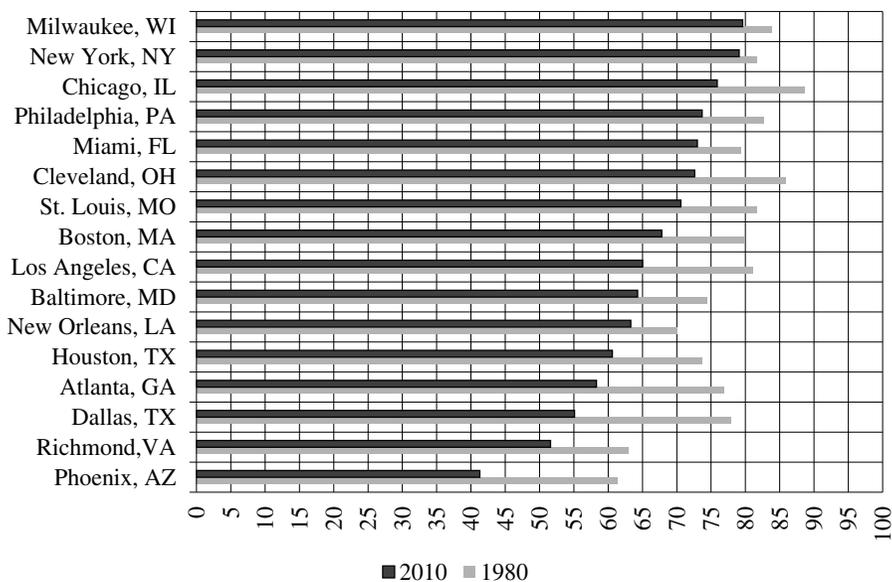
⁵⁶ *Id.*; see also MASSEY & DENTON, *supra* note 3, at 74 (operationalizing “hypersegregation” as the simultaneous and multiplicative coexistence of at least four of five measures of segregation—uneven distribution, racial isolation, clustering of Black neighborhoods, concentration within a small area, and centralization within the urban core—and criticizing oft-used single measures for understating the severity of segregation); Jacob S. Rugh & Douglas S. Massey, *Segregation in Post-Civil Rights America: Stalled Integration or End of the Segregated Century?*, 11 DU BOIS REV. 205 (2014) (uncovering heterogeneity in Black spatial dispersion, with historically hypersegregated areas remaining heavily segregated, and increases in the separation and concentration of Latinx populations).

⁵⁷ See, e.g., SAMPSON, *supra* note 26, at 103–16 (describing the persistence of segregation in Chicago into the twenty-first century); RICHARD H. SANDER, YANA A. KUCHEVA & JONATHAN M. ZASLOFF, MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING 412 (2018) (“Unfortunately, most of the metro areas with the largest black populations fell squarely at the ‘little change’ end of the spectrum.”); SHARKEY, *supra* note 26, at 153–65 (estimating the effects and impact of neighborhood change).

Whites grew up in neighborhoods with poverty rates under 10%.⁵⁸ If segregation is a stand-in for a racially stigmatized and marginalized residential context (see Section I.B.), it persists largely unchanged, even if Black-White DIs are lower than they once were.

Figure 1 displays DIs for fifteen United States cities with large Black populations, comparing 2010 to 1980, as calculated by demographers John Logan and Brian Stults. In every case, DIs declined. However, the scores themselves are still high. Demographers tend to classify metropolitan areas with dissimilarity scores greater than sixty as highly segregated, and those with scores under thirty as low in segregation.⁵⁹ *Even when these cities experienced sharp declines, nearly all of them remained high in separation. Perhaps most tellingly, none—not even southwestern and southern cities—are low in separation.*

FIGURE 1. BLACK-WHITE DISSIMILARITY CHART FOR SELECTED U.S. METROPOLITAN AREAS WITH LARGE BLACK POPULATIONS



Although this chart focuses on Black-White DIs, Latinx-White DIs are also quite high in some places. Likely because the U.S. population of Latinx Americans has increased, since 1980, the Latinx-White DI has *increased* in the metropolitan areas of Los Angeles, Boston, Santa Ana, Houston, Dallas, San Francisco, and more.⁶⁰ The

⁵⁸ SHARKEY, *supra* note 26, at 27–28.

⁵⁹ See, e.g., Massey & Tannen, *supra* note 3, at 1030.

⁶⁰ LOGAN & STULTS, *supra* note 4, at 10–13.

general finding is that in the places with the largest Latinx populations, separation is higher than aggregate numbers suggest.⁶¹ Moreover, because of population change and the dynamics of Whites' sense of racial threat, the characteristics of separation between Whites and Black, Latinx, and Asian Americans are different and have changed over the past four decades.⁶²

A substantial body of scholarship criticizes reliance upon traditional DI measures to measure separation. The DI captures distribution of two groups of individuals across a geographic area. The DI represents a checkerboard vision of residential racial equity, one in which two groups are parceled out one-by-one within a confined area. For this reason, scholars have argued that the DI slightly *overestimates* meaningful racial separation.⁶³ Many criticize the DI because it compares only two groups at a time;⁶⁴ what does it mean to report scores of Black-White or Black-“non-Black” separation in increasingly diverse, multiethnic metropolises?⁶⁵ Relatedly, the rise of mixed race households lowers DI in ways that might be misleading: Instead of the idealized mechanisms for decreased separation—opening of housing markets, decreasing housing discrimination, increasing financial resources among Black households—interracial romantic relationships are an unacknowledged and arguably spurious mechanism for reducing racial separation.⁶⁶ Some research has sug-

⁶¹ *Id.* at 10.

⁶² See Rugh & Massey, *supra* note 56, at 213–16.

⁶³ E.g., Angelo Mazza & Antonio Punzo, *On the Upward Bias of the Dissimilarity Index and Its Corrections*, 44 SOC. METHODS & RES. 80 (2015); Michael J. White, *The Measurement of Spatial Segregation*, 88 AM. J. SOC. 1008 (1983); Christopher Winship, *The Desirability of Using the Index of Dissimilarity or Any Adjustment of It for Measuring Segregation: Reply to Falk, Cortese, and Cohen*, 57 SOC. FORCES 717 (1978). The only way that a place would get a zero score would be if each individual within a racial group were evenly distributed across space, so that even randomly distributed same-race households would likely produce a non-zero DI. Charles F. Cortese, R. Frank Falk & Jack K. Cohen, *Further Considerations on the Methodological Analysis of Segregation Indices*, 41 AM. SOC. REV. 630, 632–33 (1976).

⁶⁴ See, e.g., JOHN ICELAND, THE MULTIGROUP ENTROPY INDEX (ALSO KNOWN AS THEIL'S H OR THE INFORMATION THEORY INDEX) 8–9 (2004), https://www2.census.gov/programs-surveys/demo/about/housing-patterns/multigroup_entropy.pdf (arguing the superiority of the entropy index to the DI); Sean F. Reardon & Glenn Firebaugh, *Measures of Multigroup Segregation*, 32 SOC. METHODOLOGY 33, 57–58 (2002) (arguing the superiority of Theil's information theory index, *H*, to the DI).

⁶⁵ See JENNIFER L. HOCHSCHILD, VESLA M. WEAVER & TRACI R. BURCH, CREATING A NEW RACIAL ORDER: HOW IMMIGRATION, MULTIRACIALISM, GENOMICS, AND THE YOUNG CAN REMAKE RACE IN AMERICA 10–17 (2012) (detailing the changing racial and ethnic dynamics in American cities).

⁶⁶ See Mark Ellis et al., *Agents of Change: Mixed-Race Households and the Dynamics of Neighborhood Segregation in the United States*, 102 ANNALS ASS'N AM. GEOGRAPHERS 549, 565–66 (2012). Interestingly, several scholars envision a different causal arrow running between residential segregation and interracial family formation, hypothesizing that

gested that Census tracts within metropolitan areas, the standard unit that many sociologists and demographers use to operationalize neighborhood, may be too small a unit to adequately account for current day segregation; while between-neighborhood separation within cities has declined since 1970, between-*jurisdiction* (city versus suburb) separation has increased since 1990.⁶⁷ On the other hand, Census tracts are sometimes too *large* a unit to capture the daily realities of racial residential segregation. Census tracts are too large to account for hyper-local strategies of residential segregation, such as the creation of predominantly Black alleys and side streets (for servants) and predominantly White main, front streets (for the served)—the residential segregation strategy that was prevalent in the South.⁶⁸

Finally, the Black suburbanization story, which Glaeser and Vigdor laud as evidence of serious progress,⁶⁹ occurred alongside major demographic shifts between central cities and suburbs, partly related to the relocation of poor enclaves and processes of immigration.⁷⁰ While the iconic twentieth-century suburb is affluent, secure, and stable—and mostly White—the twenty-first-century suburb is often quite ethnically diverse, sometimes high-poverty, and much less stable than it was in the late twentieth century.⁷¹ Suburbs with sub-

persistent segregation might hinder the formation of interracial relationships. E.g., Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1398–400 (2009); Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 FORDHAM L. REV. 2787, 2788 (2008); Rose Cuison Villazor, *Residential Segregation and Interracial Marriages*, 86 FORDHAM L. REV. 2717, 2717–18 (2018).

⁶⁷ Daniel T. Lichter, Domenico Parisi & Michael C. Taquino, *Toward a New Macro-Segregation? Decomposing Segregation Within and Between Metropolitan Cities and Suburbs*, 80 AM. SOC. REV. 843, 850 (2015); see also Chad R. Farrell, *Bifurcation, Fragmentation or Integration? The Racial and Geographic Structure of US Metropolitan Segregation, 1990–2000*, 45 URB. STUD. 467, 468 (2008) (observing this shifting dynamic before the 2010 Census and pointing out racial divergences between suburbs as a shifting manifestation of racial inequality); Barrett A. Lee et al., *Beyond the Census Tract: Patterns and Determinants of Racial Segregation at Multiple Geographic Scales*, 73 AM. SOC. REV. 766, 770–73 (2008) (arguing that segregation should be measured based on “local environments”).

⁶⁸ See Grigoryeva & Ruef, *supra* note 52, at 833–34 (comparing historical segregation in the North and South); John R. Logan & Matthew J. Martinez, *The Spatial Scale and Spatial Configuration of Residential Settlement: Measuring Segregation in the Postbellum South*, 123 AM. J. SOC. 1161, 1165 (2018); see also LOEWEN, *supra* note 52, at 81; Trevon Logan & John Parman, *The National Rise in Residential Segregation* 22 (Nat'l Bureau of Econ. Research, Working Paper No. 20934, 2015) (finding that a new, individualized measure for segregation indicates that segregation was higher in the South than in other regions of the United States).

⁶⁹ GLAESER & VIGDOR, *supra* note 40, at 7–8.

⁷⁰ See Lacy, *supra* note 47, at 372–78.

⁷¹ See *id.*; see also INST. ON METRO. OPPORTUNITY, AMERICAN NEIGHBORHOOD CHANGE IN THE 21ST CENTURY 21 (2019), <https://www.law.umn.edu/sites/law.umn.edu/>

stantial Black populations have long been racially and socioeconomically marginalized.⁷² Accordingly, to say that more Black people are living in the suburbs is not to say that Black suburbanites no longer experience the effects of residential segregation. This demographic fact should not be read to suggest that space and race have stopped operating together to advance subordination and domination.

For all of these reasons, claims that residential separation by race is over or near its end are premature at best, and these claims are consequential for law and legal scholarship. Consider Nicholas Stephanopoulos's otherwise highly valuable article, *Civil Rights in a Desegregating America*, which frames its main intervention around the DI research discussed above.⁷³ Stephanopoulos makes the accurate point that much of our civil rights law related to housing, voting, and school segregation assumes persistent residential separation by race. For example, the vote dilution jurisprudence, an area where Stephanopoulos has made significant intellectual and practical contributions, requires that an aggrieved racial group be both large and "geographically compact" to demand, for example, institution of single-member voting districts.⁷⁴ He concludes that reduced spatial separation would thus threaten civil rights protections. Unfortunately, Stephanopoulos spends a significant portion of the article framing out a "sociological insight" that America is becoming desegregated.⁷⁵ But, even according to the sources upon which he relies, urban Blacks

files/metro-files/american_neighborhood_change_in_the_21st_century_-_full_report_-_4-1-2019.pdf (providing statistics on low-income concentration in the suburbs); Farrell, *supra* note 67, at 469 (discussing the growing racial diversity of the suburbs); Alexandra K. Murphy, *The Symbolic Dilemmas of Suburban Poverty: Challenges and Opportunities Posed by Variations in the Contours of Suburban Poverty*, 25 Soc. F. 541 (2010) (describing oft-overlooked race-class heterogeneity between suburbs); John Rennie Short, Bernadette Hanlon & Thomas J. Vicino, *The Decline of Inner Suburbs: The New Suburban Gothic in the United States*, 1 GEOGRAPHY COMPASS 641 (2007) (detailing further the modern suburban heterogeneity). See generally ELIZABETH KNEEBONE & ALAN BERUBE, CONFRONTING SUBURBAN POVERTY IN AMERICA 55–76 (2013).

⁷² E.g., MASSEY & DENTON, *supra* note 3, at 69 ("Relatively high levels of black suburbanization in some metropolitan areas can be deceiving, however, because many black 'suburbs' are simply poor, declining cities that happen to be located outside the city limits."). Massey and Denton documented this state of affairs in Black suburbs beginning as early as 1980. See *id.*

⁷³ Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI. L. REV. 1329, 1332–33 (2016).

⁷⁴ See *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

⁷⁵ Stephanopoulos, to his credit, acknowledges some limitations of the DI measure, but he does not fully reckon with the implications of these limitations for interpreting declines in DI. See Stephanopoulos, *supra* note 73, at 1341. Instead, he labels these statistical issues mere "caveats," *id.* at 1355, and proceeds. See *id.* at 1360–61 ("From this point forward . . . I take as a given the decline in black-white separation, and turn my attention from sociology to law.").

continue to reside in highly segregated communities.⁷⁶ Moreover, as explained above, the DI is an imperfect measure of separation and a potentially misleading measure of segregation. Stephanopoulos's main argument is important, as it draws attention to an insidious and oft-neglected feature of civil rights law—the degree to which its remedial processes assume persistent segregation and thus legitimate the status quo. But the empirical world he describes does not exist, nor does it appear to be immediately on the horizon.

Policymakers should interrogate these statistics based on both a quantitative literacy with traditional segregation measures and a qualitative literacy and contextual understanding of segregation's meaning and harms.⁷⁷ Certainly, given the historical context and enduring legacy of spatialized racial subordination in the United States, very high Black-White separation scores likely indicate racial hierarchy. But the fact that separation scores have declined from extremely high to high does not mean that segregation has been eradicated or even significantly reduced in ways that matter for racial inequity. The following Sections describe persistent segregation at a more conceptual level.

B. Concentration

The corraling of groups into identifiable geographic spaces is also a hallmark of segregation. Some of the processes through which this concentration is realized are well-covered in the literature: As millions of Black Americans fled the South in response to racialized physical, sexual, and economic violence between 1915 and 1970,⁷⁸ and

⁷⁶ See GLAESER & VIGDOR, *supra* note 40, at 4.

⁷⁷ See Mario Luis Small, Harvard Univ., Rhetoric and Evidence in a Polarized Society 3–5, Public Lecture at Coming to Terms with a Polarized Society Lecture Series, Columbia University Institute for Social and Economic Research & Policy (Mar. 1, 2018), https://www.russellsage.org/sites/default/files/MLSmall_Qualitative2018.pdf (distinguishing quantitative and qualitative literacy and offering three indicators of empirically strong qualitative research).

⁷⁸ See, e.g., MARCIA CHATELAIN, *SOUTH SIDE GIRLS: GROWING UP IN THE GREAT MIGRATION* 7–9 (2015) (detailing the numerous motivations for migration, particularly sexual violence); EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 3–4 (3d ed. 2017), <https://eji.org/wp-content/uploads/2019/10/lynching-in-america-3d-ed-080219.pdf> (describing the episodes of terror lynching that contributed to Black American migration); MEGAN MING FRANCIS, *CIVIL RIGHTS AND THE MAKING OF THE MODERN AMERICAN STATE* 132–37 (2014) (describing the Elaine, Arkansas massacre of 1919); Alfred L. Brophy, *Norms, Law, and Reparations: The Case of the Ku Klux Klan in 1920s Oklahoma*, 20 HARV. BLACK LETTER L.J. 17, 47 (2004) (proposing reparations for the Tulsa massacre); Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 73 (2005) (defending the case for reparations against statute-of-limitations arguments); Geoff Ward, *Microclimates of Racial Meaning: Historical Racial Violence and*

because eugenicist biological notions of race had gained social and political influence that was used to justify racial separation,⁷⁹ racial residential segregation became a fundamental tool through which White supremacy operated.⁸⁰ However, official residential segregation was a feature of housing policy even before the Great Exodus and outside of Great Migration destinations,⁸¹ including places that have always seen themselves as progressive havens.⁸² An agglomeration of legal, policy, and industry-created innovations—redlining;⁸³ blockbusting;⁸⁴ exclusionary zoning;⁸⁵ restrictive covenants;⁸⁶ residential steering by landlords and realtors;⁸⁷ the construction of segregated

Environmental Impacts, 2016 WIS. L. REV. 575, 585–98 (discussing the effect of legacies of racial violence on localities); B.C. Franklin, *The Tulsa Race Riot and Three of Its Victims* (1931) (unpublished manuscript), https://nmaahc.si.edu/object/nmaahc_2015.176.1 (describing the Tulsa massacre of 1921).

⁷⁹ E.g., MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 116–17 (3d ed. 2015).

⁸⁰ See, e.g., MASSEY & DENTON, *supra* note 3, at 26–57. While many large cities used segregation to enshrine Black subordination, other jurisdictions used “sundown town” ordinances or “sundown state” laws to simply ban Blacks from entire places, beginning in the post-Civil War period and continuing until the 1940s. See LOEWEN, *supra* note 52, at 25, 99–100.

⁸¹ See Logan & Parman, *supra* note 68, at 22.

⁸² See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 5–14 (2017) (describing official segregation in Richmond and Palo Alto, in California’s San Francisco Bay Area).

⁸³ Redlining was a system in which mortgage lenders refused to give potential homebuyers loans to purchase homes in predominantly Black areas; those areas were outlined in red on surveying maps. See, e.g., Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 516 & n.5 (2005); Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 891–94 (explaining the predatory alternatives to mortgages available to Black borrowers).

⁸⁴ See Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1362–63 (2005) (explaining the rise of blockbusting); Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1877 (2006) (describing specific exclusionary strategies); see also MASSEY & DENTON, *supra* note 3, at 37.

⁸⁵ See John a. powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 614 (2008); Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1979–87 (2015) (explaining exclusionary zoning and its judicial history); Stephanie M. Stern, *The Dark Side of Town: The Social Capital Revolution in Residential Property Law*, 99 VA. L. REV. 811, 846–50 (2013) (explaining the rise of suburban “land cartels” through exclusionary zoning).

⁸⁶ See, e.g., SUGRUE, *supra* note 8, at 44–46 (explaining the history and enforcement mechanisms of restrictive covenants).

⁸⁷ See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 207–08 (1972) (detailing allegations and methods of residential steering); Stacy E. Seischnaydre, *The Fair Housing Choice Myth*, 33 CARDOZO L. REV. 967, 1000 (2012) (providing the HUD definition of “steering” and its applicability to third-party action).

public housing;⁸⁸ and racial violence⁸⁹—locked Black Americans into the most dispossessed and exploited communities.⁹⁰ At some points, Black neighborhoods were places where Black institutions flourished, or at least had clear pathways to survival and success.⁹¹ But between White punishment of Black success, the movement of many middle-class Blacks to inner-ring suburbs, deindustrialization, failures to reinvest after the urban unrest of the late 1960s, and more, Black neighborhoods and Black-run or Black-owned community organizations and businesses suffered.⁹² The people left behind became the “truly disadvantaged,” locked into severely under-resourced communities.⁹³ In the United States, the process of ghettoization is largely a Black urban experience.⁹⁴ Although, in some places, Latinx Americans and Asian Americans have long resided in enclaves that have been more like state-created ghettos or barrios with a similar social meaning to Black segregation.⁹⁵

⁸⁸ *E.g.*, ROTHSTEIN, *supra* note 82, at 20–24.

⁸⁹ *See infra* note 309.

⁹⁰ Recent European immigrants were consigned to those places initially, but their eventual social categorization as White ultimately created pathways to reduced separation and isolation. *See, e.g.*, STANLEY LIEBERSON, *A PIECE OF THE PIE: BLACKS AND WHITE IMMIGRANTS SINCE 1880*, at 270–91 (1980); Ceri Peach, *The Ghetto and the Ethnic Enclave*, in *DESEGREGATING THE CITY: GHETTOS, ENCLAVES, AND INEQUALITY* 31, 31 (David P. Varady ed., 2005) (contrasting the ethnic enclave, a stage in the immigrant incorporation process, with the ghetto, deemed “an end in itself”).

⁹¹ *See, e.g.*, ST. CLAIR DRAKE & HORACE R. CAYTON, *BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY* 430–69 (Harper Torchbook ed. 1962) (1945) (describing the context and dynamics of Black-owned businesses in Chicago’s Black Belt during the 1930s and 1940s); Elijah Anderson, *The Iconic Ghetto*, 642 *ANNALS AM. ACAD. POL. & SOC. SCI.* 8, 10 (2012).

⁹² *E.g.*, HANLON, *supra* note 47, at 14–27 (detailing the various categories of decline experienced in particular by the inner city and by some inner-ring suburbs); SANDER, KUCHEVA & ZASLOFF, *supra* note 57, at 99–171; SUGRUE, *supra* note 8, at 125–52, 259–71 (explaining in detail the deindustrialization of Detroit).

⁹³ *See* WILSON, *supra* note 47, at 3 (discussing the resulting “catastrophic” urban problems of the 1970s); *cf.* Harold X. Connolly, *Black Movement into the Suburbs: Suburbs Doubling Their Black Populations During the 1960s*, 9 *URB. AFF. Q.* 91, 92 (1973) (explaining that Black suburbanization accelerated prior to passage of the Fair Housing Act).

⁹⁴ This Article focuses on metropolitan segregation and policing, but it is important to note that the “ghetto” can also be a rural phenomenon. *See* JOHN M. EASON, *BIG HOUSE ON THE PRAIRIE: RISE OF THE RURAL GHETTO AND PRISON PROLIFERATION* 62 (2017) (describing the Black “rural ghetto” as a “major force reorganizing social and physical space in rural . . . communities”).

⁹⁵ *See, e.g.*, YOONMEE CHANG, *WRITING THE GHETTO: CLASS, AUTHORSHIP, AND THE ASIAN AMERICAN ETHNIC ENCLAVE* 2 (2010); Ernesto Castañeda, *Places of Stigma: Ghettos, Barrios, and Banlieues*, in *THE GHETTO: CONTEMPORARY GLOBAL ISSUES AND CONTROVERSIES* 159 (Ray Hutchinson & Bruce D. Haynes eds., 2012) (comparing ghettos, barrios, banlieues, and ethnic enclaves).

What is harmful about segregation today is not that marginalized racial groups are simply unevenly distributed, but that artificial boundaries are erected around racialized and dispossessed neighborhoods, and that those neighborhoods tend to be clustered together.⁹⁶ Why does concentration matter in ways that separation does not capture? As a growing body of social scientific research has shown, the problem of concentration is the problem of “neighborhood effects,” or the influence of localized neighborhood characteristics and dynamics on broad structural aspects of the city and on individuals’ daily lives.⁹⁷ When groups of people are cordoned off into stigmatized places, “correlated adversity”⁹⁸ or “compounded deprivation”⁹⁹ emerges, affecting family formation, school test scores, mental and physical health, crime, employment, and even speech patterns.¹⁰⁰ Racial residential segregation may even have some effect on whether

⁹⁶ E.g., SAMPSON, *supra* note 26, at 238–43.

⁹⁷ E.g., *id.* at 355–60; WILSON, *supra* note 47, at 46–52 (originally articulating the idea of “concentration effects” of living in poor, racially segregated neighborhoods); Robert Manduca & Robert J. Sampson, *Punishing and Toxic Neighborhood Environments Independently Predict the Intergenerational Social Mobility of Black and White Children*, 116 PROC. NAT’L ACAD. SCI. 7772, 7772–73 (2019). For many years, economists argued that neighborhood effects were small, nonexistent, or impossible to study due to concerns about endogeneity. See, e.g., Robert D. Dietz, *The Estimation of Neighborhood Effects in the Social Sciences: An Interdisciplinary Approach*, 31 SOC. SCI. RES. 539, 540 (2002). In recent years, more economists have recognized that neighborhoods have an independent impact upon people’s life outcomes. See, e.g., Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility I: Childhood Exposure Effects*, 133 Q.J. ECON. 1107, 1108 (2018); cf. Orlando Patterson, *How Sociologists Made Themselves Irrelevant*, CHRON. HIGHER EDUC. (Dec. 1, 2014), <https://www.chronicle.com/article/How-Sociologists-Made/150249> (“If you . . . would never dream of advocating [your research’s policy implications] for yourself or your loved ones, be wary If you find that neighborhoods have no effects, you should be prepared to . . . go live in an inner-city neighborhood If the thought offends you, then something stinks.”).

⁹⁸ See Matthew Desmond & Bruce Western, *Poverty in America: New Directions and Debates*, 44 ANN. REV. SOC. 305, 308–09 (2018).

⁹⁹ Kristin L. Perkins & Robert J. Sampson, *Compounded Deprivation in the Transition to Adulthood: The Intersection of Racial and Economic Inequality Among Chicagoans, 1995–2013*, 1 RSF: RUSSELL SAGE FOUND. J. SOC. SCI. 35, 35 (2015).

¹⁰⁰ See *supra* note 97; see also Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006) (describing neighborhood effects related to crime); John R. Rickford et al., *Neighborhood Effects on Use of African-American Vernacular English*, 112 PROC. NAT’L ACAD. SCI. 11817 (2015). Neighborhood effects on criminal behavior challenge notions of individual culpability in punishment. See, e.g., MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* 134–48 (1995) (discussing a “social adversity defense” to criminal responsibility); David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 388 (1976) (arguing that a decision to convict should include a determination of whether “society’s own conduct in relation to the actor entitles it to sit in condemnation of him with respect to the condemnable act”).

Black and Latinx people simply *visit* or are otherwise exposed to non-poor neighborhoods.¹⁰¹

Concentration of communities of color in space does not always have the exact same social meaning or give rise to the same experience; scholars have documented rising heterogeneity in specific manifestations of the “ghetto.”¹⁰² But in all of these manifestations, one can distinguish mere separation from concentration based on the degree to which the spatial arrangement has the purpose or effect of signifying and perpetuating racial inequity. Correlated disadvantage is not a direct result of poor people of color living near each other; it is a consequence of simultaneous and inevitable disinvestment, exploitation, and paradoxical state neglect and social control. Research on neighborhood effects is important for thinking about what the harms of concentration might be and how lawyers and policymakers should think about addressing them.¹⁰³

The Fair Housing Act of 1968 represents our most direct national effort to unravel the knot of ghettoization.¹⁰⁴ The framers of the FHA intended that it would end concentrated poverty and racial isolation and produce “truly integrated and balanced living patterns.”¹⁰⁵ In 2015’s *Texas Department of Housing and Community Affairs v. The*

¹⁰¹ Qi Wang, Nolan Edward Phillips, Mario L. Small & Robert J. Sampson, *Urban Mobility and Neighborhood Isolation in America’s 50 Largest Cities*, 115 *PROC. NAT’L ACAD. SCI.* 7735, 7739 (2018).

¹⁰² See, e.g., Mario L. Small, Robert A. Manduca & William R. Johnston, *Ethnography, Neighborhood Effects, and the Rising Heterogeneity of Poor Neighborhoods Across Cities*, 17 *CITY & COMMUNITY* 565, 566, 581 n.1 (2018); Mario Luis Small, *Four Reasons to Abandon the Idea of “The Ghetto,”* 7 *CITY & COMMUNITY* 389, 389 (2008) (surveying the various uses of the term “ghetto” in scholarship). Small proposes that scholars understand neighborhood mobility as a matter of “constrained choice, not ‘involuntary segregation.’” *Id.* at 394.

¹⁰³ See David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 *YALE L.J.* 78, 104 (2017) (arguing for the reduction of governmental barriers to interstate mobility). Neighborhoods use an array of legal tools of “sublocal governance” to construct a sense of community and a sense of place; often, senses of place correspond to a particular segregated landscape or diverse aesthetic. See HYRA, *supra* note 48, at 75–104 (discussing “black branding” and preservation of Black historical aesthetic); SUMMERS, *supra* note 48, at 113–17 (discussing the case study of a Washington, D.C. Whole Foods); Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 *MINN. L. REV.* 503, 509 (1997) (explaining the history of enterprise zone laws and other structures of sublocal governance); Hannah Wiseman, *Public Communities, Private Rules*, 98 *GEO. L.J.* 697, 700–01 (2010) (discussing the phenomena of rule-bound communities).

¹⁰⁴ See David D. Troutt, *Inclusion Imagined: Fair Housing as Metropolitan Equity*, 65 *BUFF. L. REV.* 5, 24–28 (2017) (discussing judicial interpretation of the FHA).

¹⁰⁵ 114 *CONG. REC.* 3422 (1968) (statement of Sen. Mondale); see also Troutt, *supra* note 104, at 23–30 (discussing the legislative history of and motivating concerns for the FHA); Brian Patrick Larkin, Note, *The Forty-Year “First Step”: The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 *COLUM. L. REV.* 1617, 1627 (2007) (providing legislators’ views of the Act as a first step).

Inclusive Communities Project, Inc., the Supreme Court reiterated the FHA's "continuing role in moving the Nation toward a more integrated society."¹⁰⁶ Yet, fifty years after its passage, reviews of the FHA's success have been mixed. Commentators sometimes applaud its relative efficacy at discouraging housing discrimination but note its shortcomings in promoting integration due in part to its weak enforcement mechanisms.¹⁰⁷ While the Act may not have abolished the ghetto, many would agree that aggregate spatial separation and certain manifestations of housing discrimination have markedly declined since the passage of the FHA.¹⁰⁸

In the housing context, courts have understood state-created concentration of racial groups as actionable and remediable. Perhaps the most famous example of this recognition and remediation of racial concentration comes from the extended *Hills v. Gautreaux* litigation, in which the Supreme Court found that the Chicago Housing Authority was liable for perpetuating segregation through its siting of public housing in Black neighborhoods.¹⁰⁹ As a remedy, the district court initiated a housing voucher program for former Black residents of the Gautreaux housing project ("Gautreaux I"). If residents used the voucher to move to the suburbs, they were not permitted to live in an area that was more than thirty percent Black.¹¹⁰ *Gautreaux I*

¹⁰⁶ 135 S. Ct. 2507, 2526 (2015).

¹⁰⁷ See, e.g., Blake Emerson, *Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing*, 65 BUFF. L. REV. 163, 171–74 (2017) (explaining HUD's poor enforcement of its obligations); Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1204–14 (2011) [hereinafter Johnson, *The Last Plank*] (discussing the Act's formal strength, weakness as to enforcement, and proposed solutions); Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 HARV. J. LEGIS. 247, 248 (2016) (providing historical context for the Act's weak enforcement); Michelle Adams, *The Unfulfilled Promise of the Fair Housing Act*, NEW YORKER (Apr. 11, 2018), <https://www.newyorker.com/news/news-desk/the-unfulfilled-promise-of-the-fair-housing-act> (explaining political efforts to obstruct the Act).

¹⁰⁸ See, e.g., Jonathan Zasloff, *Between Resistance and Embrace: American Realtors, the Justice Department, and the Uncertain Triumph of the Fair Housing Act, 1968-1978*, 61 HOW. L.J. 69, 71–72 (2017).

¹⁰⁹ 425 U.S. 284, 299–300 (1976). For examples of other times courts have found local public authorities liable for housing discrimination on similar grounds, see NAACP v. HUD, 817 F.2d 149, 151 (1st Cir. 1987); *Thompson v. HUD*, 348 F. Supp. 2d 398, 405–08, 415–16 (D. Md. 2005), *aff'd*, 404 F.3d 821 (4th Cir. 2005); *Walker v. HUD*, 326 F. Supp. 2d 773, 779 (N.D. Tex. 2004); *Sanders v. HUD*, 872 F. Supp. 216, 223 (W.D. Pa. 1994); *NAACP v. Kemp*, 721 F. Supp. 361, 365 (D. Mass. 1989); *Walker v. HUD*, 734 F. Supp. 1231, 1247–62 (N.D. Tex. 1989); *Resident Advisory Bd. v. Rizzo*, 429 F. Supp. 222, 226 (E.D. Pa. 1977).

¹¹⁰ *Gautreaux*, 425 U.S. at 288 n.6; James E. Rosenbaum & Stefanie DeLuca, *Is Housing Mobility the Key to Welfare Reform? Lessons from Chicago's Gautreaux Program*, BROOKINGS INST. SURVEY SERIES, Sept. 2000, at 2–3, <https://krieger.jhu.edu/sociology/wp-content/uploads/sites/28/2012/02/rosenbaum.pdf> (describing the racial composition of

showed overwhelmingly positive results in employment and education for people who moved to those neighborhoods.¹¹¹ *Gautreaux* shows that courts have been able to understand and design remedies that attend to concentrated disadvantage and neighborhood-based harms in the housing context.

Courts have struggled to comprehend and account for the influence of racial concentration on the creation of common interests outside of the housing discrimination and school contexts.¹¹² One prominent example of this struggle in the context of constitutional law is in the seminal 1973 case *San Antonio Independent School District v. Rodriguez*.¹¹³ *Rodriguez* in part stands for the proposition that good education is not a fundamental right, thereby meaning that property-based education funding schemes are not subject to strict scrutiny. However, the portion of the majority opinion that discusses whether wealth can be thought of as a suspect classification sheds light on the limitations of jurisprudential tools to hear claims based on collective dispossession. The *Rodriguez* plaintiffs argued that the property tax-based funding scheme made a wealth-based classification as to education quality because low-income families tended to cluster in areas

relocation destinations within Chicago versus in the suburbs); see also OWEN FISS, *A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM* 39–44 (2003) (discussing the relocation remedy); Andrea M.K. Gill, *Moving to Integration? The Origins of Chicago's Gautreaux Program and the Limits of Voucher-Based Housing Mobility*, 38 J. URB. HIST. 662, 663 (2012) (explaining the historical background of *Gautreaux*). This restriction was important in part because recipients of government-subsidized housing vouchers often use them to rent in neighborhoods similar to the neighborhoods they resided in before receiving a voucher. Vouchers stabilize housing, but they are generally not a pathway of mobility to higher-opportunity neighborhoods. E.g., MARTHA M. GALVEZ, *WHAT DO WE KNOW ABOUT HOUSING CHOICE VOUCHER PROGRAM LOCATION OUTCOMES? A REVIEW OF RECENT LITERATURE* 3–6 (2010) (providing statistics on continued poverty and racial disparities in voucher-assisted households).

¹¹¹ E.g., Ruby Mendenhall, Stefanie DeLuca & Greg Duncan, *Neighborhood Resources, Racial Segregation, and Economic Mobility: Results from the Gautreaux Program*, 35 SOC. SCI. RES. 892, 914 (2006); Rosenbaum & DeLuca, *supra* note 110, at 4–5. *Gautreaux I* spurred the Moving to Opportunity experiment, which took a similar approach but based on poverty and not on race, as well as the less-successful “*Gautreaux II*,” in which the Chicago Housing Authority issued vouchers that could be used only in neighborhoods with a relatively low Black population percentage and a low population percentage of people living in poverty. See, e.g., Greg J. Duncan & Anita Zuberi, *Mobility Lessons from Gautreaux and Moving to Opportunity*, 1 Nw. J.L. & SOC. POL'Y 110, 111, 115 (2006) (explaining key but subtle differences in the three programs that might have influenced outcomes).

¹¹² Indeed, the theory of property law has similarly struggled to account for collectivity and spatial association. See Lee Anne Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. 1227, 1229 (2006).

¹¹³ 411 U.S. 1 (1973).

with lower property tax bases, and thus violated the Equal Protection Clause.¹¹⁴

Justice Powell rejected the plaintiffs' wealth-based argument on multiple grounds. One was that the education funding scheme at issue did not discriminate "against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts."¹¹⁵ Justice Powell surmised that the plaintiffs were "unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts"¹¹⁶ and asserted that residence in particular districts bears "none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."¹¹⁷ Justice Powell criticized the court below for seemingly adopting the plaintiffs' place-based, collectively oriented wealth discrimination claim.¹¹⁸

A more sociologically sophisticated jurisprudence would have produced a different understanding of the problem of concentrated poverty in San Antonio at the time.¹¹⁹ Residing in a specific area of San Antonio in the 1960s and 1970s was deeply bound up in long-standing de jure and de facto cross-institutional racial segregation.¹²⁰ No one just "happen[ed] to reside in relatively poorer school dis-

¹¹⁴ See Michael Heise, *The Story of San Antonio Independent School Dist. v. Rodriguez: School Finance, Local Control, and Constitutional Limits*, in EDUCATION LAW STORIES 51, 51–82 (Michael A. Olivas & Ronna Greff Schneider eds., 2008).

¹¹⁵ 411 U.S. at 20.

¹¹⁶ *Id.* at 28.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 20 n.51 ("[A]ppellees suggest that . . . the Texas system is impermissibly discriminatory even if relatively poor districts do not contain poor people. . . . There are indications in the District Court opinion that it adopted this theory of districts discrimination.").

¹¹⁹ See, e.g., Guadalupe Salinas, *Mexican-Americans and the Desegregation of Schools in the Southwest*, 8 HOUS. L. REV. 929, 948–49 (1971); Guadalupe San Miguel, Jr. & Richard R. Valencia, *From the Treaty of Guadalupe Hidalgo to Hopwood: The Educational Plight and Struggle of Mexican Americans in the Southwest*, 68 HARV. EDUC. REV. 353, 371 (1998).

¹²⁰ See James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 259–60 (1999); see also Taunya Lovell Banks, *Brown at 50: Reconstructing Brown's Promise*, 44 WASHBURN L.J. 31, 59 (2004) (emphasizing that although Mexican Americans were classified as White under Texas law and not subject to the same formal segregation in public schools as Blacks were pre-*Brown*, Mexican Americans "experienced discrimination in other areas like public accommodations and housing"); Camille Walsh, *Erasing Race, Dismissing Class: San Antonio Independent School District v. Rodriguez*, 21 BERKELEY LA RAZA L.J. 133, 147 (2011) (providing examples of de facto segregation in Texas when Mexican Americans were classified as "other whites"). There is an awkward fit between the Court's bifurcated legal analysis of race- versus class-based educational inequity and the intersectional reality confronting poor Black and Brown children in many parts of the United States today.

tricts.”¹²¹ The existence of plaintiffs’ districts were a product of race and class marginalization, even if there were individuals within those districts who were not personally race- or class-marginalized. (This mode of thinking might have been helped along if the plaintiffs had not so deliberately avoided making a race-based argument.) The tragedy of *Rodriguez*, then, was not only the Court’s failure to recognize equal education as fundamental to full participation in a democratic society, or its general rejection of wealth as a suspect classification. But it was also the Court’s inability to recognize the organization of place as an enduring strategy of *collective* racial and wealth-based subordination.

C. Subordination

This Section moves from directly observable characteristics of segregation to its subjective social meaning for those who experience it. What does it mean for segregation to subordinate? A multitude of legal scholars have debated this question, centering their inquiries primarily on *Brown v. Board of Education*.¹²² In *Brown*, the Supreme Court described the problem with segregation in stark terms: “To separate [Black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”¹²³

Much scholarship over many decades has sought to unpack the harms of segregation, especially but not exclusively in the context of *Brown*.¹²⁴ While some jurists have claimed that *Brown* stands for a

Goodwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 LAW & INEQ. 81, 82–83 (2006).

¹²¹ 411 U.S. at 20.

¹²² 347 U.S. 483 (1954).

¹²³ *Id.* at 494.

¹²⁴ *E.g.*, Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518 (1980) (arguing that *Brown*’s project was to ensure that Black students who attended public schools were not “racially isolated and inferior”; the goal was not merely racial balance in schools); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424–26 (1960) (describing segregation as an “indisputably and grossly discriminatory” practice used “to maintain and further ‘white supremacy’”); Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1659 (1995) (“Segregation is the product of notions of black inferiority and white superiority, manifested geographically”); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1533 (2004) (highlighting the antisubordination goals of *Brown* and lamenting its replacement with an anticlassification perspective).

principle of state colorblindness or complete inattention to race,¹²⁵ many scholars and activists believe this “anticlassification” perspective is a misinterpretation of the essence of *Brown*. The point of ending de jure school segregation, in the classic anticlassification view, was to get the state out of the business of recognizing race—creating a colorblind state.¹²⁶ Scholars who take the classic antisubordination view claim that *Brown*’s purpose was to eliminate racial hierarchy and racial stigma.¹²⁷ Even among scholars who take an antisubordination view of *Brown* and subsequent antidiscrimination law, there are competing visions of the subordination problem and how it fits into the broader legal architecture. Is the harm of segregation and other forms of discrimination “institutionalized humiliation”?¹²⁸ Is the harm of segregation in its demeaning or disrespectful treatment of people of color?¹²⁹ Is the harm at issue national balkanization, not subordination or classification?¹³⁰ Is it structural exclusion?¹³¹ In addition, is antisubordination portable to other areas of public law, such as First Amendment free speech?¹³²

Regardless of the specific focus of their analysis, scholars who write from a perspective focused on racial hierarchy (as opposed to mere classification) all speak to a problem that separation and con-

¹²⁵ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

¹²⁶ The judicial preference for colorblindness is often credited to Justice Harlan, who wrote famously in his *Plessy* dissent that “[o]ur Constitution is color-blind.” *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). *But see* Scott Grinsell, “*The Prejudice of Caste*”: *The Misreading of Justice Harlan and the Ascendancy of Anticlassification*, 15 MICH. J. RACE & L. 317, 339–49, 353–57 (2010) (arguing that Justice Harlan’s opinion embodied an anti-caste perspective associated with slavery abolitionism).

¹²⁷ See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 12–13 (2003); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1059–63 (1986) (describing the antisubordination principle and suggesting that historically Black colleges would not offend it because they do not separate in a subordinating way); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 841, 865, 868–69 (2004).

¹²⁸ 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 128–31 (2014).

¹²⁹ See BENJAMIN EIDELSON, *DISCRIMINATION AND DISRESPECT* 71–94 (2015); DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* 30–36 (2008).

¹³⁰ Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1284 (2011).

¹³¹ See Michelle Adams, *Racial Inclusion, Exclusion and Segregation in Constitutional Law*, 28 CONST. COMMENT. 1, 15–17, 21–22 (2012) (identifying racial classification schemes as a very powerful method of systematic social categorization, and one which leads to stratification, exclusion, and group harm for people of color).

¹³² See Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2122–27 (2018).

centration literature do not adequately address: The *stigma* of separation and concentration, not the mere *fact* of separation and concentration, is what links separation and concentration to foster racial injustice.¹³³ As Dr. Martin Luther King, Jr. offered in his speech, *The Ethical Demands for Integration*: “Segregation stands diametrically opposed to the principle of the sacredness of human personality. It debases personality. . . . The tragedy of segregation is that it treats [people] as means rather than ends, and thereby reduces them to things rather than persons.”¹³⁴

Although segregation is a collective experience, the subordinating features of segregation include routinized, individualized, hierarchic, *daily spatial practices*. Social philosopher Henri Lefebvre refers to this portion of the social production of space as *spatial practice*. He explains that spatial practice “embraces production and reproduction, and the particular locations and spatial sets characteristic of each social formation.”¹³⁵ That is, space-making entails not only the existence of people in a geographic location, but rather all of their conduct that governs economic exchange. The social production of space also includes “representations,” or the renderings of symbolic meaning that define space. Practices and representations are where subordination connects with segregation. As Marco Garrido explains, “[t]o account for the intensiveness of segregation, we need to view it as more than simply the accretion of exclusive and stigmatized places but as the practice of keeping apart people recognized as categorically unequal.”¹³⁶

Mid-twentieth-century Black nationalists, such as Malcolm X, made important but often overlooked distinctions between segregation and separation. As Malcolm X explained in 1962, “segregation means to regulate or control A *segregated* community is that forced upon inferiors by superiors. A *separate* community is done vol-

¹³³ See Lenhardt, *supra* note 127, at 852, 870–71; cf. Black, *supra* note 124, at 424 (“[I]f a whole race . . . [is] confined within a system . . . [for] the very purpose of keeping it in an inferior station, and if the question is . . . whether such a race is being treated ‘equally,’ I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.”).

¹³⁴ Martin Luther King, Jr., *The Ethical Demands for Integration*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 117, 119 (James Melvin Washington ed., 1986).

¹³⁵ HENRI LEFEBVRE, *THE PRODUCTION OF SPACE* 33 (Donald Nicholson-Smith trans., 1991); see also Eugene J. McCann, *Race, Protest, and Public Space: Contextualizing Lefebvre in the U.S. City*, 31 *ANTIPODE* 163, 172–73 (1999).

¹³⁶ Marco Garrido, *The Sense of Place Behind Segregating Practices: An Ethnographic Approach to the Symbolic Partitioning of Metro Manila*, 91 *SOC. FORCES* 1343, 1344 (2013).

untarily by two equals.”¹³⁷ These nationalists envisioned a world potentially with separation but without segregation; the debate between nationalists and integrationists was whether inclusion or voluntary separation was the best strategy for Black flourishing and freedom.¹³⁸ From either standpoint, all segregation, official or unofficial, was antithetical to racial justice so long as it held a stigmatizing and subjugating social meaning.

While some have blamed or identified “self-segregation” as a reason for persistent separation, it is not a meaningful concept. “Self-segregation” equates dissimilar social processes: While segregation is a process of race-based exclusionary social closure and resource-hoarding,¹³⁹ “self-segregation” (or separation) is a process of separation by choice. If Black people steer themselves toward separate enclaves because of economic resource scarcity, fear of White violence or discrimination,¹⁴⁰ or other structural vulnerabilities, invidious segregation is still at work. Meaningful choice is absent when an action is the direct byproduct of White domination, coming from the fear of White behavior.¹⁴¹

The story of Native Americans’ struggle to retain tribal sovereignty in the face of settler colonialism provides a helpful critical case for understanding the essential distinction between dignity-enhancing

¹³⁷ Garrett Felber, *Integration or Separation? Malcolm X’s College Debates, Free Speech, and the Challenge to Racial Liberalism on Campus*, 2020 J. SOC. HIST. 1, 2 (quoting Transcript of Record at 172, SaMarion v. McGinnis, 253 F. Supp. 738 (W.D.N.Y. 1966) (Civ. 9395)).

¹³⁸ See *id.* at 14–16; see also TOMMIE SHELBY, *WE WHO ARE DARK: THE PHILOSOPHICAL FOUNDATIONS OF BLACK SOLIDARITY* 101–11 (2005); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 216–28 (2000); Amie A. Macdonald, *Racial Authenticity and White Separatism: The Future of Racial Program Housing on College Campuses*, in *RECLAIMING IDENTITY: REALIST THEORY AND THE PREDICAMENT OF POSTMODERNISM* 205, 210–14 (Paula M.L. Moya & Michael R. Hames-García eds., 2000); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 783–94 (1990).

¹³⁹ See CHARLES TILLY, *DURABLE INEQUALITY* 147–69 (1998) (identifying features of “opportunity hoarding” and discussing examples of it). See generally Frank Parkin, *Strategies of Social Closure in Class Formation*, in *THE SOCIAL ANALYSIS OF CLASS STRUCTURE* 1, 4–5 (Frank Parkin ed., 1974) (“Strategies of exclusion . . . [are] the attempt[s] by a given social group to maintain or enhance its privileges by the process of subordination The traditional caste system and the stratification of ethnic communities in the United States provide the clearest illustrations of this type of closure pattern . . .”).

¹⁴⁰ Krysan & Farley, *supra* note 35, at 962. Given the long history of racial violence directed at Black people who attempt to move to White neighborhoods, fear of White hostility is reasonable. See generally, e.g., JEANNINE BELL, *HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING* (2013).

¹⁴¹ Cf. TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM* 59–62 (2016) (describing reasons Blacks might prefer Black residential enclaves).

separation and subordinating separation.¹⁴² Native American tribes have a unique relationship with the United States federal government: Their sovereignty is recognized, though it can be limited in specific instances, including if Congress abrogates their authority through its plenary power.¹⁴³ On numerous occasions throughout American history, the federal government has shifted its position with respect to tribal sovereignty. It partook in a brutal campaign of “Indian removal” that used both direct violence and indirect, settlement-based displacement strategies to expel spatially rooted Native Nations from their land and to dispossess them of their property.¹⁴⁴ It justified that campaign through the “Marshall trilogy” of Indian law cases¹⁴⁵ and embarked upon a subsequent period of culturally genocidal policies and practices intended to promote Native assimilation against their will and interests.¹⁴⁶ The Indian Reorganization Act of 1934 represented perhaps an atonement for the cultural genocide and set a paradigm of support for Native self-governance.¹⁴⁷ Yet, since that time period, Native communities have had to consistently use legal mechanisms to protect their land and their sovereignty from external encroachment.¹⁴⁸

¹⁴² An account that does justice to this history is well beyond the scope of this Article. For works that do so, see Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1829–38 (2019); Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 445–56 (2005).

¹⁴³ See Blackhawk, *supra* note 142, at 1830–38.

¹⁴⁴ See, e.g., NED BLACKHAWK, *VIOLENCE OVER THE LAND: INDIANS AND EMPIRES IN THE EARLY AMERICAN WEST 176–225* (2008) (revealing the plight of the Colorado Utes following American conquest and expansion). See generally STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 191–227* (2005) (discussing the history of Native American removal prior to and during President Andrew Jackson’s administration); K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1891–1904 (2019) (detailing the removal of Native people by early settlers and then by the federal government from colonial times through the 1830s).

¹⁴⁵ The “Marshall trilogy” consists of: *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832); and the famous property case, *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

¹⁴⁶ E.g., Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 628–32, 635 (2009) (discussing particular instances of intense discrimination against Native people during “the Allotment and Assimilation Era for Native Americans”); Blackhawk, *supra* note 142, at 1793–94 & n.14.

¹⁴⁷ Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 5101–5129 (2018)); see also Blackhawk, *supra* note 145, at 1802.

¹⁴⁸ See, e.g., Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491 (2017); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 802, 807–13 (2007) (“A wealth of federal law embodied in treaties, the U.S. Constitution, and Supreme Court jurisprudence affirms Indian nations’ inherent, retained sovereignty”); cf. BANNER, *supra* note 144, at 236 (describing the largely contractarian processes through which many reservations were developed, and noting that there were “two broad reasons for creating reservations” that “were at cross-purposes. Some proponents of the reservation were primarily

The principles that govern spatial separation in a Native American context are distinguishable from the principles and meaning of spatial separation in the context of other communities of color in America because the origins of, reasons for, and techniques of separation have been distinct. Native American tribes are at once socially constructed as a “race” and politically constructed as nations.¹⁴⁹ Access to designated territory is necessary for the self-government of those nations.¹⁵⁰ By contrast, separation in the Black American context has almost universally signified institutionalized denigration, exploitation, and resource deprivation. For Native Americans, “segregation” in the sense of separate land and resources was developed as a way of retaining power and sustaining culture.¹⁵¹ For Black Americans, it never has been, at least not on a large scale.¹⁵² The

interested in keeping the Indians from interfering with whites; others were primarily interested in keeping whites from interfering with the Indians.”).

¹⁴⁹ See Gregory Ablavsky, “*With the Indian Tribes*”: Race, Citizenship, and Original Constitutional Meanings, 70 STAN. L. REV. 1025, 1033–34 (2018).

¹⁵⁰ See Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1058 (2009); Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1124 (2007).

¹⁵¹ See Blackhawk, *supra* note 142, at 1798 (“Integrationist, rights-based frameworks like that of *Brown* are feared in Indian law” because they are viewed as a mechanism for promoting “the colonial project against Native peoples—first as a tool of dispossession during the allotment era and more recently as a means to undermine tribal sovereignty by using the force of national rights to disrupt the power of tribal governments[.]”).

¹⁵² Of course, there have been numerous movements for Black self-governance before and after the Civil War—some criminalized, some infected with external and internal corruption, some funded by White officials, and often supported by Whites more generally as a way to “deal with” the pesky presence of Black people by eliminating or confining it. See, e.g., Devin Fergus, *Black Power, Soft Power: Floyd McKissick, Soul City, and the Death of Moderate Black Republicanism*, 22 J. POL’Y HIST. 148 (2010) (describing President Nixon’s advocacy for Soul City and the retreat from Republican support for Black nationalist and capitalist efforts in the 1980s and beyond); Justin Hansford, *Cause Judging*, 27 GEO. J. LEGAL ETHICS 1, 29–42 (2014) (describing the political context and courtroom events surrounding Marcus Garvey’s prosecution for mail fraud); Joe A. Mobley, *In the Shadow of White Society: Princeville, a Black Town in North Carolina, 1865–1915*, 63 N.C. HIST. REV. 340, 342 (1986) (on White support for the establishment of Princeville, North Carolina); Park, *supra* note 144, at 1905–09 (describing the slavery and Reconstruction-era battle between Whites over whether Black subordination would best be achieved through Black self-deportation via colonization of Liberia and ultimately settling on other tactics such as Black Codes and Jim Crow); Brenda Phillips, Patricia Ann Stukes & Pamela Jenkins, *Freedom Hill Is Not for Sale—and Neither Is the Lower Ninth Ward*, 43 J. BLACK STUD. 405, 407 (2012) (describing the establishment of Princeville, North Carolina and comparing it to Mitchelville, South Carolina); Laura Josephine Webster, *The Operation of the Freedmen’s Bureau in South Carolina*, 1 SMITH C. STUD. HIST. 67, 80 (1916) (describing White involvement in and state support for the establishment of Mitchelville, South Carolina); Gaiutra Bahadur, *The Jonestown We Don’t Know*, N.Y. REV. BOOKS (Dec. 21, 2018, 7:00 AM), <https://www.nybooks.com/daily/2018/12/21/the-jonestown-we-dont-know> (characterizing the establishment of Jonestown, Guyana as “one in a history of ventures . . . that explored and pursued futures for African

social meaning of separation for marginalized groups is deeply contextual.

Street-level bureaucrats, like police officers, are particularly important for understanding daily spatial practices that perpetuate segregation, as they are central actors in the daily maintenance and definition of space.¹⁵³ The framers of the Fair Housing Act were aware that seemingly individual acts of perpetuating segregation, regardless of the measurable effect of those individual acts on the aggregate phenomenon of segregation, were important to root out as a strategy of dismantling the “ghetto.” This is why, for example, the Act prohibits individual acts of race-based “steering”¹⁵⁴ by landlords and realtors, even though these individual acts were not originally responsible for segregation,¹⁵⁵ and even though it might be impossible to determine how much these individual acts contribute to the maintenance of aggregate, measurable segregation.¹⁵⁶ By directing traffic, putting up police tape, setting up a checkpoint, or placing substations in particular areas, police are structuring daily activity in a bounded area and imbuing a bounded area with meaning. As I argue in Part II, urban policing involves daily reiteration of definitions of geographic

Americans outside US borders”). Even with regard to Liberia, whether it truly represented self-governance was uncertain; White politicians wanted to use Liberia as a “purge” destination. White slaveholders frequently made relocation to Liberia a condition for granting Black enslaved persons freedom or property, spurring some Blacks to use the courts to resist deportation to Liberia. See Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 *YALE J.L. & HUMAN.* 251, 274–75 (1999); Melissa Milewski, *From Slave to Litigant: African Americans in Court in the Postwar South, 1865–1920*, 30 *LAW & HIST. REV.* 723, 736–38, 755–56 (2012).

¹⁵³ See, e.g., KATHERINE BECKETT & STEVE HERBERT, *BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA* 63–83 (2010) (arguing that police play a significant role in banishment tactics used to keep business improvement districts free of marginalized people, such as the homeless).

¹⁵⁴ See *infra* Section II.E.1 (discussing how police practices contribute to neighborhood reputations as high-crime areas).

¹⁵⁵ See DRAKE & CAYTON, *supra* note 91, at 175–78 (describing how Black Chicagoans lived in a landscape that was relatively less segregated at the neighborhood level before the development of “slums” following the exodus of Black Americans out of the South and into Chicago). See generally ROTHSTEIN, *supra* note 82 (describing how large-scale policy across many sectors created and continues to perpetuate segregation).

¹⁵⁶ One of the objections to the arguments of this Article might be that policing is not the predominant or even a major factor in the perpetuation of segregation: Part II does not adhere to the logic of counterfactual causality (that is, but for police practices, segregation would not exist). Yet, our remedial approach to segregation has never been framed around this type of causal analysis. Instead, we recognize that individual acts and institutional practices that perpetuate segregation have a corrosive effect on residential freedom, and that individual and institutional practices are part of a complex web of responsibility for racial-spatial inequity, an idea that is at the heart of the prohibition in fair housing law of racial steering. See *infra* Section III.B.2. If anything, our approaches to fair housing have been too individualistic and insufficiently structural, even though segregation is a structural process mostly attributable to governmental policy. See ROTHSTEIN, *supra* note 82, at xv.

spaces as bounded and racially marked, thus perpetuating residential segregation. As I explain in the next Section, this reiteration is both an act of subordination toward people from marginalized communities of color and an act of *domination*: It reasserts the power of already-powerful social groups.

D. *Domination*

More than fifty years ago, the Kerner Commission Report claimed that people of color, specifically Black Americans, have an insight about segregation that White Americans lack: “What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.”¹⁵⁷ Fifty years after the enactment of our most important national housing discrimination law, it is still true that racially separate, concentrated, and subordinated neighborhoods exist because of powerful interests and institutions that aim to maintain them. Now, in the era of colorblind racism,¹⁵⁸ it is even less likely today that many White Americans are aware of how deeply implicated their own lives and interests are in perpetuating segregation.

A fourth aspect of segregation, domination, takes a relational approach¹⁵⁹ to the problem of segregation. It examines not only the ills of subordination but also the benefits and burdens of domination. The domination perspective turns the lens to capture the conduct and experiences of Whites in a segregated society. The domination perspective heeds a call from some scholars to study the *reproducers* of privilege, not just those who experience the most obvious harm of that reproduction.¹⁶⁰ When probing the benefits of segregation for Whites, Professor Daria Roithmayr’s concepts of “locked in segregation” and “racial cartels” in housing offer a helpful starting point.¹⁶¹ Instead of viewing segregation as only harmful to people of color, scholars are examining the precise means by which political leaders enshrine

¹⁵⁷ NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, *THE KERNER REPORT* 2 (Princeton Univ. Press 2016) (1968).

¹⁵⁸ EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 238–53 (5th ed. 2018).

¹⁵⁹ See Mustafa Emirbayer, *Manifesto for a Relational Sociology*, 103 *AM. J. SOC.* 281 (1997) (explaining key features of a relational approach).

¹⁶⁰ *E.g.*, Shamus Rahman Khan, *The Sociology of Elites*, 38 *ANN. REV. SOC.* 361, 362 (2012).

¹⁶¹ *E.g.*, DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* 38–54 (2014); Daria Roithmayr, *Locked In Segregation*, 12 *VA. J. SOC. POL’Y & L.* 197, 213–22 (2004).

White advantage in the housing market.¹⁶² One benefit of this and related work is that it shows how Whites often benefit from laws and policies that promote segregation, even if they do not exhibit racial prejudice. For example, researchers have shown that anti-density zoning is more strongly associated with persistent segregation than racist preferences of Whites or direct discrimination in the real estate market.¹⁶³

While Whites *economically* benefit from segregation, this form of domination creates under-recognized social and moral costs for Whites.¹⁶⁴ It reinforces notions of racial superiority among Whites, which, as Professor Osamudia James has compellingly argued, has destructive effects on Whites' identity formation and makes them less likely to understand the structural dynamics of racial injustice.¹⁶⁵ On a broader scale, as Dean Angela Onwuachi-Willig has suggested, White spatial domination may interfere with Whites' ability to fully participate in the national community.¹⁶⁶ Segregation cheats Whites out of the benefits of exposure to diversity and the realization of the fullness of community life,¹⁶⁷ and it produces psychological and social harms by promoting racial fear and limiting Whites' capacity for cross-racial relationships.¹⁶⁸ Professor Jonathan Metzl has recently argued that

¹⁶² See, e.g., ROITHMAYR, *supra* note 161, at 38–54; JESSICA TROUNSTINE, *SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES* 78–79 (2018) (explaining that arguments for segregative zoning laws in several American cities during the early twentieth century relied on empirical claims about the potential effects of “colored” presence or the presence of “unassimilated aliens” on property values); George Lipsitz, *The Possessive Investment in Whiteness: Racialized Social Democracy and the “White” Problem in American Studies*, 47 AM. Q. 369, 371 (1995) (describing “systematic efforts from colonial times to the present” that “create a possessive investment in whiteness for European Americans”).

¹⁶³ Jonathan T. Rothwell, *Racial Enclaves and Density Zoning: The Institutionalized Segregation of Racial Minorities in the United States*, 13 AM. L. & ECON. REV. 290 (2011); see also Massey, Rothwell & Domina, *supra* note 50, at 88. In earlier decades, scholars found that White racial prejudice played a more substantial role than Rothwell and colleagues identified. See, e.g., Lawrence Bobo & Camille L. Zubrinsky, *Attitudes on Residential Integration: Perceived Status Differences, Mere In-Group Preference, or Racial Prejudice?*, 74 SOC. FORCES 883 (1996) (positing the prejudice hypothesis and arguing that racial prejudice shapes residential segregation).

¹⁶⁴ Cf. Daria Roithmayr, *Racial Cartels*, 16 MICH. J. RACE & L. 45, 48 (2010) (“Far from costing Whites to discriminate, exclusion paid significant dividends.”).

¹⁶⁵ Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 460 (2014).

¹⁶⁶ Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How Brown v. Board of Education Helped to Further White Supremacy*, 105 VA. L. REV. 343, 361–63 (2019).

¹⁶⁷ E.g., RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER* 49–62 (2009).

¹⁶⁸ E.g., DIANE J. GOODMAN, *PROMOTING DIVERSITY AND SOCIAL JUSTICE: EDUCATING PEOPLE FROM PRIVILEGED GROUPS* 107–13 (2001); Patton O. Garriott, Keisha

among disadvantaged Whites, racial resentment (which segregation facilitates) leads to political coalitions among Whites that make lower-income, rural Whites complicit in the development and implementation of laws and policies that are ultimately harmful to their own health and safety.¹⁶⁹ Along similar lines, Professor Jessica Trounstine has provided extensive empirical evidence that segregation causes racially polarized politics on a local level.¹⁷⁰

Early housing discrimination cases brought under the Fair Housing Act provide some clues as to how one could make arguments rooted in collective social benefit that includes Whites while promoting racial justice. Both *Havens Realty Corp. v. Coleman*¹⁷¹ and *Gladstone v. Village of Bellwood*¹⁷² were cases brought by testers in audit studies to detect housing discrimination. In each case, Black testers were given false information or denied housing, while White testers were given accurate information or granted housing. In both cases, the Court found that White testers had standing to sue based on the potential harm of living in a racially homogeneous neighborhood. The Court reasoned that the harm to Whites was deprivation of “the benefits that result from living in an integrated community.”¹⁷³ When this argument is made on an individual level—for example, “X White person is losing the experience of living next to Y Black person”—this type of reasoning troublingly treats individual people of color as means to the end of White experience. However, at a collective and structural level, this mode of reasoning simply recognizes how racial exclusion and hierarchy tear at the fabric of society, and thus, everyone loses.

By and large, arguments against residential segregation have rarely invoked rationales of collective benefit. The appeal to White people to fight segregation relies upon White beneficence. One of the challenges of moving forward on the fight against residential segregation is that ending segregation appears zero-sum—a potential boon to people of color and a potential loss for Whites—of property value, of

M. Love & Kenneth M. Tyler, *Anti-Black Racism, Self-Esteem, and the Adjustment of White Students in Higher Education*, 1 J. DIVERSITY HIGHER EDUC. 45 (2008); Lisa B. Spanierman, Nathan R. Todd & Carolyn J. Anderson, *Psychosocial Costs of Racism to Whites: Understanding Patterns Among University Students*, 56 J. COUNSELING PSYCHOL. 239, 240–41, 248–50 (2009).

¹⁶⁹ JONATHAN M. METZL, *DYING OF WHITENESS: HOW THE POLITICS OF RACIAL RESENTMENT IS KILLING AMERICA’S HEARTLAND* 15–18 (2019).

¹⁷⁰ TROUNSTINE, *supra* note 162, at 143–66.

¹⁷¹ 455 U.S. 363 (1982).

¹⁷² 441 U.S. 91 (1979).

¹⁷³ 455 U.S. at 375; *see also* Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL’Y 709, 744–47 (2017) (defining and analyzing the “community” harmed by segregation).

school quality, of safety.¹⁷⁴ In this way, arguments against segregation conceal segregation's collective harms—and at the same time, are often subtly and disturbingly laced with ideologies of White superiority and Black inferiority.¹⁷⁵

It may seem odd to encourage scholars and policymakers to consider the costs of segregation for Whites. The costs of domination are borne disproportionately by the oppressed. Comparatively, the social and moral costs of segregation to Whites seem speculative, and the economic costs to rural Whites seem attenuated. Whites seem to, by and large, gain economic benefit from segregation. More broadly, when strategies to promote racial justice are refracted through the lens of White interests, they tend to become less targeted and less powerful.¹⁷⁶ However, most accounts of racial injustice focus more on the experiences of subordinates, ignoring the experiences of those who benefit from domination. A better framework for segregation recognizes and dissects both.

II

THE MECHANISMS OF PRO-SEGREGATION POLICING

Decades of social science research have demonstrated that forms and qualities of policing are intimately linked with neighborhood

¹⁷⁴ *But see, e.g.,* Rachel D. Godsil, *Rigor and Relationships: The Positive Case for Integration in Schools and Neighborhoods*, 40 *CARDOZO L. REV.* 1287, 1289 (2019).

¹⁷⁵ *See, e.g.,* Mary Patillo, *The Problem of Integration*, in *THE DREAM REVISITED: CONTEMPORARY DEBATES ABOUT HOUSING, SEGREGATION, AND OPPORTUNITY* 29–32 (Ingrid Gould Ellen & Justin Peter Steil eds., 2019); Olatunde C.A. Johnson, *Integration, Reconstructed*, 1 *DUKE F.L. & SOC. CHANGE* 19, 36 (2009) (“[I]n contemporary popular discourse, the quest for racial integration seems not only irrelevant to quality learning for black children, but also, possibly denigrating to blacks: ‘Why do black children have to sit next to white children to learn?’”). Because integration is a separate goal from non-segregation, this Article sets aside debates over integration for another day.

¹⁷⁶ For example, Derrick Bell famously criticized civil rights reforms by pointing out that they only progressed when they seemed to be in the interests of Whites. *See* DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 23 (2004) (positing that, historically, policymakers have promoted White compromises at the cost of basic freedoms of Black Americans and have only acted to remedy racial injustice when such action would benefit national interests without diminishing Whites’ sense of entitlement); Bell, *supra* note 124, at 524–25 (arguing that *Brown* “cannot be understood without some consideration of the decision’s value to whites”); *see also* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 *STAN. L. REV.* 61, 66 (1988). For a countervailing view, see Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 *NW. L. REV.* 149 (2011). The most prominent example of a defanged effort toward racial justice can be found in the trajectory of affirmative action in higher education and its diversity rationale. *See* Grutter v. Bollinger, 539 U.S. 306, 330–31 (2003); Nancy Leong, *Racial Capitalism*, 126 *HARV. L. REV.* 2151, 2155 (2013) (describing the higher education affirmative action cases as evidence that “nonwhiteness has been considered a source of value”).

characteristics, especially but not exclusively neighborhood racial composition and poverty levels.¹⁷⁷ However, our common understanding of the police as crime fighters often obscures a related but distinct role that policing occupies: constructing residential life. Despite a long-standing recognition that police occupy multiple social roles—offering protection, enforcing laws, and providing services, among other work¹⁷⁸—legal and policy conversations about policing tend to focus on facilitating and restraining crime control strategy in an ecologically decontextualized fashion.¹⁷⁹

Legal scholars of criminal justice have increasingly become attentive to the intersection of place and policing. Jeffrey Fagan—with various collaborators—has most prominently advanced this agenda through his spatial analytic research.¹⁸⁰ Other scholars—such as

¹⁷⁷ See, e.g., Jeffrey Fagan, Garth Davies & Adam Carlis, *Race and Selective Enforcement in Public Housing*, 9 J. EMPIRICAL LEGAL STUD. 697 (2012) (observing a deep connection between certain enforcement tactics and public housing); N R Fyfe, *Space, Time, and Policing: Towards a Contextual Understanding of Police Work*, 10 ENV'T & PLAN. D 469, 471–76 (1992) (describing the “time-space choreography of policing”); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 226–30 (1983) (recounting incidents where racial incongruity with a police officer’s beat led to increased enforcement); Douglas A. Smith, *The Neighborhood Context of Police Behavior*, 8 CRIME & JUST. 313 (1986) (citing a considerable body of literature which suggests that neighborhood characteristics significantly affect police offers of assistance, stops, and other variations in enforcement); William Terrill & Michael D. Reisig, *Neighborhood Context and Police Use of Force*, 40 J. RES. CRIME & DELINQ. 291 (2003) (offering research in Indianapolis, Indiana and St. Petersburg, Florida which shows that neighborhood context influences the degree of force used by officers in police encounters); see also David Weisburd, *The Law of Crime Concentration and the Criminology of Place*, 53 CRIMINOLOGY 133 (2015) (finding strong support for a theory of crime concentration in microgeographic units and arguing for a focus on the criminology of place).

¹⁷⁸ See WILSON, *supra* note 16, at 140–226 (explaining three different styles—“The Watchman Style,” “The Legalistic Style,” and “The Service Style”—of policing which emphasize different aspects of policing).

¹⁷⁹ See, e.g., Harmon, *supra* note 17, at 795–808 (discussing problems and structures within current remedies towards police abuse, the rules which police must follow, police qualification and training, and police management and organization without acknowledging the importance of environments or neighborhoods); Stoughton, *supra* note 17, at 2196–220 (examining the tactic of displacement—the policy of pushing a problem into a neighboring jurisdiction—but treating jurisdictions and areas as otherwise equal and interchangeable).

¹⁸⁰ See, e.g., Jeffrey A. Fagan et al., *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, in RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS 309, 329–31 (Stephen K. Rice & Michael D. White eds., 2010) (analyzing the relationship between neighborhood conditions and the incidence of street stops); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 477 (2000) (presenting evidence which suggests that police officers are more likely to stop people who seem out of place from their surroundings); Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department’s “Stop-and-Frisk” Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS’N 813, 822

Bennett Capers, Tracey Meares, and Devon Carbado—have added theoretical heft to this empirical reality, envisioning policing as part of a broader program of racial control and exploring how spatial differences might yield police violence.¹⁸¹ Yet to date, there has been little progress in thinking about the broad, macro-level harms that emanate from the intersection of place and policing, or how the law and policy of place and policing might alleviate those harms.

In this Part, I catalog six mechanisms that link policing and residential segregation: mass criminalization, patrolling borders, coordinating with other bureaucracies, constructing jurisdiction, constructing neighborhood reputations (as high-crime or as racist), and distributing racialized economic value. With the exception of mass criminalization, the mechanisms are illustrated through the use of qualitative research—some research by others, and some interviews collected by the author or by research teams which included the author.¹⁸² Qualitative research is particularly well-suited to these tasks of mechanism identification and illustration of the “structures of signification”¹⁸³ of social phenomena as narrated by people in their daily lives¹⁸⁴: Although a wealth of research shows that there are linkages between place and policing strategies, little research unpacks how particular policing methods and philosophies function to shape the residential experience and thereby perpetuate segregation. Some of these mecha-

(2007) (finding that people of color were stopped disproportionately in New York City, a fact which was exacerbated when controlling for differences in precincts); *see also* Report of Jeffrey Fagan, Ph.D. at 18, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034) (analyzing over two million stops by the New York City Police Department using multivariate models).

¹⁸¹ *See* Capers, *supra* note 15, at 60–72 (discussing the disproportionate racial effects of certain police practices—such as pretextual *Terry* stops and traffic codes—on spaces, creating racialized borders); Carbado, *supra* note 13, at 1490–95 (describing how racial disparity interacts with particular geographic areas, or “war zones,” which experience disproportionate enforcement); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 164–65 (2015) (suggesting that individualized analysis under *Terry* may not capture the completely discriminatory nature of stops in the aggregate, and that courts should take a more expansive view); *see also* Jeannine Bell, *The Hidden Fences Shaping Resegregation*, 54 HARV. C.R.-C.L. L. REV. 813, 816–18 (2019).

¹⁸² For a recent well-regarded example of qualitative “retellings” as a mode of reanalyzing and presenting qualitative data collected by others, *see* BERNARDO ZACKA, *WHEN THE STATE MEETS THE STREET: PUBLIC SERVICE AND MORAL AGENCY* 67 (2017).

¹⁸³ CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 9 (1973) (“[W]hat we call our data are really our own constructions of other people’s constructions of what they and their compatriots are up to Analysis, then, is sorting out the structures of signification . . . and determining their social ground and import.”).

¹⁸⁴ *See, e.g.*, MICHÈLE LAMONT & PATRICIA WHITE, *WORKSHOP ON INTERDISCIPLINARY STANDARDS FOR SYSTEMATIC QUALITATIVE RESEARCH* 10 (2005), https://www.nsf.gov/sbe/ses/soc/ISSQR_workshop_rpt.pdf (noting the strengths and fruitful uses of qualitative research).

nisms, such as mass criminalization, operate on a macro-level and at a relatively removed standpoint; the appropriate way to intervene in those mechanisms is likely broader criminal system reform and economic transformation, with police change as a byproduct of those interventions. However, most of the mechanisms discussed below—some of which are unexplored in legal scholarship—could be addressed directly through fundamental modifications to police ethos, policy, and practice. Importantly, these mechanisms are not rigid categories that apply only to one type of police policy or practice. They are flexible categories that aim to organize the exceedingly complex world of segregative policing into a tractable, analyzable structure. These mechanisms intersect and overlap, and they are developed here with a hope that they will evolve over time with further research and attention to the precise intersections between policing and residential segregation.

A. *Mass Criminalization*

One of the basic strategies of police work is managing space, which includes surveilling people within physical communities of color and repelling people who, to police, seem out of place. This section focuses on the first of those tactics: surveillance. At a macro-level, heavy police surveillance in race-class subjugated neighborhoods makes poor people of color even poorer, thereby locking them into poor and segregated neighborhoods. This phenomenon is borne out in Jeffrey Fagan and Elliot Ash's detailed spatial research, which analyzes how geographically concentrated, intensive, prevention-focused policing ("New Policing") plays out in a highly segregated metropolis (New York City) and a suburb of a highly segregated metropolis (Ferguson, Missouri). Toward the end of their article, they hypothesize a potential linkage between "New Policing" and segregation. This link, in their estimation, operates primarily by exacerbating preexisting disadvantage, thereby locking low-income people of color into already disadvantaged neighborhoods. It exacerbates disadvantage by cycling people through unending rounds of arrest, misdemeanor prosecution, and various modalities of supervision.¹⁸⁵

¹⁸⁵ Fagan & Ash, *supra* note 15, at 120–22. Nearly two decades ago, Philip Heymann defined "new policing" as a mixture of "community policing," problem-solving theory, and preventive hot-spots policing. Philip B. Heymann, *The New Policing*, 28 *FORDHAM URB. L.J.* 407, 422–40 (2000). While this bundle of policing theories is certainly newer than traditional policing, this confluence of strategies is many years old at this point. *See, e.g.*, Tracey L. Meares, *The Law and Social Science of Stop and Frisk*, 10 *ANN. REV. L. & SOC. SCI.* 335 (2014); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 *COLUM. L. REV.* 551 (1997).

The mechanism Fagan and Ash describe is most deeply implicated by the *Terry* stop-question-frisk regimes that are geographically concentrated within the “ghetto.”¹⁸⁶ In the much-discussed 2013 New York City Police Department (NYPD) case, *Floyd v. City of New York*, the United States District Court for the Southern District of New York held that the NYPD’s stop-and-frisk policies and practices violated the Fourth and Fourteenth Amendment rights of Black and Latinx New Yorkers.¹⁸⁷ Judge Scheindlin’s opinion explained that residents were unduly stopped and searched on the basis of their individual race, but the opinion also made note of the *racial composition* of the areas where they were stopped.¹⁸⁸ Much of the Fagan and Ash lock-in story relies on the fact that surveillance-style policing in low-income communities of color—those with the racial compositions of the highly policed neighborhoods discussed in *Floyd*—channels people of color into the expansive criminal punishment system, which directly and indirectly contributes to the problem of housing dispossession and neighborhood-level structural inequality.

With respect to explicit links between punishment and housing restraint, numerous scholars—in disciplines including law, sociology, and criminology—have drawn attention to the housing-related collateral consequences of criminal punishment, especially drug-related punishment.¹⁸⁹ For example, public housing authorities’ “one-strike”

¹⁸⁶ See, e.g., Fagan et al., *supra* note 180, at 323 (identifying a dramatic growth in stop rates in neighborhoods with high rates of Black and Latinx residents).

¹⁸⁷ 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

¹⁸⁸ See *id.* at 589, 597, 602–03, 660; see also Fagan et al., *supra* note 180, at 329–31.

¹⁸⁹ See, e.g., JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 258–59 (2015) (noting that federal law restricts certain individuals who have been convicted of a felony from living in federally supported public housing); Regina Austin, “*Step on a Crack, Break Your Mother’s Back*”: *Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing*, 14 *YALE J.L. & FEMINISM* 273, 275 (2002) (detailing the motivations behind and potential harm of one-strike eviction policies for people with drug-related convictions or activity in public housing); Michelle Y. Ewert, *One Strike and You’re Out of Public Housing: How the Intersection of the War on Drugs and Federal Housing Policy Violates Due Process and Fair Housing Principles*, 32 *HARV. J. RACIAL & ETHNIC JUST.* 57 (2016) (chronicling the history of public housing programs and policies, criticizing the one-strike eviction policy, and examining statistical disparities in impact of public housing policies on women and people of color); Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 *NOTRE DAME L. REV.* 301, 307 (2015) (acknowledging ineligibility for public housing as a potential collateral consequence of a criminal conviction); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 *N.Y.U. L. REV.* 457, 491–92 (2010) (outlining the restrictions that the federal government imposes on individuals with certain criminal records from receiving public housing assistance and mentioning that local authorities across the United States have expanded such restrictions); Joy Radice, *The Reintegrative State*, 66 *EMORY L.J.* 1315, 1333 (2017) (observing that a misdemeanor for shoplifting that results in a sentence of only community service could still result in a public housing eviction); Lahny R. Silva, *Collateral Damage: A Public Housing Consequence of the “War on Drugs,”* 5 *U.C. IRVINE L. REV.*

policy bars people with a history of drug felonies from public housing, and allows them to summarily evict residents who reside with people or simply have guests who have been convicted of drug-related felonies.¹⁹⁰ Criminal justice involvement can restrain mobility within neighborhoods, between neighborhoods, and even to other states where there might be better employment opportunities and supportive resources; despite fifty-state arrangements to facilitate interstate mobility of people on probation, in reality, the bureaucratic process often means that people under criminal justice supervision must remain in one state.¹⁹¹ Officials often rationalize these consequences through stated interests of safety or efficiency, but many activists and commentators view them more as morality regulations that further distinguish between the “deserving” and “undeserving” poor.¹⁹²

783 (2015) (discussing exclusionary federal housing policies and identifying issues—especially inequality—in the administration of federal housing policy); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 18 (Marc Mauer & Meda Chesney-Lind eds., 2002) (highlighting a slew of invisible punishments to individuals who have been convicted of a crime, including denial of public housing).

¹⁹⁰ See *HUD v. Rucker*, 535 U.S. 125, 127–28 (2002) (ruling that the Anti-Drug-Abuse Act of 1988 requires lease terms that allow a local public housing authority to evict a tenant when any member of the household, regardless of the knowledge of the tenant, engages in drug-related criminal activity); see also Eisha Jain, *Arrests as Regulation*, 67 *STAN. L. REV.* 809, 836–38 (2015) (discussing some of the practical, evidentiary, and collateral consequences of the Supreme Court’s ruling in *Rucker*); Dahlia Lithwick, *Too Old to Narc: The Justices Toss Their Bingo Buddies into the Street*, *SLATE* (Feb. 19, 2002, 6:30 PM), <https://slate.com/news-and-politics/2002/02/fight-the-drug-war-evict-grandma.html> (providing an account of some of the facts of the *Rucker* case and reciting ten unsuccessful arguments advanced by the evicted tenants’ lawyer at oral argument). Under Secretary Julián Castro, HUD encouraged local public housing authorities to create pathways through which returning citizens could receive Housing Choice Vouchers, but the programs are often quite small and vary widely based on the jurisdiction. See Jamil A. Favors, *Deconstructing Re-Entry: Identifying Issues, Best Practices and Solutions*, 21 *U. PA. J.L. & SOC. CHANGE* 53, 65–67 (2018).

¹⁹¹ See Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 *IOWA L. REV.* 1, 31–32 (2006) (describing the Interstate Compact on Adult Offender Supervision and acknowledging the bureaucratic challenges such coordination necessitates); cf. Schleicher, *supra* note 103, at 122–32 (describing economic factors which might pressure people to stay where they are). Although Schleicher identifies several buckets of state and local law that restrict people from exiting their home states, he omits criminal justice provisions even though they can have a similar deterrent effect. People on probation may apply to move to another state through the Interstate Compact. INTERSTATE COMMISSION FOR ADULT OFFENDER SUPERVISION, <https://www.interstatecompact.org> (last visited Feb. 18, 2020).

¹⁹² See Jaime Alison Lee, *Poverty, Dignity, and Public Housing*, 47 *COLUM. HUM. RTS. L. REV.* 97, 126 (2016) (“Morality controls also remain part of life in public housing today so that benefits may be denied to the unworthy.”); see also NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT* 61–62 (2016).

There are also numerous indirect housing-related collateral consequences of criminal punishment. Conditions of supervised release, such as probation or parole, may require people with criminal records to avoid relying upon each other for housing.¹⁹³ Private landlords, who often rely on record-search companies to procure information about potential tenants,¹⁹⁴ may summarily reject the applications of people with criminal records regardless of potential tenants' income, the historical distance of relevant events, and other indicia of reliability.¹⁹⁵ Simply the act of arrest—a type of criminal legal involvement that is often not conceived of as punishment yet is controlled solely by police—can result in serious consequences for tenants living in public housing.¹⁹⁶ Recognizing the great extent to which private landlords rely upon criminal record-keeping (and that most poor people rent on the private rental market), in the waning days of the Obama Administration, HUD issued guidance notifying housing providers that had policies or practices of routinely rejecting potential residents with criminal records that they might be violating the FHA.¹⁹⁷ Although carceral history is not a protected basis of classification under the FHA,¹⁹⁸ the relationship between racial marginality and

¹⁹³ See JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 121 (2003).

¹⁹⁴ See Matthew Desmond & Monica Bell, *Housing, Poverty, and the Law*, 11 ANN. REV. L. & SOC. SCI. 15, 19 (2015) (pointing out that hundreds of data-mining companies now specialize in tenant screening reports which detail, among other things, an applicant's previous evictions and convictions); Rudy Kleysteuber, Note, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1363 (2007) (explaining that landlords generally treat tenant-screening reports as a blacklist).

¹⁹⁵ See Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1398, 1416 (2018) (highlighting the long-lasting impacts of a criminal record and describing how landlords can use a background check as a fast and inexpensive way to choose applicants and deselect others under the justification of resource allocation); Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact*, 93 IND. L.J. 421 (2018) (reciting the common problem of denial of access to housing for people convicted of crimes and analyzing the advantages and shortcomings of an Obama-era guidance from HUD which sought to lessen harsh collateral consequences); Rebecca Oyama, Note, *Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 212–15 (2009) (criticizing a lack of individualization within private housing screening policies).

¹⁹⁶ See Jain, *supra* note 190, at 833–38 (noting, among other things, that housing officials can rely merely on arrest records or knowledge of an arrest as a cost-effective way to restrict housing for violation of a lease); see also Desmond & Bell, *supra* note 194, at 19 (observing that tenant reports are often riddled with errors).

¹⁹⁷ U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 10 (2016), https://portal.hud.gov/hudportal/documents/huddoc?id=hud_ogcguidappfhastandcr.pdf.

¹⁹⁸ Title VIII bars housing discrimination “because of race, color, religion, sex, familial status, . . . national origin,” and on the basis of disability or “handicap.” 42 U.S.C. § 3604(a), (c)–(f) (2012).

incarceration means that a policy or practice of rejecting applicants based on carceral history has a disproportionate effect on Black and Latinx people. This disparate impact justifies intervention under the FHA.¹⁹⁹ The HUD guidance also specified that mere arrests, widely understood to be a product of race and geography as much as a correlate of actual criminal behavior,²⁰⁰ are not a reliable reason to deny someone housing.²⁰¹ Earlier HUD guidance had disallowed using arrests alone as a barrier to public or Section 8 housing.²⁰² Although these pieces of guidance are not likely to be enforced under the Trump Administration,²⁰³ they acknowledge and seek to break this connection between the housing system and criminal justice involvement. States and municipalities can intervene as well. For example, in 2016, the District of Columbia Council passed the Fair Criminal Record Screening for Housing Act which, similar to a “ban the box” statute in the employment or college context, aims to delay the point at which an applicant’s criminal record affects consideration for housing. It also authorizes fining landlords who fail to comply with the new tenant-screening process.²⁰⁴

¹⁹⁹ In 2015, the Supreme Court upheld, 5–4, the application of the disparate impact standard to potential violations of the FHA in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

²⁰⁰ E.g., David S. Kirk, *The Neighborhood Context of Racial and Ethnic Disparities in Arrest*, 45 DEMOGRAPHY 55 (2008) (finding that there exist differences in arrest rates between Black youths and youths of other racial and ethnic groups which come about through multiple layers of disadvantage such as family instability and concentrated poverty in Black neighborhoods). Partly on these grounds, recent scholarship has noted that arrests are unduly consequential both within and beyond the criminal justice system. See generally Jain, *supra* note 190.

²⁰¹ U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 197, at 5–6.

²⁰² See PUB. & INDIAN HOUS., U.S. DEP’T OF HOUS. & URBAN DEV., NOTICE PIH 2015-19, GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAs) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS 2 (2015).

²⁰³ The Trump Administration’s HUD has retreated from enforcing existing laws regarding segregation, nondiscrimination, transgender access to shelter, and more. See, e.g., Henry Grabar, *Ben Carson Ends Obama-Era Efforts to Reduce Housing Segregation*, SLATE (Aug. 13, 2018, 7:33 PM), <https://slate.com/business/2018/08/ben-carson-ends-obama-era-efforts-to-reduce-housing-segregation.html>; Tracy Jan, *Proposed HUD Rule Would Strip Transgender Protections at Homeless Shelters*, WASH. POST (May 22, 2019, 3:05 PM), <https://www.washingtonpost.com/business/2019/05/22/proposed-hud-rule-would-strip-transgender-protections-homeless-shelters/>; see also *Nat’l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 53–63 (D.D.C. 2018) (dismissing a suit against HUD Secretary Carson for violating the FHA on standing and other procedural grounds).

²⁰⁴ See D.C. CODE § 42-3541.01–.09 (2017); see also Valerie Schneider, *Racism Knocking at the Door: The Use of Criminal Background Checks in Rental Housing*, 53 U. RICH. L. REV. 923, 942–47 (2019) (providing an overview of the Fair Criminal Record Screening for Housing Act and pondering challenges and unanswered questions).

Even if a person with a criminal record can find someone willing to rent to them, they might not be able to afford it. The nation is in the midst of an affordable housing crisis,²⁰⁵ and people with criminal records are uniquely disadvantaged in the employment market, limiting their resources to pay for housing. First, as sociologist Devah Pager has shown, people with criminal records—especially if the individuals are Black—face employment discrimination on those grounds.²⁰⁶ Thus, they have a difficult time procuring steady employment that earns a living wage, especially shortly after prison when their networks are most frayed.²⁰⁷ Other features of criminal justice involvement make it hard to retain employment. Probation, for example, is a growing part of the system that comes along with employment barriers related to the need for check-ins and the constant risk of being violated for the most minor, noncriminal, infractions.²⁰⁸ People often wind up on probation or subject to other court-related mechanisms of social control due to petty offenses, and the intensive state management process is a constant threat to employment.²⁰⁹

²⁰⁵ See, e.g., Matthew Desmond & Nathan Wilmers, *Do the Poor Pay More for Housing? Exploitation, Profit, and Risk in Rental Markets*, 124 AM. J. SOC. 1090, 1093 (2019) (exploring the decline of affordable housing across the United States and how it has disproportionately affected the poor).

²⁰⁶ DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 5–6 (2007) (noting that a criminal record has become a salient marker for employers); see also Jeffrey Selbin, Justin McCrary & Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM. L. & CRIMINOLOGY 1, 46 (2018) (reporting positive results of a record clearing experiment that aimed to increase program participants' employment rates).

²⁰⁷ See BRUCE WESTERN, *HOMEWARD: LIFE IN THE YEAR AFTER PRISON* 83–99 (2018) (acknowledging the tenuous livelihoods of people coming out of prison and offering the stories of a sample of formerly incarcerated individuals who had tried to make a living after their convictions); see also SANDRA SUSAN SMITH, *LONE PURSUIT: DISTRUST AND DEFENSIVE INDIVIDUALISM AMONG THE BLACK POOR* 107–09 (2007) (providing an anecdote exemplifying why workers with a criminal history—and the sullied labor market reputation such history brings—might struggle in the labor market and fail to use personal contacts to their advantage).

²⁰⁸ See Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 310–14 (2016) (listing and discussing common probation conditions related to employment, schooling, and support of dependents); see also Michelle S. Phelps, *Mass Probation: Toward a More Robust Theory of State Variation in Punishment*, 19 PUNISHMENT & SOC'Y 53, 59–62 (2017) (describing the rise of “mass probation” alongside mass incarceration as an additional mechanism in the expansion of carceral control).

²⁰⁹ See, e.g., ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 189 (2018) (explaining how the arrest-to-arraignment time period in New York can exceed the legal limit and lead to a cascading set of negative consequences); ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME* 23–24, 187–201 (2018).

Scholars and lawmakers usually think of these criminal justice-related housing restrictions as setbacks for individuals caught up in the criminal justice system—tragic consequences to be sure, but perhaps limited to those individuals and their loved ones. Given the racial and ecological concentration of punishment,²¹⁰ we sometimes acknowledge that the communities where criminal justice involvement is concentrated also face repercussions, but the “community” label is often attached mostly to *people* and only secondarily attached to the physical neighborhood.²¹¹ However, these are also *spatial setbacks*: They contribute to segregation by restraining mobility out of racially isolated and high poverty neighborhoods and by characterizing neighborhoods on the basis of police practice and reputation. They sharpen the normative contours of the “ghetto,” even structuring how people interact on a daily basis.²¹² In the remainder of this Part, I focus on mechanisms linking policing and residential segregation that have not, to date, received much discussion in legal scholarship.

B. *Patrolling Borders*

Some police conduct their work harshly in predominantly Black, Latinx, or poor areas. Others are tasked with spatial exclusion in predominantly White and more affluent areas. As noted in the previous section, watching and warding off people who seem out of place in White areas are core aspects of police work.²¹³ This Section focuses

²¹⁰ See, e.g., Robert J. Sampson & Charles Loeffler, *Punishment's Place: The Local Concentration of Mass Incarceration*, 139 DÆDALUS 20 (2010) (demonstrating that mass incarceration is a locally experienced phenomenon with perennial hot spots which share demographic and structural characteristics); Jessica T. Simes, *Place and Punishment: The Spatial Context of Mass Incarceration*, 34 J. QUANTITATIVE CRIMINOLOGY 513, 529–30 (2018) (concluding that incarceration is profoundly “spatially concentrated,” as evidenced by high admission rates from communities characterized by disadvantage and the presence of racial minorities, and disproportionately felt in small cities and suburbs).

²¹¹ See, e.g., TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 3 (2007) (identifying the “concentration of imprisonment” as a significant problem and an obstacle to comprehensive reform); Oyama, *supra* note 195, at 197–99 (stating that dense populations of formerly incarcerated individuals in an area can have significant impacts on both those individuals and their communities); Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 164 (2004) (describing incarceration as a “common life event” for young Black males who did not have the opportunity to receive a college education).

²¹² See, e.g., James P. Lynch & William J. Sabol, *Effects of Incarceration on Informal Social Control in Communities*, in IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 135 (Mary Pattillo, David Weiman & Bruce Western eds., 2004) (detailing how incarceration can affect community processes).

²¹³ Although this dynamic is not Fagan and Ash’s concentration given their empirical focus on a segregated metropolis and a predominantly Black suburb, they briefly mention the problem of border patrol through stop-question-frisk, noting “a pattern of stops of

on those techniques of border patrol. In “white space,” people of color seem particularly out of place, and thus police are more likely to intervene.²¹⁴ A litany of recent, viral incidents in which White people called the police to report mostly licit behavior of people of color have drawn attention to this problem, though it is long-recognized among communities of color.²¹⁵ Recent cases when police officers have used lethal force have also occurred in suburbs—for example, the killing of Antwon Rose ultimately resulted in the disbanding of the East Pittsburgh Police Department and persistent protests throughout

individuals who were out of place: people who had crossed racial boundaries and entered places where other races or ethnicities were the dominant presence.” Fagan & Ash, *supra* note 15, at 123.

²¹⁴ Elijah Anderson, “*The White Space*,” 1 *SOC. RACE & ETHNICITY* 10, 10 (2015); see also Jeannine Bell, *Can't We Be Your Neighbor? Trayvon Martin, George Zimmerman, and the Resistance to Blacks as Neighbors*, 95 *B.U. L. REV.* 851, 865–67 (2015) (focusing on suspicion of middle-class Black people in White neighborhoods); Bell, *supra* note 181, at 816–18; Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being “Out of Place” from Emmett Till to Trayvon Martin*, 102 *IOWA L. REV.* 1113 (2017). This problem is not new. See Carl Werthman & Irving Piliavin, *Gang Members and the Police*, in *THE POLICE: SIX SOCIOLOGICAL ESSAYS* 56, 78–79 (David J. Bordua ed., 1967) (“Being a Negro per se (or being a Negro in a Negro neighborhood) is apparently not as important a criterion of suspiciousness as being a Negro who is ‘out of place.’”).

²¹⁵ The details of these incidents are too numerous to list. One prominent episode includes an incident in Philadelphia’s Rittenhouse Square when a Starbucks barista called the police on two Black men who were waiting for a meeting and did not order anything, leading to their arrest. Matt Stevens, *Starbucks C.E.O. Apologizes After Arrests of 2 Black Men*, *N.Y. TIMES* (Apr. 15, 2018), <https://www.nytimes.com/2018/04/15/us/starbucks-philadelphia-black-men-arrest.html>. The “BBQ Becky” incident involved a White woman calling the police on a group of Black people who were using a charcoal grill in a non-charcoal grill area of the park surrounding Oakland’s Lake Merritt. Otis R. Taylor Jr., *Even in Oakland, Calling the Cops on Black People Just Living Their Lives*, *S.F. CHRON.* (May 17, 2018), <https://www.sfchronicle.com/news/article/Even-in-Oakland-calling-the-cops-on-black-people-12920652.php>. The “Permit Patty” incident made headlines when Alison Ettel, a White marijuana dispensary owner, called the police on a Black girl and her mother for selling bottled water without a license. Niraj Chokshi, *White Woman Nicknamed ‘Permit Patty’ Regrets Confrontation over Black Girl Selling Water*, *N.Y. TIMES* (June 25, 2018), <https://www.nytimes.com/2018/06/25/us/permit-patty-black-girl-water.html>. At Colorado State University, a woman called the police on two Native American boys of the Mohawk, who were on a college tour, because they were too quiet. Lorraine Kahneratokwas Gray, *A Woman Called the Police on My Native American Sons While They Were on a College Tour*, *ACLU* (June 5, 2018, 2:15 PM), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/woman-called-police-my-native-american-sons-while-they>. At Yale, Sarah Braasch, a White Yale graduate student, called the police on a Black fellow Yale graduate student for taking a nap in a dormitory common area. Cleve R. Wootson Jr., *A Black Yale Student Fell Asleep in Her Dorm’s Common Room. A White Student Called Police.*, *WASH. POST* (May 11, 2018, 8:07 AM), <https://www.washingtonpost.com/news/grade-point/wp/2018/05/10/a-black-yale-student-fell-asleep-in-her-dorms-common-room-a-white-student-called-police>. Police officers in Rialto, California, detained Black Airbnb guests after a neighbor called the police. Daniel Victor, *A Woman Said She Saw Burglars. They Were Just Black Airbnb Guests.*, *N.Y. TIMES* (May 8, 2018), <https://www.nytimes.com/2018/05/08/us/airbnb-black-women-police.html>.

Pittsburgh's suburbs.²¹⁶ Legal scholars have written about this manner of garnering suspicion as “racial incongruity.”²¹⁷

Historically, vagrancy laws were one major conduit through which police officers criminalized human location, often to maintain racial segregation.²¹⁸ Simply existing in a public space unwelcomed could give officers a legitimated reason to engage, without needing to rely on vague justifications of suspicious behaviors or “furtive movements.”²¹⁹ Yet, in a well-known story, the Supreme Court's 1972 ruling in *Papachristou v. City of Jacksonville* invalidated vagrancy laws on the basis of their vagueness and arbitrariness.²²⁰ Today, the same groups that faced unjust policing during the vagrancy era may still be targets, but the justifications for targeting them are different. They might rely on more precise justifications or be allowed in closely policed business improvement districts, for example.²²¹

Border patrol-driven interactions might play out in a fair, seemingly legitimacy-building way, but the message people of color receive about their belongingness in the “white space”—and their social citizenship more generally—is the same.²²² Consider, for example, the story of Richard Jones, one of fifty young people my research team interviewed in Baltimore, Maryland, in 2015.²²³ Richard, aged nineteen, grew up constantly moving between Edmonson Village, a

²¹⁶ Brentin Mock, *In Police Violence, the Fates of Cities and Suburbs Are Intertwined*, CITYLAB (Mar. 26, 2019), <https://www.citylab.com/equity/2019/03/cities-suburbs-police-violence-antwon-rose-pittsburgh/585676>.

²¹⁷ Johnson, *supra* note 177, at 226–30 (originally articulating this concept); see Jeffrey Fagan, *Law, Social Science, and Racial Profiling*, 4 JUST. RES. & POL'Y 103, 120 (2002) (“[R]acial incongruity stops may reflect the characteristics of an area in which a person is traveling, and the likelihood of being stopped may be explained jointly by area and individual characteristics.”); Gelman, Fagan & Kiss, *supra* note 180, at 822 (identifying a set of stops best explained as racial incongruity stops).

²¹⁸ See, e.g., RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960s* 112–46 (2016) (discussing the effect, intent, and rise of vagrancy laws in the United States); Livingston, *supra* note 185, at 607–08.

²¹⁹ See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 578 (S.D.N.Y. 2013) (“[A]n officer's impression of whether a movement was ‘furtive’ may be affected by unconscious racial biases.”); Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 78–79 (2015) (finding that New York City Police Department officers very frequently and arbitrarily used the “furtive movement” justification for conducting a stop-and-frisk).

²²⁰ 405 U.S. 156 (1972).

²²¹ See BECKETT & HERBERT, *supra* note 153, at 64; Tracey L. Meares, *This Land Is My Land?*, 130 HARV. L. REV. 1877, 1897 (2017) (reviewing GOLUBOFF, *supra* note 218) (explaining that groups that were disfavored under vagrancy laws are still heavily controlled under proactive policing regimes).

²²² See Bell, *supra* note 22, at 2100–04 (on procedural injustice).

²²³ Interview by Mitchell Generette & Juliana Wittman with Richard Jones, in Balt., Md. (July 27, 2015). Throughout this Article, all names of interview participants are pseudonyms used to protect the confidentiality of these data.

housing project in Baltimore, and various towns in Baltimore County. He credits his survival thus far to his sports involvement: “The way I got here in Baltimore like, just still alive and stuff, is because I stayed in sports, and I’d meet people like that [who] was going to keep me going.” Richard had initially hoped to go to college on an athletic scholarship, but, unlike several of his friends, he was not recruited. As an alternative, he has decided to enter the military, which will give him an opportunity to go to college and create a more stable existence. His plan is to remain in the military for a time, long enough to retire, and then to pursue home construction and real estate. Indeed, he told our interviewer that when she was ready to purchase a home, she should contact him: “[W]hen I have my business . . . contact me and I[’ll] get you a good house. Because I’m going to build it for you and you can tell me what you want and I[’ll] try to make it reasonable, but I got you.”

Appropos of his long-term goals, one of Richard’s favorite pastimes is looking at houses, imagining himself owning and living in one, and dreaming of his post-military career. A few weeks before the interview, Richard saw that indulging his desire to see nice houses could be risky. According to Richard, he, his cousin, and a couple of close friends he calls “brothers” were taking a long walk home from one friend’s house to another. They were in an area where there isn’t public transportation, so they had to walk for hours and they took several breaks along the way:

It was just me and my brothers. We was just walking from our homeboy’s house cause we was just having fun. It was the summer-time, we was walking through a nice neighborhood ‘cause we never really saw that neighborhood, so we [were] looking around and then we [were] just sitting down cause we was tired cause we had a long walk.

One of the places they stopped to sightsee was a predominantly White residential neighborhood near a golf course. They really enjoyed seeing this neighborhood because it was very different from anything they had seen before. “We was just having fun like teenagers supposed to be, having fun, living life, not doing anything stupid That could have been our last day with each other, because you never know.” (Without emphasizing it, Richard underscored a fear of many of our respondents, that they might die an untimely death.) Richard and his friends were particularly impressed by the swimming pools. “They had pools and stuff! We didn’t know pools [were] out there. We didn’t know how nice it was. So, we was just looking around, just looking, just roaming the streets, just looking at everything.” Through the American racial lens, a group of curious young Black boys

strolling through this all-White neighborhood, gazing admiringly at the houses and yards, attracted suspicion.²²⁴ Eventually, someone called the police. “I guess one of the Neighborhood Watchers just said there [were] some kids goofing and I think they was invading private property.”

When the officer arrived, she was calm and pleasant, but the boys were terrified. As she approached, Richard was worried that his cousin, who was a bit younger than the other boys, might be afraid. So, he told him, “[J]ust stay calm. You with your big cousin. He got you. If they got to take me, I’ll tell them to take me, but keep you out.” The officer asked the boys if it was their first time in the area, and they explained that they were just looking at the houses. Richard told us that they were looking at the houses, “[b]ecause we want to be able to live like them.” Richard has lived a complicated life and is not naïve when it comes to the police. He likely knew that “just roaming the streets” in an unfamiliar neighborhood might invite curiosity and suspicion, and he may have known that their race meant he and his friends were more likely to evoke fear and official police involvement, not polite unofficial neighborly inquiry. But on a blissful adolescent summer day, he and his friends got to see a life they wanted up close. A concerned caller interrupted that moment and symbolically barricaded this wealthy, predominantly White neighborhood against Richard and his friends.

Border patrol is a general project of racial boundary maintenance. It often functions as a form of exclusionary social closure by Whites against Black and Brown people to protect White space—a project in which police have been central, but where private violence and suspicion have also played central roles.²²⁵ However, more broadly, border patrol functions to discourage cross-racial commingling and solidarity. Even Whites who are in areas that are predominantly Black or Brown (and thus perceived to be high in crime) may also evoke at least some excess suspicion.²²⁶ Research has also shown

²²⁴ See generally Fagan, *supra* note 217 (analyzing American police practices, the extent to which intensive surveillance of communities of color is part of those practices, and whether data supports their related characterization as “racial profiling”).

²²⁵ E.g., Addie C. Rolnick, *Defending White Space*, 40 *CARDOZO L. REV.* 1639 (2019) (examining the relationship between modern self-defense laws, residential segregation, and race).

²²⁶ See, e.g., Rod K. Brunson & Ronald Weitzer, *Police Relations with Black and White Youths in Different Urban Neighborhoods*, 44 *URB. AFF. REV.* 858, 866–67 (2009) (concluding that being in a racially mixed or predominantly Black neighborhood is one of three situations when White youth might have negative experiences with the police); Gelman, Fagan & Kiss, *supra* note 180, at 822; Meghan Stroshine, Geoffrey Alpert & Roger Dunham, *The Influence of “Working Rules” on Police Suspicion and Discretionary Decision Making*, 11 *POLICE Q.* 315, 323 (2008) (“Whites in Black neighborhoods are

that when youth hang out in multiracial groups, they may also evoke police suspicion.²²⁷

Racialized police deployment emanates in part from the shock of having to recognize people of color as equal parts of a White community. If there were fewer racially identifiable communities, this shock would have to dissipate over time. As Professor Elizabeth Anderson explains, racial segregation “marks off ‘black’ from ‘white’ neighborhoods” and thereby “provides the occasion for generalized suspicion of the presence of blacks in the ‘wrong’ neighborhood.”²²⁸ According to Anderson, “[s]uch racial profiling could not occur in integrated neighborhoods.”²²⁹ While it likely *could* still occur, if police officers and departments exercise their own discretion and foreground promotion of desegregation in their policies and practices, it would be significantly less likely.

C. Coordinating with Other Bureaucracies

Although much legal and criminological literature on policing treats it as a closed system, sociological research has shown deep official entanglements between police departments and other arms of the state, with police at times channeling people into, and at other times barring access to, other systems of social support or social control.²³⁰ Criminologists Lorraine Mazerolle and Janet Ransley have labeled this blurring of the civil-criminal distinction between police and other

either buying drugs, soliciting prostitutes, or lost.”). The policing and neighborhood context research draws inspiration from Werthman and Piliavin’s theory of “ecological contamination,” which predicts that police will suspect every person they encounter in a high-crime neighborhood as an offender or potential offender, even if their other characteristics would not be perceived as suspicious in other settings. The specific concept of ecological contamination is more micro-level, giving the example of someone who, by standing next to a friend that the police suspect is engaging in criminal activity, becomes suspicious, almost like guilt by association. Werthman & Piliavin, *supra* note 214, at 79 (“It is also possible to become a ‘suspicious person’ by *ecological contamination*. A boy who is standing near a friend who has landed in the situation of suspicion has a good chance of being drawn into the sample himself.”).

²²⁷ See, e.g., Brunson & Weitzer, *supra* note 226.

²²⁸ ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 42 (2010).

²²⁹ *Id.*

²³⁰ See, e.g., FORREST STUART, *DOWN, OUT, AND UNDER ARREST: POLICING AND EVERYDAY LIFE IN SKID ROW 37–77* (2016) (analyzing the historical and contemporary role that police and the criminal legal system have in social control and “poverty governance”); Monica C. Bell, *Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism*, 50 *LAW & SOC’Y REV.* 314, 335–38 (2016) (surveying anecdotal instances of mothers either relying on or avoiding police help based on the likelihood of related social programs or agencies becoming involved); Armando Lara-Millán, *Public Emergency Room Overcrowding in the Era of Mass Imprisonment*, 79 *AM. SOC. REV.* 866, 880–81 (2014) (analyzing the impact of incarceration on emergency room medical care staff triage decisions).

arms of the state “third-party policing,” and they characterize it as a major shift in policing philosophy and practice beginning in earnest during the 1990s.²³¹ What distinguishes third-party policing from border patrol is that the exclusionary function is a product of law (often municipal ordinances) or official agreements between the police and other agencies. This section shows that when police departments coordinate with other bureaucracies that manage access to housing and public space, their work can perpetuate residential segregation.

Historically, racially restrictive covenants and “sundown town” ordinances were avenues through which police were involved in official spatial exclusion.²³² Police were the enforcers of these private covenants and ordinances. Yet, in 1948, the Supreme Court in *Shelley v. Kraemer* unanimously barred private racially restrictive covenants, enforced by public actors, as a violation of the Equal Protection Clause.²³³ Thus, while there remain de facto sundown towns, the official endorsement of policing and spatial racial exclusion has evolved to become less explicit.

Matthew Desmond’s research has revealed how third-party policing sometimes leads to eviction.²³⁴ Nuisance property ordinances, or ordinances that penalize landlords if their tenants’ behavior elicits police involvement, are a mechanism through which local government facilitates rampant eviction of low-income Black women from housing.²³⁵ When a neighbor calls the police on another neighbor to report a fairly innocuous infraction, such as noisiness, or an incident in which the primary tenant is being victimized, such as intimate partner violence, it can set off a chain of events that leads to an eviction.²³⁶

²³¹ LORRAINE MAZEROLLE & JANET RANSLEY, *THIRD PARTY POLICING 2* (2005).

²³² See, e.g., LOEWEN, *supra* note 52, at 99–105. The state of Oregon took the most extreme approach to barring Black Americans from residence, banning them from the state altogether prior to official statehood and retaining the Black-exclusion clause as it became a state, and after its official repeal, instituting numerous laws designed to repel and disempower Black Americans, Native Americans, and Chinese Americans. See, e.g., Ralph James Mooney, *Remembering 1857*, 87 OR. L. REV. 731, 753–59, 780 (2008); see also Schindler, *supra* note 84, at 1987–88.

²³³ 334 U.S. 1 (1948).

²³⁴ Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117 (2012).

²³⁵ See Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1568 (2012) (referring to nuisance property ordinances as “the ‘new’ racially restrictive covenant”).

²³⁶ While Desmond has produced the most extensive empirical research on this process to date, a small amount of additional scholarship identified the problem as well, particularly for women who are survivors of intimate partner violence. See Gretchen Arnold & Megan Slusser, *Silencing Women’s Voices: Nuisance Property Laws and Battered Women*, 40 LAW & SOC. INQUIRY 908 (2015) (revealing how law enforcement policies

In poor, racially isolated neighborhoods, such as the neighborhoods Desmond studied in Milwaukee, the primary harm exacted is the focal family's loss of shelter. Yet, when third-party policing occurs in neighborhoods or suburbs that are predominantly White or racially mixed, it can exact an additional, collective harm of perpetuating segregation.

Professor Rahim Kurwa's sociological research in Los Angeles's Antelope Valley area illustrates this mechanism. Kurwa shows, based on ethnographic research and many interviews with White residents of a Los Angeles suburb, that the residents reported using a number of techniques to informally police Blacks—who they suspected were housing voucher holders, given the racial coding of housing vouchers²³⁷—including calling the police for border patrol.²³⁸ Kurwa also explains that the predominantly White and Latinx Los Angeles suburb of Lancaster adopted a nuisance ordinance to expel voucher holders from the area.²³⁹ In 2011, Public Counsel filed a suit to strike down the ordinance as a violation of several provisions of the FHA, the Equal Protection Clause, and corresponding California state law provisions. Their complaint quotes the mayor as asking the city council to adopt the ordinance in 2008 as “a means for making it very easy for neighbors to file nuisance lawsuits with the assistance of the city,” to fight against an encroaching Section 8 voucher-holder presence.²⁴⁰

According to the U.S. Department of Justice's investigation of the Los Angeles County Sheriff's Department's (LASD) policing in the Antelope Valley, LASD “devoted extensive resources to policing Antelope Valley participants of the Housing Choice Voucher Program” between 2004 and 2011.²⁴¹ This was in large part because of Whites' sense that their racial dominance in the region was threatened

related to nuisance property laws reinforce gender inequality); Cari Fais, Note, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181, 1184–95 (2008) (describing the then still-growing trend of adopting nuisance property ordinances).

²³⁷ Norrinda Brown Hayat, *Section 8 Is the New N-Word: Policing Integration in the Age of Black Mobility*, 51 WASH. U. J.L. & POL'Y 61, 70 (2016); Emily Badger, *How Section 8 Became a 'Racial Slur,'* WASH. POST (June 15, 2015, 7:53 AM), <https://www.washingtonpost.com/news/wonk/wp/2015/06/15/how-section-8-became-a-racial-slur>.

²³⁸ Rahim Kurwa, *Policing to Segregate: Sketching the Contours of an Eviction Regime in Suburban Los Angeles 13–14* (unpublished manuscript) (on file with author).

²³⁹ *Id.*

²⁴⁰ First Amended Complaint at 6 & n.16, 47–55, *Cmty. Action League v. City of Palmdale*, No. 11-CV-4817-ODW-VBK (C.D. Cal. Feb. 1, 2012), <http://www.publiccounsel.org/tools/assets/files/First-Amended-Complaint-FILED.pdf>.

²⁴¹ CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, *INVESTIGATION OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT STATIONS IN ANTELOPE VALLEY 2* (2013) [hereinafter *INVESTIGATION OF LASD*], <https://www.justice.gov/file/414701/download>.

because of increasing racial diversity.²⁴² In 1990, the region was seventy-nine percent non-Latinx White; by 2010, its population had massively increased and it was just under fifty percent White.²⁴³ Much of the change came from a growing Latinx population, but the Black population had also increased. Understanding voucher holding as a proxy for Blackness, White Antelope Valley residents deployed the county sheriff's department to expel and repel voucher holders, hoping to stave off "the creeping darkness."²⁴⁴

Rather than direct border patrol initiated by private citizens, as described in Section II.A, however, the LASD collaborated with political officials and other agencies in the Antelope Valley to do this exclusionary work in a coordinated fashion. The DOJ found that two Antelope Valley municipalities entered into Memoranda of Understanding with the county Housing Authority that included a provision for voucher fraud investigators. These investigators were all former LASD officers, all worked out of LASD offices, and all conducted business using LASD email addresses: In short, they functioned fully as sheriff's deputies but were tasked only with investigating potential voucher fraud.²⁴⁵ In addition, LASD deputies routinely accompanied Housing Authority officials to investigate whether a particular voucher holder was following the housing program's rules; checked parole, probation, and arrest records to gain information about voucher rule compliance; channeled voucher holders into criminal prosecution for violating voucher rules; and more.²⁴⁶ The entanglements between the Sheriff's Department and the Housing Authority were intensive and expansive—and they all aimed to perpetuate racial residential segregation.

It is difficult to know whether the segregationist policies of LASD are common or unusual. But we do know nuisance property ordinances like those in Milwaukee and Lancaster exist in roughly two thousand American municipalities.²⁴⁷ We know that they are common in many of America's largest (and most segregated) cities, including New York City, the nation's largest city and the heart of the nation's

²⁴² See Kurwa, *supra* note 238, at 8 (noting that almost half of all respondents surveyed used language referencing "invasion[s], threat[s], or racial change" and grossly overestimated the extent to which vouchers were used).

²⁴³ INVESTIGATION OF LASD, *supra* note 241, at 3.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 19–20.

²⁴⁶ *Id.*

²⁴⁷ PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA 138 (2017).

third-most Black-White separated metropolitan area.²⁴⁸ We also know that these ordinances arose as part of a racially tinged, multilevel governmental response during the 1980s and 1990s crack cocaine crisis.²⁴⁹ These ordinances draw inspiration from the federal “one-strike” law, adopted as part of the Anti-Drug Abuse Act of 1988,²⁵⁰ which licenses landlords to evict tenants if they, their household members, or their guests engage in drug-related crime, among other things, in or around their home.²⁵¹

Advocates have on occasion successfully fought these ordinances and their enforcement;²⁵² police can be effective advocates against them as well. Although police departments are tasked with enforcing the laws that municipal governments pass, they have considerable discretion in how they enforce these laws. Police leaders are also well-positioned to discourage passage of such ordinances and to advocate for their repeal. Police departments can also refuse to enter agreements to engage in this mode of spatial exclusion.

D. Constructing Jurisdiction

One way that policing constructs urban space is by the segmenting of police departments into districts, precincts, and service areas.²⁵³ Although scholars frequently describe the fact that policing varies across geographic space, including across police districts or pre-

²⁴⁸ Cf. SCOUT KATOVICH, MORE THAN A NUISANCE: THE OUTSIZED CONSEQUENCES OF NEW YORK’S NUISANCE ORDINANCES (2018), https://www.nyclu.org/sites/default/files/field_documents/nyclu_nuisancereport_20180809.pdf; LOGAN & STULTS, *supra* note 4, at 6.

²⁴⁹ See Desmond & Valdez, *supra* note 234, at 120 (noting nuisance ordinances began appearing in the 1980s to combat drug dealing); Mary B. Spector, *Crossing the Threshold: Examining the Abatement of Public Nuisances Within the Home*, 31 CONN. L. REV. 547, 561–64 (1999) (examining the rise of nuisance laws to control conduct within the home as part of the War on Drugs); Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 827, 848–50 (2015).

²⁵⁰ Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of 5, 21 U.S.C.); see Lisa Weil, Note, *Drug-Related Evictions in Public Housing: Congress’ Addiction to a Quick Fix*, 9 YALE L. & POL’Y REV. 161, 165 (1991).

²⁵¹ Kathryn V. Ramsey, *One-Strike 2.0: How Local Governments Are Distorting a Flawed Federal Eviction Law*, 65 UCLA L. REV. 1146, 1169–72 (2018).

²⁵² See, e.g., Verified First Amended Complaint at 2–4, *Briggs v. Borough of Norristown*, No. 2:13-cv-02191 (E.D. Pa. Apr. 29, 2013), <https://www.aclu.org/legal-document/briggs-v-borough-norristown-et-al-complaint>; Release and Settlement Agreement at 2–4, *Briggs v. Borough of Norristown*, No. 2:13-cv-02191 (E.D. Pa. Sept. 18, 2014), <https://www.aclu.org/legal-document/briggs-v-borough-norristown-et-al-release-and-settlement-agreement>.

²⁵³ See David A. Klinger, *Negotiating Order in Patrol Work: An Ecological Theory of Police Response to Deviance*, 35 CRIMINOLOGY 277, 286 (1997) (describing police officers as “cloistered in their respective patrol districts” which means that negotiation of practice rules differ by district); see also John MacDonald et al., *Race, Neighbourhood Context and Perceptions of Injustice by the Police in Cincinnati*, 44 URB. STUD. 2567, 2574 (2007).

cincts, the processes through which police districts and precincts are constructed are virtually absent from the literature in law, sociology, and criminology. This is true despite recognition even among police that how they behave and the policies they enforce vary by precinct.²⁵⁴

Professor Daanika Gordon, engaging in rich ethnographic and interview-based research, focused on the aftermath of a de-identified Midwestern police department's redistricting process, and sheds considerable light on how police departments sometimes construct districts, and how those districts may construct how police officers conduct their daily work.²⁵⁵ In Gordon's field site, the police department chose to reorganize the districts in ways that aligned with the city's preexisting racial boundaries. The official demarcation of districts in line with race and class in Gordon's field site coincided with substantive demarcation of districts by race, class, and its frequent proxy, crime, versus "service." The department's strategy relied on narratives that the race-class subjugated district was dealing with violent crime, while the wealthier and Whiter areas wanted police presence for service and to promote economic activity.²⁵⁶

This redistricting strategy, focusing on violence in the predominantly Black district and "service" or economic value in the predominantly White, wealthy area, was part of a reformist agenda to engage in more "community policing."²⁵⁷ According to Gordon, the chief declared that the redistricting would improve policing by "keeping coherent neighborhoods—with similar problems—together for a stable policing presence," and a city council member who represented a district with a large Black population supported this approach to redistricting "one hundred percent" because he believed it would be a "better way to tailor policing in these respective neighborhoods."²⁵⁸ At least in Gordon's case, it seemed to function more like an enforcement mechanism for harsh policing in the predominantly Black district, and for an uncritical client service model in the predominantly White district. Residents of the predominantly Black district also wanted police assistance in their economic development initiatives. However, police leadership and city officials treated policing only as a tool for violent crime response and prevention in that district, choosing to disregard countervailing narratives about the community's

²⁵⁴ E.g., Kimberly D. Hassell, *Variation in Police Patrol Practices: The Precinct as a Sub-Organizational Level of Analysis*, 30 *POLICING* 257, 266–71 (2007).

²⁵⁵ Daanika Gordon, *The Police as Place-Consolidators: The Organizational Amplification of Urban Inequality*, 45 *LAW & SOC. INQUIRY* 1 (2019).

²⁵⁶ *Id.* at 18–20.

²⁵⁷ *Id.* at 13–15, 18.

²⁵⁸ *Id.* at 10–11.

interests.²⁵⁹ The department dedicated more than ten percent of the officers assigned to the predominantly Black precinct to special units that added an additional layer of proactive policing focused on violence, gang activity, and drug crimes; these officers spent most of their time conducting stops throughout the precinct. There were no special units of any kind developed for the White precinct.²⁶⁰

In the context of segregation, community policing can appear to be a special arrangement for communities of color or a justification for a principle that different types of communities want fundamentally different services from the police. While this idea of respecting difference and context sounds appealing at first, racially distinctive approaches to policing have a tortured and conflicted legacy in American history.²⁶¹ In his testimony before the 1967 Kerner Commission, illustrious police scholar Al Reiss, Jr. analogized “[t]he slum police precinct” to “the slum schools,” concluding that both “get[], with few exceptions, the worst in the system.”²⁶² Sociologist William Westley, writing about police violence based on ethnographic research conducted in the 1960s and 1970s, reported that the police he observed believed Black people “respond only to fear and rough treatment.”²⁶³ Much later, in 2008, ethnographer Peter Moskos described Baltimore police officers’ banter about “ghetto” neighborhoods in Baltimore’s Eastern District, with both Black and White officers referring to the area as “a jungle,” proposing “to napalm the whole area. . . . [A]nd watch the whole thing go up in flames,” and dreaming of “just flood[ing] the place, biblical-like.”²⁶⁴ To be sure, some sort of non-essentialist cultural responsiveness might be desirable; however, there is no evidence that a jurisdictional strategy for policing differently by race produces cultural responsiveness. Layering

²⁵⁹ *Id.* at 20–22. Gordon’s finding here mirrors the work of sociologist Devon Magliozzi, who finds that in a wealthy, White municipality proximate to a predominantly Black part of another city, residents view themselves as “customers” who use police to protect their already advantaged social status. Devon Magliozzi, *Securing the Suburbs: How Elites Use Policing to Protect Their Advantages* (Dec. 2018) (unpublished Ph.D. dissertation, Stanford University) (on file with author). I engage this point further in Section II.F.

²⁶⁰ Gordon, *supra* note 255, at 19.

²⁶¹ Compare SARAH A. SEO, *POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM* 190 (2019) (quoting a 1940s police training manual telling officers to be “equally courteous to all”), with EGON BITTNER, *THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY* 10 (1970) (“As is well known, the preferred targets of special police concern are some ethnic and racial minorities, the poor living in urban slums, and young people in general. . . . [T]his kind of reasoning was basic to the very creation of the police . . .”).

²⁶² NAT’L ADVISORY COMM’N ON CIV. DISORDERS, *supra* note 156, at 307.

²⁶³ William A. Westley, *Violence and the Police*, 59 AM. J. SOC. 34, 40 (1953).

²⁶⁴ PETER MOSKOS, *COP IN THE HOOD: MY YEAR POLICING BALTIMORE’S EASTERN DISTRICT* 39–40 (2008).

police districts atop segregation merely reinforces the troubling policing strategies that seem inevitable in the context of segregation.

The limited literature on police districting suggests that the allocation of precincts and districts is most focused on effective operations management, such as equalizing officer work burden and smoothing police car allocation.²⁶⁵ Usually, police redistricting is conceptualized as a purely technical matter of operations, facilitated through proprietary algorithms.²⁶⁶ Yet, as a growing number of scholars have explained, algorithms in the criminal justice process writ large often simply internalize current social disparities, largely along race and class lines.²⁶⁷ Thus, a larger number of officers may be assigned to “high-crime,” predominantly Black or Latinx parts of cities, affecting both the statistical likelihood of crime detection and structuring the mental frameworks of the officers assigned to those areas.²⁶⁸ To be sure, in the era of “big data” and predictive, “hot spots” policing, algorithms also play an increasing role in police practices, even aside from district organization.²⁶⁹ Yet, the official demarcation of police areas often follows the contours of residential segregation. To date, there is

²⁶⁵ See Steven J. D’Amico et al., *A Simulated Annealing Approach to Police District Design*, 29 COMPUTERS & OPERATIONS RES. 667, 668–69 (2002); see also Victor Bucarey, Fernando Ordóñez & Enrique Bassaletti, *Shape and Balance in Police Districting*, in APPLICATIONS OF LOCATION ANALYSIS 329 (H.A. Eiselt & Vladimir Marianov eds., 2015) (noting police departments are familiar with the trade-off between aggregation and individualization of resources); Kevin M. Curtin, Karen Hayslett-McCall & Fang Qiu, *Determining Optimal Police Patrol Areas with Maximal Covering and Backup Covering Location Models*, 10 NETWORKS & SPATIAL ECON. 125 (2010); Yue Zhang & Donald E. Brown, *Police Patrol Districting Method and Simulation Evaluation Using Agent-Based Model & GIS*, 2 SECURITY INFORMATICS, no. 7, 2013, at 1. *But see* Samuel E. Bodily, *Police Sector Design Incorporating Preferences of Interest Groups for Equality and Efficiency*, 24 MGMT. SCI. 1301 (1978) (explaining that district boundaries could be manipulated based on interest groups’ concerns, such as equality).

²⁶⁶ See, e.g., M. Camacho-Collados & F. Liberatore, *A Decision Support System for Predictive Police Patrolling*, 75 DECISION SUPPORT SYSTEMS 25 (2015); Xu Chen & Tak-Shing Peter Yum, *Patrol Districting and Routing with Security Level Functions*, in 2010 IEEE INTERNATIONAL CONFERENCE ON SYSTEMS, MAN AND CYBERNETICS 3555 (2010); Arvind Verma et al., *Rationalizing Police Patrol Beats Using Voronoi Tessellations*, in 2010 IEEE INTERNATIONAL CONFERENCE ON INTELLIGENCE AND SECURITY INFORMATICS 165 (2010).

²⁶⁷ E.g., VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR* (2017); ANDREW GUTHRIE FERGUSON, *THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT* (2017); Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59 (2017); Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043 (2019); Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109 (2017).

²⁶⁸ See Evan Gerstmann, *Where Is Equal Protection? Applying Strict Scrutiny to Use of Race by Law Enforcement*, 29 HARV. J. RACIAL & ETHNIC JUST. 1, 6 (2013).

²⁶⁹ See Anthony A. Braga, Andrew V. Papachristos & David M. Hureau, *The Effects of Hot Spots Policing on Crime: An Updated Systematic Review and Meta-Analysis*, 31 JUST.

little discussion in the literature of how the police districting process could be used to fight segregation, in similar ways to those that have been attempted for school districts—either by de-centering the importance of neighborhood-level geography in school assignment (which might not make sense in a policing context) or by drawing boundaries that cross traditional boundaries of segregation.

Policing also constructs jurisdiction through less formal, discretionary demarcations, such as where officers patrol, how they are distributed across a jurisdiction, and how they create territorial barriers around suspects and crime scenes.²⁷⁰ Even in so-called progressive cities, like New York and San Francisco, police tend to be more heavily present in predominantly Black neighborhoods, a feature that police leaders claim is justified for drug law enforcement even though drug use is not more prevalent in Black communities than in White ones.²⁷¹ Moreover, police managers sometimes use assignment to particular precincts or beats as rewards or punishments, meaning that better-performing officers can get “easier” assignments in ostensibly lower-crime, often White neighborhoods.²⁷² Sometimes assignment is determined on the basis of seniority, meaning that less experienced officers—often with hotter heads and less ability to detect when a situation is actually dangerous—work in “less desirable” areas, which in many environments are the predominantly Black or Latinx neighborhoods that police perceive as more dangerous.²⁷³

E. Constructing Neighborhood Reputations

How police officers see places contributes to how homeseekers see places. Police policies and practices profoundly shape how parents see neighborhoods as places for themselves and for their children.

Q. 633 (2014); Sarah Brayne, *Big Data Surveillance: The Case of Policing*, 82 AM. SOC. REV. 977 (2017).

²⁷⁰ See Steve Herbert, *Territoriality and the Police*, 49 PROF. GEOGRAPHER 86 (1997) (analyzing how the Los Angeles Police Department governs the public through spatial parameters); Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1187–88 (2012) (describing the geographic deployment of the police).

²⁷¹ See, e.g., Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 7 J. EMPIRICAL LEGAL STUD. 591 (2010); Mona Lynch et al., *Policing the ‘Progressive’ City: The Racialized Geography of Drug Law Enforcement*, 17 THEORETICAL CRIMINOLOGY 335, 347 (2013).

²⁷² See, e.g., John Van Maanen, *Identity Work and Control in Occupational Communities*, in ORGANIZATIONAL CONTROL 111 (Sim B. Sitkin, Laura B. Cardinal & Katinka M. Bijlsma-Frankema eds., 2010).

²⁷³ See, e.g., MOSKOS, *supra* note 264, at 38; John A. Eterno, Arvind Verma & Eli B. Silverman, *Police Manipulations of Crime Reporting: Insiders’ Revelations*, 33 JUST. Q. 811, 818 (2016) (noting that more senior officers are likely able to obtain assignment in “more pleasant working environments”).

They do this in both direct and indirect ways, sometimes by exacting different crime control methodologies in different neighborhoods, and other times by becoming sources of information and advice about which neighborhoods, or parts of a neighborhood, are the best places to live. Place reputations emerge from collective social experiences and reflect social meanings; they are not just attributable to individual experiences or even accurate representations of daily life in a place.²⁷⁴ Policing, according to some research, can play an outsized role in helping to establish a neighborhood or suburb's reputation as high in crime or racist.

1. *As High-Crime*

We interviewed Sylvia, a thirty-year-old Black mother of two, in a pristine, freshly built affordable housing complex south of Dallas's Oak Cliff neighborhood.²⁷⁵ Especially because of the kids, Sylvia was eager to find a place that she could afford on her cashier's salary that was also safe and family-friendly. Having previously had difficult housing experiences—including an eviction and residence in an affordable housing complex in such poor condition that it had to be closed and renamed—she approached her most recent apartment search with great care. On other occasions, she had moved because of familial conflict or financial desperation; this was the first time she had embarked upon a purposeful housing search.²⁷⁶

Sylvia started by doing research through people she trusted, and she relied in particular on the advice of a few police officers she had gotten to know as frequent customers at the store where she worked. The officers told her that a previous place she had lived was unsafe, making reference to some of the calls they had received for service in that area. One officer told her that they were monitoring the area for human trafficking, which Sylvia found shocking. These warnings convinced Sylvia that it was time to move. However, she had to limit her search to official affordable housing complexes, given her precarious

²⁷⁴ See generally GARY ALAN FINE, *DIFFICULT REPUTATIONS: COLLECTIVE MEMORIES OF THE EVIL, INEPT, AND CONTROVERSIAL* 3 (2001) (“[R]eputations are collective representations enacted in relationships . . .”).

²⁷⁵ Interview by Stefanie DeLuca & Monica Bell with Sylvia in Dall., Tex. (July 11, 2013). This case is reconstructed from field notes, as the original audio recording was lost before transcription.

²⁷⁶ *Id.* A deliberate housing search is not only rare for Sylvia, but for many low-income homeseekers. Research shows that poor families tend to experience “reactive mobility,” primarily moving involuntarily in response to eviction, “unit failure” (such as caved-in ceilings, mold, and infestations), or threats of violence. Stefanie DeLuca, Holly Wood & Peter Rosenblatt, *Why Poor Families Move (and Where They Go): Reactive Mobility and Residential Decisions*, 18 *CITY & COMMUNITY* 556, 564–69 (2019).

financial situation. Sylvia learned about her current housing complex on the advice of her “police officer friends.” They told her that they did not receive many calls from there and encouraged her to move to the complex. Even though she had never heard of the complex before, she heeded their advice. When we interviewed Sylvia, she said that one of her favorite things about the apartment complex is that there are police officers actually living there, Black officers. To her, their presence makes the community feel especially safe.

In a way, Sylvia’s story is an example of “community policing” done right.²⁷⁷ She got to know police officers through repeated friendly contact. She came to trust them, and she seemed to project that trust upon police in general, not just the individual officers she had gotten to know.²⁷⁸ She was able to move her family to a safe and comfortable housing complex she could afford, where there are many neighborhood children, a place that would likely be better for her kids. Yet this story also reveals that police officers function as community experts, not just crime responders or preventers. Some officers, like Sylvia’s “police officer friends,” use this power to influence residential decisionmaking in positive ways. However, there are reasons to believe that this sort of guidance and information sharing is not uncommon, and that it might not always be used to produce outcomes like Sylvia’s.

Under the FHA, real estate professionals are prohibited from engaging in “racial steering”—or directing homeseekers toward neighborhoods based on race and proxies for race, including crime

²⁷⁷ Community policing is notoriously inconsistently defined and implemented. *E.g.*, BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 46–47 (2001) (characterizing community policing as prevention-oriented, involving the integration of officers into the community); Justin Hansford, *Community Policing Reconsidered: From Ferguson to Baltimore*, in POLICING THE PLANET: WHY THE POLICING CRISIS LED TO BLACK LIVES MATTER 215, 218–23 (Jordan T. Camp & Christina Heatherton eds., 2016) (analyzing the nuance of who comprises a “community” and what is “meant by policing.”); Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253, 1254 (2000) (“Because the community policing moniker has been assigned to so many different initiatives, no brief summary captures its nuanced approach . . .”). The DOJ’s Office of Community Oriented Policing Services (COPS) defines community policing as “a philosophy that promotes organizational strategies that support the systematic use of partnerships and problem-solving techniques to proactively address the immediate conditions that give rise to public safety issues such as crime, social disorder, and fear of crime.” COPS, U.S. DEP’T OF JUSTICE, COMMUNITY POLICING DEFINED 3 (2012), <https://cops.usdoj.gov/pdf/vets-to-cops/e030917193-cp-defined.pdf>.

²⁷⁸ *But see* Bell, *supra* note 230, at 326–29 (finding that Black mothers in another similar setting would develop positive trusting relationships with police officers in their communities, but they did not project that trust onto the institution of policing).

and school quality.²⁷⁹ In *Havens Realty Corp. v. Coleman*, the Supreme Court defined racial steering as a “practice by which real estate brokers and agents preserve . . . racial segregation . . . by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups.”²⁸⁰ Residential steering is not merely directing a homeseeker to live one place or another based on their race; it is also using soft cues and description of places to make a place seem more or less fitting for that homeseeker.²⁸¹ Any practice by a real estate professional that “in any way impedes, delays or discourages a prospective homebuyer from purchasing housing on a racial basis”²⁸² violates Section 3604 of the FHA.²⁸³ In this way, the FHA restricts the flow of certain types of racialized information from a real estate professional to a homeseeker.²⁸⁴

The problem with steering is that it impedes people’s free choice to decide where to live: Even if they technically *can* choose not to live in an area that reflects their racial group, the messages they receive from realtors suggest that they should. Even this restriction on cognitive choice violates the Act.²⁸⁵ But more broadly, the harm of steering is not only an individual’s loss of choice. Rather, the harm is the experience of living in a segregated community.²⁸⁶ Accordingly, an indi-

²⁷⁹ See Neil C. Bruce, *Real Estate Steering and the Fair Housing Act of 1968*, 12 TULSA L. REV. 758, 760–67 (1977).

²⁸⁰ 455 U.S. 363, 366 n.1 (1982).

²⁸¹ The most common mode of steering is “editorializing,” or giving robust and “gratuitous” commentary on a potential homeowner’s or renter’s residential choice and the characteristics of potential neighborhoods. Powell, *supra* note 84, at 612–14.

²⁸² *Zuch v. Hussey*, 366 F. Supp. 553, 557 (E.D. Mich. 1973).

²⁸³ 42 U.S.C. § 3604 (2012).

²⁸⁴ Adam M. Samaha & Lior Jacob Strahilevitz, *Don’t Ask, Must Tell—And Other Combinations*, 103 CALIF. L. REV. 919, 970–71 & n.236 (2015). See also Stephanie M. Stern, *A Social Norm Theory of Regulating Housing Speech Under the Fair Housing Act*, 84 MO. L. REV. 435, 436 (2019) (explaining that Section 3604 of the FHA is unexpectedly “robust”).

²⁸⁵ See *Zuch v. Hussey*, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975) (noting that the Act protects freedom of choice); see also Wilhelmina A. Leigh & James D. McGhee, *A Minority Perspective on Residential Racial Integration*, in HOUSING DESEGREGATION AND FEDERAL POLICY 31, 32 (John M. Goering ed., 1986).

²⁸⁶ See, e.g., *Gladstone v. Vill. of Bellwood*, 441 U.S. 91, 115 n.32 (1979) (noting that the complaints, related to racial steering, can be read as alleging loss of social and professional benefits as well as economic injury); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (concluding that landlord discrimination harms not only the “blacklist[ed]” individual but also “the whole community”); *S.-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868, 882 (7th Cir. 1991) (“The Fair Housing Act is concerned with both the furtherance of equal housing opportunity and the elimination of segregated housing.”); *Smith v. City of Cleveland Heights*, 760 F.2d 720, 722 (6th Cir. 1985) (recognizing the “stigmatic” harm of living in a community affected by racial steering); see

vidual need not show that she was personally steered into segregated housing in order to have standing to pursue a FHA claim, so long as the person resides in the segregated area at issue.²⁸⁷

One way real estate professionals can work around steering restrictions without violating the law is by referring homeseekers to other neighborhood authorities, and the police are a popular alternative information source.²⁸⁸ One real estate professional, writing for the influential *REALTOR Magazine* blog, suggests that one tactic real estate professionals can use to provide potential buyers with

also Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1687 n.93 (2001) (“[Courts] have defined the injury as the end result of these actions—segregation itself—which affects all members of the group, regardless of how the state has treated them or where they live.”).

²⁸⁷ See *Gladstone*, 441 U.S. at 111–13.

²⁸⁸ E.g., Mikita & Rocanova, *5 Questions Your Real Estate Agent Can't Legally Answer*, MIKITA & ROCCANOVA ATTORNEYS L. (Aug. 8, 2018), <https://www.mr-laws.com/5-questions-real-estate-agent-answer> (“Crime statistics can also be references to race, which is why they’re on the do-not-discuss list. But they’re also public record, so you can certainly look into crime statistics on your own. Visit local police departments or search online for crime reports instead.”); *When a Real Estate Agent’s Lips Are Sealed*, AMY HANK REAL EST. TEAM (May 8, 2018), <https://www.amyhank.com/2018/05/08/when-a-real-estate-agent-s-lips-are-sealed> (“We CAN’T tell you whether or not a neighborhood is ‘safe.’ We CAN direct you to the local police department or other resources for general crime statistics.”); John Dolgetta, *Legal Corner: Fair Housing Laws: ‘Steering’ Clear of Potential Violations*, REAL ESTATE IN-DEPTH (Sept. 2016), <http://www.realestateindepth.com/legal-advocacy/legal-corner-fair-housing-laws-steering-clear-of-potential-violations> (“When a client asks about crime in a certain area, the agent must recommend that the client go to the local police station or research other publicly available information or data.”); Deborah Madey, *Why Can’t Realtors Tell Me Which Areas Are Safer to Live in?*, TRULIA (Mar. 26, 2008), https://www.trulia.com/voices/Crime_and_Safety/Why_can_t_realtors_tell_me_which_areas_are_safer_t-27460 (“I do tell buyers to pick up the phone and call the local police dept. Ask them where the police blotter reports are published. Retrieve several back papers for those blotters, and review them. And, yes, I also direct buyers to visit websites and review data there.”); Kerri Rushing, *An Important Thing About Your New Home That Your Real Estate Agent Is Forbidden to Tell You*, GRAND REALTY SERVS. (Aug. 15, 2018), <https://grandrealtyservices.net/real-estate-blog/an-important-thing-about-your-new-home-that-your-real-estate-agent-is-forbidden-to-tell-you> (“[W]hen your question is met with silence, or you’re directed to the local police station or a website or two, please don’t think we’re brushing you off.”); Meghan Webber, *Questions to Not Ask Your Realtor*, LANSING ST. J. (Apr. 12, 2018), <https://www.lansingstatejournal.com/story/marketplace/real-estate/2018/04/12/questions-not-ask-your-realtor/510529002> (“Commenting on a neighborhood’s safety could be interpreted as a reference to race or class, so most REALTORS® will wisely choose to direct buyers to do their own research. To assess the overall safety of a neighborhood, you can visit the local police department for more information.”); *You Can Steer Boats and Cars – but Not Buyers*, FLA. REALTORS (Mar. 18, 2019), <https://www.floridarealtors.org/NewsAndEvents/article.cfm?id=378058> (“‘Is this a safe neighborhood?’ is a perfectly valid question for buyers to ask. But instead of answering, point buyers to the local police department for further information on area crime statistics.”).

neighborhood information while avoiding racial steering is to “direct them to the police.”²⁸⁹

Crime records are technically public, but crime data has only recently become easily accessible and usable to the public. Some police departments, especially those in large cities, regularly put crime data online and make it easy for interested residents to map crime data themselves, not requiring expertise in geographic information systems.²⁹⁰ For others, proprietary websites, such as CrimeReports.com, SpotCrime.com, NeighborhoodScout.com, and AreaVibes.com, make the same information available. Sometimes, they even add additional scores or grades.²⁹¹ This use of crime data might facilitate activity that violates the spirit, if not the letter, of fair housing law.²⁹²

Differences in how discretion plays out across segregated space means that crime statistics are not truly “objective”; crime statistics, especially about nonviolent crimes and simple assaults, may be just as much an artifact of local police policies and practices as they are of crime. Nonetheless, they may play an important role in residential decisionmaking.

To be sure, much more empirical research is needed on this potential nexus between real estate professionals, police departments, and crime data proprietors. What might be more important in constructing neighborhood reputations is the *indirect* role of policing in determining how neighborhoods are understood as “high-crime.” Crime certainly happens at different levels across different places, for a variety of reasons; to ignore actual differences in exposure to crime, especially violent crime, would not do justice to the experiences of people living in higher-crime areas and who, like everyone, yearn for safety and security.²⁹³ However, even considering differences in levels

²⁸⁹ Marcus A. Wally, *6 Ways to Avoid Illegal Steering*, REALTOR MAG. (Apr. 1, 2009), <http://realtormag.realtor.org/law-and-ethics/law/article/2009/04/6-ways-avoid-illegal-steering>.

²⁹⁰ See, e.g., Mark Burdon, *Privacy Invasive Geo-Mashups: Privacy 2.0 and the Limits of First Generation Information Privacy Laws*, 2010 U. ILL. J.L. TECH. & POL'Y 1, 15–17 (2010).

²⁹¹ For example, AreaVibes gives neighborhoods a “[l]ivability [s]core” and grades from A+ to F across seven dimensions, including amenities, cost of living, crime, education, employment, housing, and weather. *Methodology*, AREA VIBES, <https://www.areavibes.com/methodology> (last visited Feb. 18, 2020).

²⁹² Advocates have raised analogous concerns about online school ratings and fair housing law, given the close linkage between school ratings and racial segregation. See Kendra Yoshinaga & Anya Kamenetz, *Race, School Ratings and Real Estate: A ‘Legal Gray Area,’* NPR: NPRED (Oct. 10, 2016, 6:00 AM), <https://www.npr.org/sections/ed/2016/10/10/495944682/race-school-ratings-and-real-estate-a-legal-gray-area>.

²⁹³ See generally JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); MICHAEL JAVEN FORTNER, *BLACK SILENT*

of violence, police discretion matters for whether and how crime is detected and coded.²⁹⁴ Neighborhood characteristics coincide with the number of officers assigned to a precinct;²⁹⁵ the amount and nature of suspicion officers bring to observations and interactions;²⁹⁶ the presence of “special forces” such as narcotics units;²⁹⁷ the jurisdiction of extra layers of police, such as public housing police units or school police officers;²⁹⁸ the policing philosophies at work and the likelihood

MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT 7–9 (2015); Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703, 715–22 (2019).

²⁹⁴ See, e.g., MOSKOS, *supra* note 264, at 55–60 (recounting officers’ use of discretion in Baltimore); Sean P. Varano et al., *Constructing Crime: Neighborhood Characteristics and Police Recording Behavior*, 37 J. CRIM. JUST. 553 (2009).

²⁹⁵ E.g., Steven J. Briggs & Kelsey A. Keimig, *The Impact of Police Deployment on Racial Disparities in Discretionary Searches*, 7 RACE & JUST. 256, 258–59 (2017) (describing higher patrol concentrations in neighborhoods considered higher in crime); Hassell, *supra* note 254, at 264–66 (describing how the distribution of assigned patrol officers in one Midwestern city varies by the demographics of each precinct).

²⁹⁶ See, e.g., Joshua Correll et al., *Dangerous Enough: Moderating Racial Bias with Contextual Threat Cues*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 184, 184 (2011) (describing research showing that police perception of threat depends on neighborhood context); Olaoluwa Olusanya & Jacinta M. Gau, *Race, Neighborhood Context, and Risk Prediction*, 2 CRIM. JUST. STUDS. 159, 161 (2012) (arguing that neighborhood characteristics influence officers’ risk perception). Lay assessments of whether a neighborhood was high-crime may just be code for the neighborhood’s racial composition. E.g., Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows,”* 67 SOC. PSYCHOL. Q. 319 (2004). Police make related errors, calling places high-crime that are not especially high in crime. Fagan & Geller, *supra* note 219, at 79–80 (finding that a stop in the lowest-crime quintile of New York City was as likely to be identified as a high-crime area as one in the highest-crime quintile); Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CALIF. L. REV. 345, 383–94 (2019) (finding that, across multiple measures of crime, actual crime rates do not predict whether an area will be identified as high-crime); see also Andrew Guthrie Ferguson & Damien Bernache, *The “High-Crime Area” Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587 (2008). The Supreme Court has at least partly endorsed the use of place as a factor in determining the reasonableness of individualized suspicion. See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (ruling that, even if a suspect’s presence in a high-crime area is not enough on its own to support reasonable suspicion, “officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation”). To be sure, the underlying facts meant that the Court was speaking of a crime hotspot, not an entire neighborhood. See *id.* (describing the place at issue as “an area known for heavy narcotics trafficking”).

²⁹⁷ E.g., Robert M. Lombardo & David E. Olson, *Organizational Approaches to Drug Law Enforcement by Local Police Departments in the United States: Specialized Drug Units and Participation in Multi-Agency Drug Task Forces*, 11 JUST. RES. & POL’Y 45, 48–50, 58–59, 67 (2009) (finding that neighborhoods with a larger White population and with more owner-occupied housing were less likely to be assigned a drug unit).

²⁹⁸ See, e.g., NICHOLAS DAGEN BLOOM, *PUBLIC HOUSING THAT WORKED: NEW YORK IN THE TWENTIETH CENTURY* 189–92, 263–64 (2008) (discussing the origins and demise of the New York City Housing Police); Alexis Karteron, *Arrested Development: Rethinking*

of encountering proactive crime investigation;²⁹⁹ the level of force police are likely to use;³⁰⁰ whether and how much officers expect that people in the community will cooperate with them;³⁰¹ and the types of issues police officers think it is important to prioritize.³⁰² Police departments do not engage in “broken windows” policing³⁰³ in wealthy white neighborhoods, even if the neighborhood youths are doing more than breaking windows: race and class facilitate leniency and second chances.³⁰⁴ Kids who authorities expect to have bright futures commit crimes that are not reported; kids who authorities “de-futurize[]” are arrested, prosecuted, and sentenced.³⁰⁵ When kids get into fisticuffs in wealthy schools and school districts, teachers and counselors respond and parents retain authority.³⁰⁶ In West Baltimore and other “ghettoes,” police respond; they use mace; they arrest; they report the simplest of simple assault, and parents have little say in the outcome.³⁰⁷

Fourth Amendment Standards for Seizures and Uses of Force in Schools, 18 NEV. L.J. 863, 872–77 (2018) (describing the increasing role of law enforcement in public schools).

²⁹⁹ E.g., SCOTT JACQUES & RICHARD WRIGHT, *CODE OF THE SUBURB: INSIDE THE WORLD OF YOUNG MIDDLE-CLASS DRUG DEALERS* 66, 148–51 (2015) (showing that urban teens who sell drugs are far more likely to be investigated and arrested than suburban teens who do the same); Fagan, Davies & Carlis, *supra* note 177, at 701–03, 713–17 (finding increased trespass enforcement in public housing compared to surrounding areas and differential enforcement across public housing sites).

³⁰⁰ Terrill & Reisig, *supra* note 177, at 306 (finding that police officers are more likely to use higher levels of force in disadvantaged neighborhoods).

³⁰¹ John A. Shjarback, Justin Nix & Scott E. Wolfe, *The Ecological Structuring of Police Officers’ Perceptions of Citizen Cooperation*, 64 CRIME & DELINQ. 1143, 1156 (2018) (finding that officers working in disadvantaged neighborhoods were less likely to expect cooperation from citizens).

³⁰² E.g., Gordon, *supra* note 255.

³⁰³ See Sampson & Raudenbush, *supra* note 296.

³⁰⁴ See JACQUES & WRIGHT, *supra* note 299, at 150.

³⁰⁵ GONZALEZ VAN CLEVE, *supra* note 192, at 101–02.

³⁰⁶ See David M. Ramey, *The Social Structure of Criminalized and Medicalized School Discipline*, 88 SOC. EDUC. 181, 186–87 (2015).

³⁰⁷ *Id.*; see also MONIQUE W. MORRIS, *PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS* 21 (2016) (describing the high rate of arrests of Black girls for “person offenses” such as assault); VICTOR M. RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* 82–83 (2011) (describing school and criminal legal authorities’ marginalization of Black and Latinx parents); Tia Stevens, Merry Morash & Meda Chesney-Lind, *Are Girls Getting Tougher, or Are We Tougher on Girls? Probability of Arrest and Juvenile Court Oversight in 1980 and 2000*, 28 JUST. Q. 719 (2011) (documenting an increase in arrests of girls for simple assault, with disproportionate effects on Black girls).

2. *As Racist*

Historically, police harassment maintained all-White “sundown towns,” where Black people were not allowed to live;³⁰⁸ the border patrol functions described in Section II.B unsettlingly mirror the sundown town dynamic. Police have helped to maintain segregated schools and communities by looking the other way—or even participating—when Whites have violently resisted integration.³⁰⁹ Given that the police may use violent force under the aegis of the state,³¹⁰ Whites who sought to maintain residential segregation could use sympathetic officers to their ends.

Because police departments are highly locally governed and organized,³¹¹ they often function very differently across relatively small geographic spaces. Professor Geoff Ward calls the environments created by present racial violence and the legacy of past racial violence “microclimates of racial meaning,”³¹² propelled through numerous mechanisms, including persistent structural inequality.³¹³ Historical racial violence, including police violence, helps to create these racialized microclimates in ways that scholars are increasingly

³⁰⁸ LOEWEN, *supra* note 52, at 3–4, 193, 234–36, 241–42, 342.

³⁰⁹ See, e.g., BELL, *supra* note 140, at 43; see also MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 408–42 (2004) (describing the politics and practices of massive resistance and racial violence in response to *Brown* and civil rights advocacy); LOEWEN, *supra* note 52, at 92–99, 270–75 (describing a widespread pattern of riots and lynchings used to drive Black people out of “sundown towns” between 1890 and 1930, with violence continuing into the late twentieth century); MASSEY & DENTON, *supra* note 3, at 33–38 (describing White violence as both a tool that pushed Black people into “the ghetto” during the early twentieth century and as a persistent strategy for maintaining racialized enclaves); Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence*, 51 HARV. C.R.-C.L. L. REV. 159, 170 (2016) (explaining that segregation concentrates Black people in heavily policed neighborhoods and makes their presence outside those neighborhoods seem unusual, doubly exposing them to police violence). For the classic account of White violence in the wake of Black population growth, see DRAKE & CAYTON, *supra* note 91, at 178–79.

³¹⁰ Cf. Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78 (H.H. Gerth & C. Wright Mills eds. & trans., 1946) (describing the state as having a “monopoly of the legitimate use of physical force”).

³¹¹ E.g., Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 877 (2015); Noah M. Kazis, *Special Districts, Sovereignty, and the Structure of Local Police Services*, 48 URB. LAW. 417 (2016) (discussing the importance of policing for local government sovereignty); Stephen D. Mastrofski & James J. Willis, *Police Organization Continuity and Change: Into the Twenty-First Century*, 39 CRIME & JUST. 55, 58–68 (2010) (describing the persistent decentralization and fragmentation of American policing); Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 59–60 (2019) (questioning the extent to which police decisions should continue to be made locally).

³¹² Ward, *supra* note 78, at 603.

³¹³ *Id.* at 606–11.

able to trace but only beginning to uncover.³¹⁴ Laypeople are often aware of these micro-level distinctions between policing histories and current practices across place, and they sometimes structure their residential preferences and “neighborhood frames” based on the amount of racial profiling or racial violence they expect.³¹⁵ It is only logical that people would avoid neighborhoods that have reputations for police racism, regardless of whether they personally experienced that racism, even if the police were just perceived to be part of a larger racist agenda, and regardless of the specific details or context of the violence.

Consider Ray, a thirty-four-year-old Black father of two I interviewed in Dallas, Texas, in 2013. A chronic disease sufferer who has survived many serious health crises, Ray exudes warmth and gratitude, consistently optimistic in the face of adversity. Thus, when Ray described his experiences of racism, he did so with a tinge of consternation. When Ray described most of the neighborhoods around Dallas where he would not want to live, the reason was that they were “area[s] that still need[] to be fixed up.”³¹⁶ However, he ruled out Mesquite, Texas, a large Dallas suburb, “because there’s still a lot of racism going on.”³¹⁷ Among other incidents, Ray reported that many years ago, he came across a Ku Klux Klan gathering while driving through Mesquite. “That kind of messed my head up because I’m like that’s still going on?” Ray recounted, still shocked even though he believed the incident had taken place in 2003 or 2004, a decade before our interview.³¹⁸ Most of the racist incidents Ray described involved private actors, not the police. However, he believed the police were in on the racism too: “The thing about [that] is, there was a police car right there, so who knows if a police officer”³¹⁹ Ray trailed off and chuckled in bewilderment. Ray saw Mesquite as a place to avoid, both for living and now even for visiting.

³¹⁴ E.g., Rachel M. Durso & David Jacobs, *The Determinants of the Number of White Supremacist Groups: A Pooled Time-Series Analysis*, 60 SOC. PROBS. 128 (2013); Ryan D. King, Steven F. Messner & Robert D. Baller, *Contemporary Hate Crimes, Law Enforcement, and the Legacy of Racial Violence*, 74 AM. SOC. REV. 291 (2009); Geoff Ward, *Living Histories of White Supremacist Policing: Towards Transformative Justice*, 15 DU BOIS REV. 167 (2018).

³¹⁵ Monica C. Bell, *Located Institutions: Neighborhood Frames, Residential Preferences, and the Case of Policing*, 125 AM. J. SOC. 917, 918 (2020); see also ANDERSON, *supra* note 228, at 42 (“Racial profiling in turn reinforces racial segregation, by deterring blacks from entering neighborhoods where they fear police harassment.”).

³¹⁶ Interview with Ray (July 24, 2013).

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

It is certainly believable that Ray came across a Klan rally in the area. In January 2019, mysterious recruitment fliers for the Texas Rebel Knights of the Ku Klux Klan were dropped at numerous homes in Wolfe City, Texas, a small town only about an hour's drive north of Mesquite.³²⁰ In the late 1980s, when Ray was a young boy, the Klan marched on Dallas City Hall to actively protest the use of affirmative action in the hiring of Dallas police officers; according to reports, police officers appeared to surround the Klan in order to protect them from anti-Klan protesters.³²¹ The bizarre, unprovoked police killings of Botham Jean in Dallas,³²² Jordan Edwards in Balch Springs, an inner-ring Dallas suburb,³²³ and Atatiana Jefferson in Fort Worth,³²⁴ underscore concerns about police disregard for Black life.³²⁵ Although it is true that police officers at the Klan rally might have been tasked with keeping the peace, Ray reasonably suspected that they were participating in the rally and shared the views of the Klan. Ray exhibited a common framing, one in which policing and private racism are inextricably bound together. Even if racist policing is simply a byproduct of abundant private racism in an area, racist policing reinforces the idea that the community as a unified whole is racist, and that people of color will have no recourse there.

Jenifer, a twenty-four-year-old Latina mother of three, and her husband, who works in the contracting business, embarked upon a careful and extensive home search when they decided to move from an affordable housing complex on Dallas' whiter, wealthier North Side to the Fort Worth suburbs.³²⁶ They saw one of their favorite houses in Mansfield, Texas, a predominantly White suburb that has

³²⁰ Brad Kellar, *Investigation into KKK Fliers in Wolfe City Underway*, HERALD-BANNER (Jan. 3, 2019), https://www.heraldbanner.com/news/investigation-into-kkk-fliers-in-wolfe-city-underway/article_aa661682-0f07-11e9-829a-d38b1245ecbf.html ("The posting of such fliers is relatively rare in Hunt County, especially in the Wolfe City area, but it is unfortunately not unique.").

³²¹ *Angry Crowd Disrupts Rally by Ku Klux Klan in Dallas*, N.Y. TIMES, Feb. 28, 1988, at 25.

³²² Amy Harmon, *Her Son Was Careful to Avoid Police Officers. Then He Was Killed by One.*, N.Y. TIMES (Sept. 21, 2018), <https://www.nytimes.com/2018/09/21/us/botham-jean-mother-dallas-police-shooting.html>.

³²³ Adeel Hassan, *Former Texas Police Officer Found Guilty of Killing 15-Year-Old Jordan Edwards*, N.Y. TIMES (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/us/roy-oliver-guilty-jordan-edwards.html>.

³²⁴ Marina Trahan Martinez, Nicholas Bogel-Burroughs & Sarah Mervosh, *Fort Worth Officer Charged with Murder for Shooting Woman in Her Home*, N.Y. TIMES (Oct. 14, 2019), <https://www.nytimes.com/2019/10/14/us/fort-worth-police-officer-charged-murder.html>.

³²⁵ It is noteworthy that all of these recent Dallas-area killings occurred well after my interviews with Ray.

³²⁶ Interview with Jenifer (July 15, 2013); Interview with Jenifer (June 17, 2014).

been listed on *Money* magazine's annual list of "Best Places to Live" for its "friendly feel" and "high-rated schools."³²⁷ Jenifer loved the neighborhood and was ready to move her family from Dallas to Mansfield, but while asking around about the suburb, she heard information that made her uncomfortable. "[T]hey said that Mansfield police were like, you know, pretty tough. . . . [A]nd when I mean tough, I mean kind of like racist." "Mm," I replied. "So we didn't want it," she said.³²⁸

Jenifer's sister was also on the market for a home in roughly the same timeframe, and her realtor also showed her a home in Mansfield. "And then my sister . . . —they took her to see a house over there[.] . . . [Her partner] had . . . a coworker that lives around there. He's like, 'Yeah man,' he's like, 'At night, . . . if you're going to drive, you better—don't get out of the line, because [the police] will find any excuse" According to Jenifer, her sister was dismayed by this rumor. "[S]he was telling me that she really liked it but she's like, 'I—no.' She's like, 'You know, we don't want to get pulled over just for being Hispanic or that stereotype thing, you know?'"

Of course, there is no good way to corroborate Jenifer's claims about Mansfield police behavior without an investigation specific to this suburb, nor is there a way to return to 2003 and find out exactly what the presence of a police car at the Mesquite Klan rally actually meant. But collective and individual memories, including memories of racial violence and injustice, are not always based on complete information. The value of memories is not so much in their accuracy as in their function as lenses through which people interpret the world, lenses that guide future action.³²⁹ One challenge of police reform is that, regardless of the facts of an event, the memory of the event is what matters for how communities will adapt to it in the future.³³⁰ Police officials may complain that their actions are assumed to be racist, or that one bad incident makes everyone believe police, generally, are racist. But this is precisely the difficulty police have the responsibility to navigate: Regardless of whether they behave in a procedurally just fashion today, they are policing in the context of "microclimates" of racial violence with enduring impacts. Those

³²⁷ Turner Cowles, *Mansfield, Texas*, MONEY MAG.: BEST PLACES TO LIVE 2014 (Sept. 19, 2014), <http://time.com/money/collection-post/3312326/mansfield-texas-best-places-to-live>.

³²⁸ Interview with Jenifer (June 17, 2014), *supra* note 326.

³²⁹ See, e.g., Asher Koriat, Morris Goldsmith & Ainat Pansky, *Toward a Psychology of Memory Accuracy*, 51 ANN. REV. PSYCHOL. 481, 523 (2000).

³³⁰ For a primer on processes of collective social memory, see, for example, Jeffrey K. Olick & Joyce Robbins, *Social Memory Studies: From "Collective Memory" to the Historical Sociology of Mnemonic Practices*, 24 ANN. REV. SOC. 105 (1998).

microclimates harden into reputations for harsh policing that drive away people of color and reinforce segregation.

Sociological research suggests that Latinx undocumented migrants may restrict their housing choices based on expectations of racial profiling and racially biased policing in predominantly White neighborhoods. For example, Professors Asad L. Asad and Eva Rosen find, based on interviews with Latinx undocumented migrants who also live in Dallas, that although most migrants say their ideal neighborhoods would be predominantly White Dallas suburbs such as Irving, Plano, or Farmers Branch, their immigration status and ethnicity put those places off-limits.³³¹

Respondents believed that the baseline profiling that would occur would be based on the detectability of their Latinx background. Asad and Rosen tell the story of Selena, a Mexican immigrant who said that she would ideally want to move to Irving, Texas. However, Selena “viewed residence in Irving as impossible given rumours that law enforcement will stop all Hispanics—U.S.-born citizens and otherwise—in these areas to verify their legal status.”³³² Selena made specific reference to attempted changes in the law in Farmers Branch, which she viewed as an effort both to repel undocumented families, but also “Hispanics” writ large, regardless of their legal status.³³³ In 2006, 2007, and 2008, the Farmers Branch City Council passed local ordinances that effectively prohibited landlords from renting homes to undocumented migrants.³³⁴ (After a successful legal challenge, the statute was never enforced.)³³⁵ In addition to the rental ordinances, the city council also passed a largely ceremonial ordinance establishing English as the city’s official language.³³⁶ Selena believed that these suburbs’ police departments were operating in a racist way, even though she never visited those places. Rumors of racial profiling can mark otherwise appealing suburbs as uninhabitable for some Latinx

³³¹ Asad L. Asad & Eva Rosen, *Hiding Within Racial Hierarchies: How Undocumented Immigrants Make Residential Decisions in an American City*, 45 J. ETHNIC & MIGRATION STUD. 1857 (2019).

³³² *Id.* at 1867.

³³³ *Id.*

³³⁴ *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835, 839–41 (N.D. Tex. 2010).

³³⁵ See *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524 (5th Cir. 2013); see also Dianne Solís, *Supreme Court Refuses Farmers Branch Immigration Ordinance*, DALL. MORNING NEWS (Mar. 4, 2014), <https://www.dallasnews.com/news/2014/03/04/supreme-court-refuses-farmers-branch-immigration-ordinance>.

³³⁶ *Villas at Parkside Partners*, 701 F. Supp. 2d at 840.

families, including native-born U.S. citizens, even before they officially embark on a housing search.³³⁷

F. *Distributing Racialized Economic Value*

Finally, policing can reinforce segregation by operating as an attractive and possibly exclusionary amenity for Whites by protecting their racial and economic value.³³⁸ Professor Lior Strahilevitz has written of exclusionary amenities in White, wealthy neighborhoods, identifying the burst of construction of neighborhoods around golf courses that required membership in a golf league, largely during the 1990s, as a mode of reinforcing and exacerbating racial residential segregation.³³⁹ Golf, in Strahilevitz's estimation, functioned as a proxy for race.³⁴⁰ Policing can occupy a similar role in the real estate market as these golf courses, signaling to the right (White) people that they belong in a particular community, while functionally repelling Black and Latinx potential residents.³⁴¹ The mechanism highlighted in this section focuses on the value of racial exclusion and the increased economic value Whites experience through pro-segregation policing. Affluent seekers of noncriminal police services are not unlike the "lower classes" who depend heavily on the police, described in a landmark account by policing scholar Al Reiss nearly fifty years ago.³⁴² But, in an odd reversal of the scenario he described, higher-income people who tend not to use police officers to enforce the law are using them for service *instead of* safety, not necessarily in combination with other, more traditionally celebrated policing objectives.

Interview data from Cuyahoga County, Ohio, illustrate some of these dynamics. In data collected as part of the How Parents House Kids study, thirteen respondents identified the police department of Lakewood, Ohio, an inner-ring suburb of Cleveland that was about ninety percent White in 2010, as a department notable for its intensity. Some non-White respondents who mentioned the Lakewood Police

³³⁷ Cf. MARIA KRYSAN & KYLE CROWDER, *CYCLE OF SEGREGATION: SOCIAL PROCESSES AND RESIDENTIAL STRATIFICATION* (2017) (on heuristics that limit the housing search); Amada Armenta & Rocío Rosales, *Beyond the Fear of Deportation: Understanding Unauthorized Immigrants' Ambivalence Toward the Police*, 63 AM. BEHAV. SCI. 1350 (2019) (describing ambivalence among undocumented migrants about American police).

³³⁸ Cf. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1724–45 (1993) (describing the central features of the property value in Whiteness).

³³⁹ Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437 (2006).

³⁴⁰ *Id.* at 465.

³⁴¹ See Bell, *supra* note 315, at 936–41 (describing amenities that serve to attract wealthy residents and exclude others).

³⁴² See ALBERT J. REISS, JR., *THE POLICE AND THE PUBLIC* 63–64 (1971).

said the department was a reason to avoid the suburb. (This may not be a coincidence, given that the City of Lakewood was facing a major, heavily reported racial profiling lawsuit during the research period, which eventually culminated in a half-million-dollar settlement.)³⁴³ However, most of the White respondents who spoke about Lakewood policing described it in glowing terms. For example, Ann and Ron, a wealthy White couple, said the police were one of the main attractions of Lakewood, mentioning the police after rattling off community amenities they enjoyed such as the suburb's walkability, bike paths, and fun events.³⁴⁴ "[T]he police are amazing," Ann gushed. "Our taxes go to great use." In a later conversation, Ron praised their visibility: "You see . . . 'em driving, patrolling, doing their job. That's nice."³⁴⁵

Several other White residents of Lakewood viewed the suburb as especially appealing because of the police department. Sally, a low-income mother of two, looked for the cheapest rent she and her husband could in Lakewood. "I wanted to stay in Lakewood because of the school systems and because of the emergency response systems. . . . The police, the fire department," she explained. She highlighted the speedy response of Lakewood officers: "If you need somebody the response time for a cop is on average around here five minutes."³⁴⁶ We asked forty-year-old Suzy, "What makes a community a good community to you?" She replied, "[S]afety[—]that's very important." She continued, "As long as they are not cutting back on police officers—and that's something I've seen a lot—they have done a good job in Lakewood." Like Ron, she was pleased with their visibility: "[Y]ou see a lot of police officers always circling around. They are just visible, which is important."³⁴⁷ Joe, a fifty-two-year-old male,

³⁴³ The City of Lakewood recently paid more than \$500,000 to settle a suit alleging that Lakewood Police officers harassed Black tenants of a transitional housing facility for youth coming out of foster care or juvenile detention on the basis of race. Bruce Geiselman, *Lakewood Pays \$507,500 to Settle Hidden Village Racial Discrimination Lawsuit*, CLEVELAND.COM (Oct. 7, 2014), https://www.cleveland.com/lakewood/2014/10/lakewood_pays_507500_to_settle.html. Plaintiffs claimed that the alleged harassment began in response to police department memoranda. *Hidden Vill., LLC v. City of Lakewood*, 734 F.3d 519, 526 (6th Cir. 2013) (affirming the district court's denial of summary judgment in favor of defendants) ("The record suggests that city officials repeatedly singled out the Youth Re-Entry Program for unfavorable treatment. A police department memo, for example, instructs officers to target program members for arrests.").

³⁴⁴ Interview by Beth Schueler with Ann & Ron (Aug. 7, 2013).

³⁴⁵ Interview by Anna Rhodes & Sarah Jabour with Ann & Ron (June 22, 2014).

³⁴⁶ Interview by Sarah Jabour & Liz Gomez with Sally (June 28, 2014).

³⁴⁷ Interview by Kathryn Reed with Suzy (June 26, 2013).

simply called the department “super,” applauding the officers’ response speed.³⁴⁸

The Lakewood model of generalized heavy police presence works because Lakewood is a well-resourced suburb that is jurisdictionally separate from Cleveland, a financially distressed, predominantly Black city.³⁴⁹ However, police departments in cities find other ways of distributing extra economic value to wealthier and Whiter neighborhoods. As noted in Section II.D, the police in the diverse city Daanika Gordon studied protected the economic value of predominantly White areas by setting different priorities there, responding quickly to concerns in the Whiter residential area in order to retain them as residents, protecting their tax base, and cultivating greater investment in downtown commercial areas by being very visibly present, which appeals to tourists and investors.³⁵⁰

In Dallas, Texas, the Police Department distributes additional economic value to whiter, wealthier places through its “Expanded Neighborhood Patrol” or “Extended Neighborhood Patrol” (ENP) public-private partnership.³⁵¹ Authorized by the Dallas City Council in 1991, ENP allows neighborhood associations to pay the Dallas Police Department large fees to procure specialized community policing.³⁵² Under the program, sworn Dallas officers who are off duty spend overtime hours in specific neighborhoods that pay for the privilege of greater protection and for a relationship with their assigned officer.³⁵³ Aside from patrol hours, the greatest benefits of ENP are the extra services and special attention neighborhood residents get from their assigned officers. ENP officers check on residents’ homes

³⁴⁸ Interview by Beth Schueler with Joe (Aug. 6, 2013).

³⁴⁹ See Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1164 (2014); see also Magliozzi, *supra* note 259 (manuscript at 73–78) (describing a similar dynamic in Piedmont, California).

³⁵⁰ Gordon, *supra* note 255, at 14–17.

³⁵¹ See DALL. CRIME WATCH EXEC. BD., DALLAS CRIME WATCH RESOURCE PACKAGE, at II.C. (2013), <http://www.dallaspolice.net/divisions/Shared%20Documents/DallasCrimeWatchResourcePackage.pdf>.

³⁵² E.g., Sherry Jacobson, *18 Neighborhoods Hire Extra Police; Critics Say City Subsidizing Wealthy, Question Effectiveness*, DALL. MORNING NEWS, Jan. 17, 1993, at 1A; Naomi Martin, *As More Dallas Neighborhoods Pay for Extra Patrols, Some Question Fairness*, DALL. MORNING NEWS (Oct. 25, 2015, 11:51 PM), <https://www.dallasnews.com/news/crime/2015/10/25/as-more-dallas-neighborhoods-pay-for-extra-patrols-some-question-fairness>. Neighborhood demand for the program is apparently on the rise. See *Dallas PD Set to Make Changes to Off-Duty Patrol Program*, FOX4 NEWS (July 17, 2019), <http://www.fox4news.com/news/dallas-pd-set-to-make-changes-to-off-duty-patrol-program>.

³⁵³ See, e.g., Naheed Rajwani & Kylie Madry, *Neighborhoods Hire Cops to Pick up Slack for a Dallas Police Force ‘Stretched Thin.’*, DALL. MORNING NEWS (June 30, 2017, 3:18 PM), <https://www.dallasnews.com/news/dallas-police/2017/06/30/neighborhoods-hire-cops-pick-slack-dallas-police-force-stretched-thin>.

when they are away on vacation; respond to 911 calls “within seconds” when they are on duty instead of sending callers through the regular system; “become experts on [their] neighborhood, able to recognize suspicious activity”; and, at residents’ request, will conduct a home security audit.³⁵⁴ One neighborhood association even offers teen curfew enforcement and security provision at the neighborhood elementary school.³⁵⁵ Officers are assigned to a specific neighborhood over a long period of time, essentially walking and driving a beat. Often, the discourse of community policing proceeds as if its main ostensible benefits run toward high-poverty, predominantly Black or Latinx neighborhoods.³⁵⁶ In Dallas, however, “community policing” is found most consistently in low-poverty, low-crime neighborhoods, especially those in affluent, predominantly White north central Dallas neighborhoods.³⁵⁷

Anna, a thirty-seven-year-old mother who lived in one of Dallas’ wealthiest neighborhoods, was particularly pleased with Expanded Neighborhood Patrol.³⁵⁸ “[T]hey have like an extended patrol . . . , like you chip in, and we have a police car. A lot of them are parked right behind my house right there . . . , so it kind of makes you feel good. [It] [m]akes me feel good when I pull in because the alley’s not . . . you know that can make you feel a little vulnerable.”³⁵⁹ Anna was referring to an alleyway behind her home. I asked Anna who pays for the patrols. She explained that “here, our neighborhood does or whoever wants to donate money to the fund pays for it. And . . . I think they’re asking for some money to . . . increase the hours or something.”³⁶⁰

Anna explained that if someone sees anything suspicious, they do not have to call 911. Instead, they can reach out to their neighborhood officer. This is more efficient because “they’re usually there or at that

³⁵⁴ *Extended Neighborhood Patrol*, LOWER GREENVILLE NEIGHBORHOOD ASS’N, <https://lgna.net/crime-watch/extended-neighborhood-patrol> (last visited Feb. 18, 2020).

³⁵⁵ *ENP*, WHITE ROCK VALLEY, <https://wrvna.org/enp> (last visited Feb. 18, 2020).

³⁵⁶ See sources cited *supra* note 277.

³⁵⁷ See James Ragland, *Paying for Extra Patrols: We Do What We Need to Do*, DALL. MORNING NEWS, Mar. 7, 2009, at 1B (“Therein lies one glaring disparity: Affluent neighborhoods have an upper hand because they can better afford the extra costs, even if they do hold their noses while paying. . . . More than three-fifths of the groups that paid for Expanded Neighborhood Patrols last year . . . are in North Dallas.”); Jacobson, *supra* note 352; cf. CMTYS. FOUND. OF TEX. & CTR. FOR PUB. POLICY PRIORITIES, DALLAS ECONOMIC OPPORTUNITY ASSESSMENT 11 (2018), <https://www.cftexas.org/cft/files/70/7000d1c2-1958-4752-9bc2-a0e411d3f9d4.pdf> (describing race-class segregation in Dallas).

³⁵⁸ Interview by Monica Bell & Jenny Ferentz with Anna (June 13, 2014).

³⁵⁹ *Id.*

³⁶⁰ *Id.*

street.”³⁶¹ Anna pointed to the locations where their officer can usually be found. The neighborhood association distributes a direct number for their neighborhood Dallas Police officer, and the officer also maintains an active presence on social media that allows him to easily interact with the community. Anyone in the neighborhood can use the special number, text the officer, or reach them through social media. The assigned officer also proactively keeps the community informed about crime in their neighborhood and surrounding areas. When something suspicious happens, like a strange car driving around, “the[y] post it, and they give you the car [information], and what the person looks like . . . [Y]ou know, it makes you feel better I guess knowing some of that. So yeah, we kind of keep each other informed.”³⁶²

The Dallas Police Department mandates that a neighborhood seeking expanded patrol have “a valid community organizational structure sufficient to support the program, the means of payment and a representative to act as a liaison between the group and the [Police Department].”³⁶³ They advise participating neighborhood associations to take out a million-dollar liability insurance policy, recommending consultation with an insurance advisor and an attorney.³⁶⁴ They also encourage special diligence around upfront fee collection, warning would-be organizers that “[c]ollection difficulties often occur, even in the best of neighborhoods.”³⁶⁵ The Department warns prospective consumers that they “may find ENP to be cost prohibitive in [their] neighborhood.”³⁶⁶

The leader of one wealthy Dallas neighborhood’s Crime Watch applauded ENP in her neighborhood association’s magazine, explicitly referring to the neighborhood’s affluence as a benefit: “It made a huge difference for us,” the leader declared. “We’re fortunate that many of our homeowners are affluent and can afford the cost of added patrol.”³⁶⁷ A supporter of the ENP program who works in the real estate industry recently wrote in support of the program, “The

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ DALL. CRIME WATCH EXEC. BD., *supra* note 351, at I.C (“Expanded Neighborhood Patrol (ENP) is a program authorized by the DPD in which neighborhood organizations may hire armed, uniformed off-duty police officers to patrol their area. The organizations may pay to rent a Dallas police car for use by the officers subject to availability.”).

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ Becky Vaughan, *Crime in Our Neighborhood*, ADVOC. PRESTON HOLLOW (Feb. 1, 2003), <http://prestonhollow.advocatemag.com/2003/02/01/crime-in-our-neighborhood>.

private neighborhood patrols also enhance property values,”³⁶⁸ (referring to the Dallas department program as “private” even though the program is authorized by City Council; filtered through the police department; and staffed by publicly sworn officers who wear publicly issued uniforms, patrol in publicly owned and privately rented police cars, and work the same beats as when they are on duty for the public),³⁶⁹ and that “ENPs make a home and its neighborhood more attractive to buyers.”³⁷⁰ Officials from the neighborhood association in one North Dallas neighborhood underscore that the program is less about crime and more about peace of mind: “It’s all about deterrence. It’s not really about catching people,” the neighborhood association president claims. “We’ve always been low crime, but you can never be too low crime.”³⁷¹ While private nonprofit neighborhood associations pay for and administer certain aspects of the program, they cash in on the fact that their “private” patrol consists of public police. Dallas residents value ENP officers more like private security guards than like public police: Similar to other private police, they are expected to “focus on loss instead of crime,” concerning themselves with “property and asset protection.”³⁷²

This type of policing policy is pro-segregation in that it directs community policing toward neighborhoods with the greatest economic capital. Socioeconomic segregation, which is inextricable from race

³⁶⁸ Candy Evans, *Dallas PD Reportedly Mulls Takeover of Popular ENP Program*, CANDYS.DIRT.COM (July 15, 2019), <https://candysdirt.com/2019/07/15/dallas-pd-reportedly-mulls-takeover-of-popular-enp-program>.

³⁶⁹ Cf. Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 67–90 (2004) (describing private-public partnerships in which public police agencies collaborate with private security forces but do not necessarily themselves provide staffing for additional police work).

³⁷⁰ Evans, *supra* note 368; see also LES JARDINS / RNA EXTENDED NEIGHBORHOOD PATROL PROGRAM (ENP), <http://www.lesjardinsenp.org> (last visited Feb. 18, 2020) (“The Extended Neighborhood Patrol (ENP) program is completely separate from normal on-duty police activity. Off-duty officers sign up for ENP duty These same officers also work in the area while on duty so are very aware of the criminals, crime, and neighborhoods.”); WHITE ROCK VALLEY, *supra* note 355 (“These regular Dallas Police Department (DPD) officers are armed, trained to make arrests, issue citations etc. and they will patrol in a DPD official police car. The police cars are equipped with computers, allowing the officers to check for outstanding warrants, stolen cars, and other violations instantaneously.”).

³⁷¹ Elissa Chudwin, *Patrolling for Peace of Mind: Preston Hollow’s Longtime Fixation with Private Police Forces*, ADVOC. PRESTON HOLLOW (Mar. 23, 2017), <https://prestonhollow.advocatemag.com/2017/03/23/patrolling-peace-mind-preston-hollows-longtime-fixation-private-police-forces>; see also Jacobson, *supra* note 352, at 1A (“[M]ost are in the wealthiest areas of Dallas, which have among the lowest crime rates.”).

³⁷² Joh, *supra* note 369, at 62.

given the racial construction of economic inequality in America,³⁷³ is a publicly authorized pathway to increased access to and power over publicly sworn police.

Some research on policing and whiteness suggests that White neighborhoods experience an absence of the police, while Black and Latinx neighborhoods, especially in urban areas, are characterized by heavy police presence.³⁷⁴ However, in areas that seem, to Whites, at risk—urban areas that are gentrifying,³⁷⁵ suburban areas that are diverse but where Whites feel threatened because of racial and socio-economic change,³⁷⁶ suburban areas that are adjacent to Black or Latinx neighborhoods³⁷⁷—police presence and private security protects the racialized economic value of White communities.³⁷⁸

³⁷³ See generally Issa Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*, 113 NW. U. L. REV. 1163, 1199 (2019) (describing the “meaningless” effort to isolate race as a causal treatment given the effect race has on virtually every other fact of a person’s existence); Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 523–26 (2001) (describing specific devices of racialized economic dispossession in the Reconstruction and Redemption eras); K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 LAW & SOC. INQUIRY 1006 (2016) (describing key devices of racialized economic dispossession in the American colonial era).

³⁷⁴ E.g., JACQUES & WRIGHT, *supra* note 299.

³⁷⁵ E.g., Christina B. Hanhardt, *Broken Windows at Blue’s: A Queer History of Gentrification and Policing*, in POLICING THE PLANET: WHY THE POLICING CRISIS LED TO BLACK LIVES MATTER, *supra* note 277, at 41, 50–59; see also Ayobami Laniyonu, *Coffee Shops and Street Stops: Policing Practices in Gentrifying Neighborhoods*, 54 URB. AFF. REV. 898 (2018) (discussing how gentrification increases policing in the gentrified area but not neighboring areas). *But see* Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 29 (2006) (“Very often, original residents enthusiastically support these changes because they are able to successfully lobby for improved public services such as improved policing . . .”).

³⁷⁶ E.g., Brenden Beck, *Broken Windows in the Cul-de-Sac? Race/Ethnicity and Quality-of-Life Policing in the Changing Suburbs*, 65 CRIME & DELINQ. 270 (2019); Susan Clampet-Lundquist et al., *Moving Teenagers Out of High-Risk Neighborhoods: How Girls Fare Better than Boys*, 116 AM. J. SOC. 1154, 1169–70 (2011).

³⁷⁷ Magliozzi, *supra* note 259.

³⁷⁸ See, e.g., Brenden Beck & Adam Goldstein, *Governing Through Police? Housing Market Reliance, Welfare Retrenchment, and Police Budgeting in an Era of Declining Crime*, 96 SOC. FORCES 1183 (2018) (finding support for growth in police budgets to protect property prices); Benjamin Goold, Ian Loader & Angélica Thumala, *Consuming Security? Tools for a Sociology of Security Consumption*, 14 THEORETICAL CRIMINOLOGY 3 (2010); Tim Newburn, *The Commodification of Policing: Security Networks in the Late Modern City*, 38 URB. STUD. 829, 829–38 (2001) (analyzing the growth of private security and commodification of policing as a new service to consumers). *But see* Clampet-Lundquist et al., *supra* note 376, at 1169–70 (describing harsh police surveillance of young Black men in “less poor yet still largely African American” Baltimore suburbs).

III TOWARD ANTI-SEGREGATION POLICING

This Part describes legal and policy frameworks and approaches to critically interrogate the police role in perpetuating segregation and, as much as possible, to reduce it. This Part does not aim to be an exhaustive list of the approaches that would constitute an anti-segregation policing agenda. Some reforms that are implied above, such as fighting against nuisance property ordinances and radically reducing the use of special gang and narcotics units, are not discussed in greater detail below, in part because many policy specifics would have to be decided on a local level, with community members in control of the process. Good policy in one area might not be easily portable to another. Instead, the suggestions offered below are best understood as normative legal frameworks that advocates and police leaders can use to interrupt the role of policing in perpetuating segregation.

A. *The Fragility and Futility of Segregation-Tolerant Police Reform*

Racial residential segregation is a structural feature of American urban life that thwarts police reform. This is first and most centrally because of the highly spatially responsive nature of policing and the nature of human psychology. Police make determinations about what is normal in a community based on visual cues, including the perceived race or ethnicity of usual residents.³⁷⁹ This is why “racial incongruity” stops are so common, including for members of the Black and Latinx community in predominantly White areas, and for White people in predominantly Black or Latinx areas.³⁸⁰ Police officers also develop narrative frames of the places they police, and this is not a dynamic that one can reasonably expect to change: Race feeds into the heuristics, or cognitive shorthand, for police and for most people encountering daily life.³⁸¹ There is no way to train officers not to use

³⁷⁹ See *supra* note 217 and accompanying text; see also *United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000) (en banc) (“The citing of an area as ‘high-crime’ requires careful examination . . . because such a description . . . can easily serve as a proxy for race or ethnicity. District courts must carefully examine the testimony of police officers . . . and make a fair and forthright evaluation of the evidence they offer . . .”).

³⁸⁰ E.g., Gelman, Fagan & Kiss, *supra* note 180, at 822; Fagan, *supra* note 217, at 120.

³⁸¹ See Harold Baer, Jr., *Got a Bad Feeling? Is That Enough? The Irrationality of Police Hunches*, 4 J.L. ECON. & POL’Y 91, 98–101 (2007); Nancy Leong, *Improving Rights*, 100 VA. L. REV. 377, 396–406 (2014) (discussing heuristics in the judicial rights-making environment); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 296–314 (2012).

at least some heuristics, and those heuristics will always be racially oriented in the context of segregation.³⁸²

One example of where we have seen reform break down in the context of segregation is Cincinnati, Ohio. Scholars and police reform leaders have praised Cincinnati as an example of the Section 14141 consent decree process gone right.³⁸³ Cincinnati's consent decree process began in 2001 after White police officer Stephen Roach shot and killed unarmed Black nineteen-year-old Timothy Thomas, sparking unrest ("riots") in the city.³⁸⁴ Roach was eventually acquitted of negligent homicide.³⁸⁵ The judge asserted, seeming to offer a justification for Thomas's death and Roach's acquittal, that Thomas was in an "especially dangerous section of Cincinnati" and that his "record was not unblemished."³⁸⁶ After the unrest, Cincinnati's mayor sought a DOJ investigation.³⁸⁷ After the Cincinnati Police Department entered an agreement with the DOJ in 2002, police use-of-force incidents and citizen complaints eventually fell dramatically.³⁸⁸ The Department undertook many changes, both structural (creating a Citizen Complaint Authority) and cultural (changing policing philosophy).³⁸⁹ In the wake of Ferguson, Baltimore, and other recent incidents all-too-similar to Thomas's death, observers, including former Attorney General Loretta Lynch, have looked to Cincinnati as an emblem of

³⁸² See Carbado, *supra* note 13, at 1482–83.

³⁸³ Joshua Chanin, *Evaluating Section 14141: An Empirical Review of Pattern or Practice Police Misconduct Reform*, 14 OHIO ST. J. CRIM. L. 67, 91–95 (2016); Linda Sheryl Greene, *Before and After Michael Brown—Toward an End to Structural and Actual Violence*, 49 WASH. U. J.L. & POL'Y 1, 56–59 (2015); Simmons, *supra* note 6, at 531–33. *But see* Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3218–21 (2014).

³⁸⁴ Christopher Maag, *In Cincinnati, Life Breathes Anew in Riot-Scarred Area*, N.Y. TIMES (Nov. 25, 2006), <http://www.nytimes.com/2006/11/25/us/25cincy.html>; Mark Singer, *A Year of Trouble*, NEW YORKER (May 12, 2002), <https://www.newyorker.com/magazine/2002/05/20/a-year-of-trouble>.

³⁸⁵ Robert E. Pierre, *Officer Is Acquitted in Killing That Led to Riots in Cincinnati*, WASH. POST (Sept. 27, 2001), <https://www.washingtonpost.com/archive/politics/2001/09/27/officer-is-acquitted-in-killing-that-led-to-riots-in-cincinnati/a678d262-f020-4766-998d-d1f27eed6e3b> (quoting Municipal Judge Ralph Winkler).

³⁸⁶ *Id.*

³⁸⁷ Alana Semuels, *How to Fix a Broken Police Department*, ATLANTIC (May 28, 2015), <https://www.theatlantic.com/politics/archive/2015/05/cincinnati-police-reform/393797>.

³⁸⁸ See Elliot Harvey Schatmeier, *Reforming Police Use-of-Force Practices: A Case Study of the Cincinnati Police Department*, 46 COLUM. J.L. & SOC. PROBS. 539, 559–63 (2013).

³⁸⁹ See Semuels, *supra* note 387 (describing "the adoption of a new method of policing"); see also Jay Rothman & Randi Land, *The Cincinnati Police-Community Relations Collaborative*, 18 CRIM. JUST. 35, 39 (2004) (summarizing key elements of the Cincinnati consent decree).

and roadmap for meaningful reform.³⁹⁰ Yet the Cincinnati metropolitan area remains highly segregated, with Black-White DI of 66.9 in 2010 and, more importantly, a recognition that that dissimilarity is the enduring legacy of racial subordination and White domination in Cincinnati.³⁹¹

Gentrification in Cincinnati has positioned police to exhibit some of the behavior described in Section II.F, making Black people uncomfortable in places that are undergoing racial change in order to protect and promote greater economic value for new White residents. In 2014, the *Washington Post* quoted a Black long-time business owner whose business is located in the neighborhood where Timothy Thomas was killed, which has undergone gentrification. The business owner explained, “It’s hard to use the word ‘trust’ about the police when one minute you’re talking to them and the next they can slam you down on the ground—and they do.”³⁹² He believed that police were allowing White business owners to move about freely even if they were exhibiting the same behavior as Black business owners, and were closely monitoring Black business owners for the slightest, inconsequential infractions: “Go three blocks down Vine Street and the white people sit in front of their businesses and nobody bothers them. Out here, the cops are pushing blacks around to make a more expensive environment, to make it safe for the people who can afford these new condos.”³⁹³

Even with the much-lauded reforms in Cincinnati, and with some success in loosening racial separation from its heights, there is still a great racial divide that centers especially on policing. In Cincinnati’s predominantly Black neighborhoods, police distrust “remains palpable.”³⁹⁴ In racially changing areas, police behavior seems oriented around protecting the interests of White gentrifiers rather than exercising discretion to reinforce the belongingness of Black residents and

³⁹⁰ Kevin Grasha, *AG: Cincinnati Police a Nationwide Model*, CINCINNATI ENQUIRER (May 19, 2015, 5:52 PM), <http://www.cincinnati.com/story/news/2015/05/19/loretta-lynch-visit/27606525>.

³⁹¹ LOGAN & STULTS, *supra* note 4, at 6.

³⁹² Marc Fisher, *Cincinnati Still Healing from Its Riots, and Has Lessons to Share with Ferguson*, WASH. POST (Sept. 5, 2014), https://www.washingtonpost.com/politics/cincinnati-still-healing-from-its-riots-and-has-lessons-to-share-with-ferguson/2014/09/05/2ff8b944-34a1-11e4-9e92-0899b306bbea_story.

³⁹³ *Id.*; see also Jeffrey Nathaniel Parker, *Broken Windows as Growth Machines: Who Benefits from Urban Disorder and Crime?*, 17 CITY & COMMUNITY 945 (2018) (theorizing elite deployment of broken windows policing as a catalyst for gentrification).

³⁹⁴ Fisher, *supra* note 392; Yuning Wu, Ivan Y. Sun & Ruth A. Triplett, *Race, Class or Neighborhood Context: Which Matters More in Measuring Satisfaction with Police?*, 26 JUST. Q. 125 (2009).

other residents of color.³⁹⁵ These spatial dynamics of policing reinforce distrust and legal estrangement,³⁹⁶ and they reduce the stickiness of reform. Many of the reforms that came about because of the Section 14141 process and collaborative agreement have been discontinued or defunded in recent years.³⁹⁷ While it would be difficult to identify segregation as the sole cause of this policy breakdown, the racial dynamics of reform, including persistent legal cynicism and reasonable distrust within Cincinnati's segregated Black communities, certainly erodes the power of the political argument for sustained reform.

The moral clarity of #BlackLivesMatter is vital as a clarion call for a broader movement for racial justice of which police transformation is a part.³⁹⁸ But racial justice should not be the only argument for more basic good governance strategies like procedural justice training or community policing. As described in Section II.F, a wide swath of communities seem to want "community policing" of some type; but policymakers only refer to these and other strategies as "community policing" when they are implemented in marginalized communities. Segregation creates a dynamic in which communities that are largely Black and largely poor are viewed as in need of "special" forms of governance. People across groups actually tend to want roughly the same types of service from the police, but segregation obscures this fact and gives police departments a justification for taking radically

³⁹⁵ See, e.g., Charles C. Lanfear, Lindsey R. Beach & Timothy A. Thomas, *Formal Social Control in Changing Neighborhoods: Racial Implications of Neighborhood Context on Reactive Policing*, 17 CITY & COMMUNITY 1075 (2018) (noting higher incidence of probable cause findings and arrests for reactive police contacts with Black reporters and Black targets, particularly in "changing" neighborhoods).

³⁹⁶ Cf. Bell, *supra* note 22, at 2085–88 (defining legal estrangement).

³⁹⁷ Sharon Coolidge, *As Cincinnati's Police Reforms Fade, What's Next?*, CINCINNATI ENQUIRER (June 2, 2017, 1:48 PM), <https://www.cincinnati.com/story/news/2017/06/02/collaborative-wanes-refresh-ahead/360584001>. The arguable crown jewel of the reform, the Citizens Complaint Authority, has had a backlog of cases and employed only three of the five required investigators as of June 2017. The city ended its contract with RAND to monitor traffic stops. Also, the Community Police Partnering Center's funding has been cut to about ten percent of its initial annual funding. *Id.*; see also Jay Hanselman, *How's the Refresh of the City's Collaborative Agreement Going? Opinions Differ*, WVXU.ORG (June 11, 2019), <https://www.wvxu.org/post/how-refresh-citys-collaborative-agreement-going-opinions-differ#stream/0>.

³⁹⁸ See, e.g., CHRISTOPHER J. LEBRON, *THE MAKING OF BLACK LIVES MATTER: A BRIEF HISTORY OF AN IDEA*, at xii (2017); KEEANGA-YAMAHTTA TAYLOR, *FROM #BLACKLIVESMATTER TO BLACK LIBERATION* 107–08 (2016); FERGUSON COMM'N, *supra* note 23, at 15–17 (outlining Ferguson Commission working group structure and considerations).

different approaches to the treatment of human life based on the intersection of race, class, and space.³⁹⁹

Moreover, segregation makes sustainable reform impossible because concentrated legal estrangement⁴⁰⁰ and institutional distrust are overdetermined in marginalized, segregated places. The very conditions of life in the context of segregation foster distrust on many levels, of many institutions and even of friends and family.⁴⁰¹ Poverty and dispossession—key features of the construction of race in America—are predictive of generalized social distrust.⁴⁰² Policing scholars often paint the problem of police distrust as if distrust were isolated to the police. There are, of course, specific reasons that police distrust is of particular intensity among Blacks and in predominantly Black neighborhoods. But sociologists and economists have documented pervasive distrust of many kinds in modern society;⁴⁰³ this distrust is attributable in part to residential segregation and is profound in under-resourced communities.⁴⁰⁴ Sociologists studying poverty and community life have long provided evidence that even when people rely on each other to survive poverty and social marginality, those relationships are generally not sanguine, trusting relationships. Those relationships are often unstable and destabilizing.⁴⁰⁵ The resultant dis-

³⁹⁹ See, e.g., Lorraine Mazerolle et al., *Shaping Citizen Perceptions of Police Legitimacy: A Randomized Field Trial of Procedural Justice*, 51 *CRIMINOLOGY* 33, 36 (2013) (reviewing literature on procedural justice and perceived legitimacy in policing); Tracey Meares, *The Legitimacy of Police Among Young African-American Men*, 92 *MARQ. L. REV.* 651, 660–64 (2009) (highlighting unconventional programs not typically offered by police to poor or minority groups that increase perceived legitimacy in policing); Tom R. Tyler, *Policing in Black and White: Ethnic Group Differences in Trust and Confidence in the Police*, 8 *POLICE Q.* 322, 338–39 (2005) (finding a reinforcing mechanism of public trust and favorable police policies).

⁴⁰⁰ See Bell, *supra* note 22, at 2085–87.

⁴⁰¹ See Bell, *supra* note 293, at 722–31.

⁴⁰² Sandra Susan Smith, *Race and Trust*, 36 *ANN. REV. SOC.* 453 (2010) (reviewing literature).

⁴⁰³ See, e.g., Betsey Stevenson & Justin Wolfers, *Trust in Public Institutions over the Business Cycle*, 101 *AM. ECON. REV. PAPERS & PROC.* 281, 282–86 (2011) (showing that Americans' trust in numerous public and private institutions has declined since the 1970s); see also ANTHONY GIDDENS, *MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE* 18–20 (Stanford Univ. Press 1991) (explaining the necessary contours of trust in late modernity).

⁴⁰⁴ ERIC M. USLANER, *SEGREGATION AND MISTRUST: DIVERSITY, ISOLATION, AND SOCIAL COHESION* 71–72 (2012) (arguing that segregation, not mere diversity, reduces social trust); cf. Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century: The 2006 Johan Skytte Prize Lecture*, 30 *SCANDINAVIAN POL. STUDS.* 137, 149–50 (2007) (arguing that diversity reduces social trust).

⁴⁰⁵ See, e.g., JUDITH A. LEVINE, *AIN'T NO TRUST: HOW BOSSES, BOYFRIENDS, AND BUREAUCRATS FAIL LOW-INCOME MOTHERS AND WHY IT MATTERS* 5 (2013); SMITH, *supra* note 206, at 27–54; Matthew Desmond, *Disposable Ties and the Urban Poor*, 117 *AM. J. SOC.* 1295, 1322 (2012).

trust extends to police, to other institutions, to neighbors, family members, and intimates.⁴⁰⁶ It is born of concentrated disadvantage, which co-occurs with racial segregation and marginality.⁴⁰⁷

Also, as described above, segregation erodes the degree to which communities feel that they can come together to collectively act, what sociologists call “collective efficacy.”⁴⁰⁸ To the extent that transformative change in policing requires community empowerment, meaningful power building is extremely difficult to achieve and maintain in the context of socioeconomic isolation and economic deprivation. Those conditions must change to build sustainable policy and to support the capacity for long-term community self-governance.⁴⁰⁹

Police officers and officials sometimes complain that communities do not take on enough of a role in attending meetings, serving as witnesses, or helping them address crime, at times seeming to view this noninvolvement as a moral or cultural failing.⁴¹⁰ But as long as a community is isolated and deprived, the community as a whole is unlikely to develop trusting relationships with the police. Indeed, research on police-community relations in Israel-Palestine,⁴¹¹ Apartheid-era South Africa,⁴¹² and pre-Good Friday Agreement Northern Ireland⁴¹³ sug-

⁴⁰⁶ E.g., LEVINE, *supra* note 405, at 5; Linda M. Burton, Andrew Cherlin, Donna-Marie Winn, Angela Estacion & Clara Holder-Taylor, *The Role of Trust in Low-Income Mothers' Intimate Unions*, 71 J. MARRIAGE & FAM. 1107, 1114–21 (2009).

⁴⁰⁷ LEVINE, *supra* note 405, at 23–46 (describing the structural antecedents of distrust among low-income mothers); Robert J. Sampson, Jeffrey D. Morenoff & Felton Earls, *Beyond Social Capital: Spatial Dynamics of Collective Efficacy for Children*, 64 AM. SOC. REV. 633, 635–37 (1999).

⁴⁰⁸ See, e.g., Sampson, Morenoff & Earls, *supra* note 407, at 635, 637–38, 656–57; Robert Vargas, *Gangstering Grants: Bringing Power to Collective Efficacy Theory*, 18 CITY & COMMUNITY 369 (2019) (illustrating mechanisms through which power relations in neighborhoods with concentrated disadvantage can stifle collective efficacy).

⁴⁰⁹ See SUDHIR ALLADI VENKATESH, *AMERICAN PROJECT: THE RISE AND FALL OF A MODERN GHETTO* 1–109 (2000) (describing high levels of community organization and self-governance in the 1960s and early 1970s in Chicago's Robert Taylor Homes before those self-governance and support efforts broke down in the late 1970s).

⁴¹⁰ See, e.g., MOSKOS, *supra* note 264, at 97–102 (describing the difference between “bullshit” and unfounded calls and the role of uncooperative witnesses and victims); WESLEY G. SKOGAN, *POLICE AND COMMUNITY IN CHICAGO: A TALE OF THREE CITIES* 112–15 (2009) (noting belief among survey respondents and White police officers and officials that poorer residents would turnout in lower numbers to neighborhood beat meetings).

⁴¹¹ See, e.g., Badi Hasisi, *Police, Politics, and Culture in a Deeply Divided Society*, 98 J. CRIM. L. & CRIMINOLOGY 1119, 1120–21 (2008) (on policing in Israel-Palestine).

⁴¹² See, e.g., JOHN D. BREWER, *BLACK AND BLUE: POLICING IN SOUTH AFRICA* (1994).

⁴¹³ See, e.g., RONALD WEITZER, *POLICING UNDER FIRE: ETHNIC CONFLICT AND POLICE-COMMUNITY RELATIONS IN NORTHERN IRELAND* 1 (1995) (“In deeply divided societies, the police face more legitimacy problems . . . than in more integrated societies. Moreover, the police are evaluated not only on their own merits but also in terms of what they symbolize as defenders of a particular system of sociopolitical domination.”); see also

gests that police distrust and illegitimacy are seemingly inevitable in the context of deep social and political division.⁴¹⁴ Those who would like to reform or transform policing must not lose sight of the more general social, political, and legal process leading to broad-based legal estrangement and noncooperation with police. They should not assume that these problems are specific to America or to Black or Latinx Americans; instead, they are structurally inevitable, and segregation has been and remains a key feature of structural inequity and division across the globe. Thus, police reform that does not directly aim to counteract its historical and present role in perpetuating segregation will ultimately be both morally and practically unsuccessful.

B. Fair Housing

Aspects of fair housing law can form the basis to imagine an affirmative duty for police departments to take approaches to policing that counteract residential segregation. The Supreme Court as recently as 2015 acknowledged the FHA's "continuing role in moving the Nation toward a more integrated society."⁴¹⁵

1. Affirmatively Furthering Fair Housing

The FHA requires the U.S. Department of Housing & Urban Development (HUD), all other executive departments and agencies, and state and local governments or agencies that receive federal grants, to administer programs "relating to housing and urban development . . . in a manner affirmatively to further [fair housing]."⁴¹⁶ Courts have interpreted this provision, colloquially known as "AFFH," to mean that agencies must actively promote residential

id. at 127–73 (discussing relations between the police and the community in Northern Ireland).

⁴¹⁴ See Weitzer, *supra* note 25, at 1130–32, 1130 n.3 (setting forth the group-position thesis which is supported in the cases of the U.S. and other "profoundly unequal and ethnically polarized societies"); *cf.* CHLOE HOOPER, TALL MAN: THE DEATH OF DOOMADGEE 56–79 (2009) (describing a "riot" that ensued in Palm Island, Australia, after the 2004 death of Black indigenous Australian Cameron Doomadgee in police custody and the beliefs about his death in the indigenous Australian community).

⁴¹⁵ *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2526 (2015).

⁴¹⁶ 42 U.S.C. §§ 3608(d)–(e), 5309(b) (2012); *see also* Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1768–73 (2005) (reviewing judicial interpretation of the "affirmatively to further" requirement); Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 360–68 (2007) (discussing "affirmatively to further [fair housing]" (AFFH)'s legislative and judicial interpretive history).

integration (or at least, non-segregation).⁴¹⁷ The provision takes an approach to civil rights law that moves beyond restricting overt discrimination and demanding colorblindness and, instead, obliges the government to *proactively bring about* social inclusion.⁴¹⁸

In 2015, Obama's HUD promulgated a new rule that clarified the type of analysis and depth of planning the AFFH provision demands of grantees. The new rule clarified that AFFH requires federal agencies and state and local grantees to "tak[e] meaningful actions that . . . address significant disparities in housing needs and in access to opportunity."⁴¹⁹ Among other things, the rule required grantees to submit a more specific and detailed "Assessment of Fair Housing," which must draw from a combination of HUD data and local data to identify barriers to fair housing.⁴²⁰ Grantees are also required under the rule to engage the community in the assessment process and set specific goals related to fair housing.⁴²¹ Trump's HUD has fully backed away from the 2015 rule, initially failing to enforce it outrightly and then, to avoid legal defeat, using a less direct nonenforcement strategy.⁴²² HUD's nonenforcement of the AFFH rule, which has continued through ever-changing strategies, has been the subject of national litigation led

⁴¹⁷ *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1133 (2d Cir. 1973) ("We agree with the parties and with the district court that the Authority is under an obligation to act affirmatively to achieve integration in housing."); *Shannon v. HUD*, 436 F.2d 809, 820–21 (3d Cir. 1970).

⁴¹⁸ See Nestor M. Davidson, *Property's Morale*, 110 MICH. L. REV. 437, 482–83 (2011).

⁴¹⁹ Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,316 (July 16, 2015), <https://www.gpo.gov/fdsys/pkg/FR-2015-07-16/pdf/2015-17032.pdf>.

⁴²⁰ 24 C.F.R. §§ 5.152, 5.154 (2017).

⁴²¹ 24 C.F.R. §§ 5.152, 5.154(d)(2), 5.154(d)(4)(iii), 5.158 (2017). Much of the scholarship that has deeply analyzed the pre-2015 understanding of the AFFH provision has concluded that its implementation fell well short of its promise and original intentions. See, e.g., Lisa T. Alexander, *Hip-Hop and Housing: Revisiting Culture, Urban Space, Power, and Law*, 63 HASTINGS L.J. 803, 864–65 (2011); Emerson, *supra* note 107, at 171–72 (calling pre-2015 HUD enforcement of AFFH "tentative at best"); Johnson, *The Last Plank*, *supra* note 107. Scholars have debated the expected effectiveness of the revised AFFH rule. See, e.g., Lee Anne Fennell, *Searching for Fair Housing*, 97 B.U. L. REV. 349, 411–21 (2017) (arguing that the rule should push agencies to explore strategies that empower home-seekers); Olatunde C.A. Johnson, *Overreach and Innovation in Equality Regulation*, 66 DUKE L.J. 1771, 1785–86 (2017) (arguing that the traditional regulatory form of the AFFH rule left it more vulnerable to claims of bureaucratic overreach); Troutt, *supra* note 104, at 7–8 (characterizing the rule as a reinstatement of the true, more capacious meaning of fair housing, which includes both nondiscrimination and desegregation); Jonathan Zasloff, *The Price of Equality: Fair Housing, Land Use, and Disparate Impact*, 48 COLUM. HUM. RTS. L. REV. 98, 145, 147 (2017) (calling the rule "tepid" and "toothless").

⁴²² Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 Fed. Reg. 683 (Jan. 5, 2018); First Amended Complaint at 2, 4, 6, *Nat'l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14 (D.D.C. 2018) (No. 1:18-cv-01076-BAH), https://pracc.org/pdf/Amended_complaint_AFFH.pdf.

by fair housing organizations, but their efforts thus far have been unsuccessful.⁴²³ Legislators who are Trump allies have sought to formally weaken or nullify the AFFH rule.⁴²⁴ Implementation of the new AFFH rule has been postponed through at least 2020.

However, the fragility of AFFH under Trump is mostly irrelevant to the way it would be used in this area. The AFFH rule as applied to police departments should not be thought of as a legal tool to demand anti-segregation policing. Instead, AFFH is a statement of municipal good government ideology that police leaders can also use to understand where their priorities should lie, considering the capaciousness of their role in urban life. Even if today's HUD is reluctant to enforce AFFH, AFFH stands for the proposition that municipalities should be held accountable for meeting a positive duty to untangle the knot of residential segregation. AFFH has always applied to all federal grantees, not just public housing authorities—many agencies and programs “relat[e] to housing and urban development” that are not housing authorities.⁴²⁵ The difficulty, of course, is identifying a limiting principle for “relating,” but Part II makes clear that police departments could logically fall within those limits.⁴²⁶ In keeping with other scholarship that seeks to treat police departments like other agencies,⁴²⁷ AFFH might also be interpreted as a commitment that *each agency within* a grantee municipal government—including the police department—should develop policies and practices that affirmatively fight segregation.

2. *Avoiding Racial Steering*

Before passage of the FHA, White real estate professionals believed it was part of their professional obligation to direct White families toward White neighborhoods and to avoid sending Black

⁴²³ See, e.g., *Nat'l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 39–40, 53–62 (D.D.C. 2018) (holding that plaintiffs lack Article III standing and, conceding standing, still would not be entitled to a preliminary injunction, and that the Agency's action was not arbitrary and capricious); *Plaintiffs' Motion to Amend the Judgment and for Leave to Amend the Complaint*, *Nat'l Fair Hous. All. v. Carson*, 397 F. Supp. 3d 1 (D.D.C. 2019) (No. 1:18-cv-1076-BAH), https://prrc.org/pdf/rule_59_motion.pdf.

⁴²⁴ See *Local Zoning Decisions Protection Act of 2017*, H.R. 482, 115th Cong. § 2(a)–(b) (2017) (proposing to nullify the AFFH rule and the assessment tool).

⁴²⁵ *Fair Housing Act*, 42 U.S.C. § 3608(d) (2017).

⁴²⁶ See Troutt, *supra* note 104, at 7 (claiming that the FHA was developed with incidents like Ferguson in mind, considering the interconnection of segregation with policing, education, and so forth).

⁴²⁷ Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1876 (2015); Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1042–43 (2016); Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 95 (2016).

families into White neighborhoods.⁴²⁸ Steering practices were “seen as consistent with the segregative tendencies of the society at large.”⁴²⁹ Now, those practices—which seemed to many like a rational adaptation to preexisting residential segregation—have been legally prohibited for more than fifty years. This rational adaptation perspective is not too dissimilar from the way many people think of policing today: To the extent policing plays a role in segregation, it is because society at large was already segregated, and they are simply adapting and behaving in accordance with the current social landscape.

Title VIII assumes that the only relevant housing intermediaries are landlords and realtors, but many more actors operate together to perpetuate housing segregation by making different places appealing to different categories of people. Decisions that appear to emerge from “self-steering”⁴³⁰ by families deciding where to live might actually be steering by actors other than real estate professionals or landlords. Sometimes steering might emerge from institutional policies such as incentives for arrest or location of neighborhood mini-stations; other times it might happen when individual police officers behave as brokers by sharing certain information with residents about neighborhood life or engaging in practices in predominantly Black or poor areas that they do not use in other areas. Why are real estate professionals—private actors—the only actors barred from engaging in racial steering?

Police steering is segregation via the public fisc. Because policing is a governmental institution, and because police officers are public actors, one might argue that they should be *more* subject to civil rights principles, not less. The FHA, like other Civil Rights era legislation, constrains private actors but allows public actors to go on perpetuating segregation. Professor Bruce Ackerman has critiqued this aspect of Title VII of the Civil Rights Act of 1964.⁴³¹ Ackerman explains that, even as the statute forced private employers to eschew their dis-

⁴²⁸ ROSE HELPER, RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS 143–54 (1969). Real estate professionals widely believed that encouraging Black people to rent or buy in White neighborhoods would reduce Whites’ property values. This alleged effect might have worried some real estate professionals that they were engaging in illegal blockbusting, perhaps swaying legally unsophisticated real estate professionals toward engaging in racial steering. See Dmitri Mehlhorn, *A Requiem for Blockbusting: Law, Economics, and Race-Based Real Estate Speculation*, 67 *FORDHAM L. REV.* 1145, 1176–79 (1998).

⁴²⁹ T. Alexander Aleinikoff, Note, *Racial Steering: The Real Estate Broker and Title VIII*, 85 *YALE L.J.* 808, 812 (1976).

⁴³⁰ See Gary Orfield, *The Movement for Housing Integration: Rationale and the Nature of the Challenge*, in *HOUSING DESEGREGATION AND FEDERAL POLICY* 18, 25 (John M. Goering ed., 1986).

⁴³¹ ACKERMAN, *supra* note 128, at 175.

criminatory hiring practices, highly segregated southern bureaucracies were allowed to retain their discriminatory practices until 1972.⁴³² The 1964 Civil Rights Act might have established the “reverse state action” regime⁴³³—that is, holding private actors to a higher standard for nondiscrimination than public actors—but the FHA crystallized it.⁴³⁴ Thus, one policy goal might be to bring the civil rights agenda for public segregators in line with the agenda for private segregators.

Eliminating racial steering could be part of a proactive agenda for reformist police departments. Often, interventions designed to change policing are targeted at individual interactions⁴³⁵ or internal department operations (creating just processes,⁴³⁶ diversifying forces,⁴³⁷ and so forth). Eliminating racial steering, however, is an explicitly external and community-focused policy goal, one that supports community vitality.

Some observers might find it odd to suggest that anti-racial steering principles and policies be extended to other entities. Usually, scholars see steering law (including, in particular, the FHA) as ineffective at rooting out steering even among realtors and landlords.⁴³⁸ In the past, and even today, research suggests that racial steering by

⁴³² *Id.* In 1972, Congress amended Title VII to bar discrimination by public employers. 42 U.S.C. § 2000e (2012).

⁴³³ ACKERMAN, *supra* note 128, at 175.

⁴³⁴ See Sophia Z. Lee, *A Revolution at War with Itself? Preserving Employment Preferences from Weber to Ricci*, 123 YALE L.J. 2964, 2975 & n.57 (2014).

⁴³⁵ See, e.g., PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 20, at 9–18; Mark Sedevic, *Procedural Justice & Police Legitimacy Training in Chicago: Reaping the Benefits of the Golden Rule*, 911 MAG., <https://perma.cc/75L4-SDBG?type=image> (last visited Feb. 18, 2020); Ronal W. Serpas & Remi A. Braden, *Reply to Community Policing Revisited: Implementing the Principles of Procedural Justice and Police Legitimacy*, POLICE CHIEF (Mar. 2016), <https://www.policechiefmagazine.org/ideas-insights-reply-to-community-policing-revisited-implementing-the-principles-of-procedural-justice-and-police-legitimacy>.

⁴³⁶ PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 20, at 14.

⁴³⁷ See, e.g., U.S. DEP’T OF JUSTICE & EQUAL OPPORTUNITY EMP’T COMM’N, *ADVANCING DIVERSITY IN LAW ENFORCEMENT*, at i–ii (Oct. 2016), <https://assets.documentcloud.org/documents/3121853/Federal-report-on-diversity-in-law-enforcement.pdf> (explaining why police force diversity is important); Mike Maciag, *Where Police Don’t Mirror Communities and Why It Matters*, GOVERNING (Aug. 28, 2015), <http://www.governing.com/topics/public-justice-safety/gov-police-department-diversity.html> (same); see also David Alan Sklansky, *Not Your Father’s Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1223–24 (2006) (describing some effects of diversifying officer employees within police departments).

⁴³⁸ See Johnson, *The Last Plank*, *supra* note 107, at 1196–98 (describing how the FHA failed to lower steering practices used by landlords and real estate agents); Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s “Affirmatively Further” Mandate*, 100 KY. L.J. 125, 130–36 (2011) (explaining how steering persists after enactment of the FHA).

landlords and realtors is common despite the Act;⁴³⁹ some research from the early 2000s suggests that steering has *increased* in frequency over time,⁴⁴⁰ while more recent research is ambivalent about whether there has been even subtly positive change.⁴⁴¹ In general, the FHA has relatively weak public and private enforcement mechanisms.⁴⁴² Regardless of the results through its enforcement thus far, racial steering law and doctrine is the most powerful existing framework for developing legal responses to intermediaries' behaviors and their potentially segregative consequences.

C. Police Districts

As discussed in Section II.D, police district organization is consequential for how officers think about the connection between space and policing, and thus for how places are policed differently. However, policing experts rarely analyze police districts as an organizational feature that might reflect police departments' normative commitments. They tend to think about police district organization as a purely technical matter of operations, made easier by increasingly sophisticated algorithms.⁴⁴³

It is not clear why this is so given that police districts or precincts are the fundamental organizational building blocks of urban policing. Much like the electoral district, the police district is highly consequential for community collective voice: It is the structure upon which mid-level leadership is determined, it sets the boundaries for commu-

⁴³⁹ *E.g.*, Christopher Mele & Robert M. Adelman, *Racial Exclusion and Spatial Inequality in Metropolitan America*, in RACE, SPACE, AND EXCLUSION: SEGREGATION AND BEYOND IN METROPOLITAN AMERICA 1, 5 (Robert M. Adelman & Christopher Mele eds., 2015); Max Besbris & Jacob William Faber, *Investigating the Relationship Between Real Estate Agents, Segregation, and House Prices: Steering and Upselling in New York State*, 32 SOC. F. 850, 852, 867, 871 (2017); Casey J. Dawkins, *Recent Evidence on the Continuing Causes of Black-White Residential Segregation*, 26 J. URB. AFF. 379, 393–94 (2004); Elizabeth Korver-Glenn, *Compounding Inequalities: How Racial Stereotypes and Discrimination Accumulate Across the Stages of Housing Exchange*, 83 AM. SOC. REV. 627, 637–40 (2018); George Galster & Erin Godfrey, *By Words and Deeds: Racial Steering by Real Estate Agents in the U.S. in 2000*, 71 J. AM. PLANNING ASS'N 251 (2005). *But see* George Galster, *Racial Steering by Real Estate Agents: Mechanisms and Motives*, 19 REV. BLACK POL. ECON. 39 (1990).

⁴⁴⁰ NAT'L FAIR HOUSING ALL., UNEQUAL OPPORTUNITY—PERPETUATING HOUSING SEGREGATION IN AMERICA 4 (Apr. 5, 2006), <http://nationalfairhousing.org/wp-content/uploads/2017/04/trends2006.pdf>.

⁴⁴¹ MARGERY AUSTIN TURNER ET AL., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012, at 65 (June 2013).

⁴⁴² *See* Johnson, *The Last Plank*, *supra* note 107, at 1204–07 (discussing the weak enforcement mechanisms and questioning whether they will ever be strong enough).

⁴⁴³ *See* Braga, Papachristos & Hureau, *supra* note 269, at 634, 636; Brayne, *supra* note 269, at 981.

nity meetings,⁴⁴⁴ and it channels places into certain policy interventions.⁴⁴⁵ To the extent community members have any say in what the police do, community voice is directed through the precinct. While police chiefs are somewhat democratically accountable—most are appointed by their mayors or a board of other elected officials⁴⁴⁶—the precinct level is where community members can have a more consistent and direct voice before police.

It is odd, then, that conversations about community voice and democratization in legal scholarship forego conversations about police districts. For example, in 2017, nineteen prominent legal scholars of policing issued a white paper on democratic criminal justice, which included policing reforms focused on promoting procedurally just policing, the elimination of racially unjust policing, and improving linkages between police and community.⁴⁴⁷ More specifically, the democratic criminal justice white paper proposed civilian review boards, selecting and training officers for racial fairness, and training on de-escalation.⁴⁴⁸ The structural organization of policing did not make their list. Similarly, the movement for police democratic accountability through administrative rulemaking does not appear to discuss district organization.⁴⁴⁹

This may be in part because, unlike special units focused on gangs and narcotics, it is less clear what types of precinct arrangements would increase democratic voice. It is difficult to know whether, in general, communities that are segregated in the status quo are better served when their entire precinct is comprised of other segregated

⁴⁴⁴ See WESLEY G. SKOGAN ET AL., *ON THE BEAT: POLICE AND COMMUNITY PROBLEM SOLVING* 171–72 (1999) (describing beat community meetings in Chicago); Aaron Roussell & Luis Daniel Gascón, *Defining “Policeability”: Cooperation, Control, and Resistance in South Los Angeles Community-Police Meetings*, 61 *SOC. PROBS.* 237, 237 (2014).

⁴⁴⁵ E.g., Edmund F. McGarrell, Duren Banks & Natalie Hipple, *Community Meetings as a Tool in Inmate Reentry*, 5 *JUST. RES. & POL’Y* 5, 9–10 (2003); Danielle Wallace et al., *Desistance and Legitimacy: The Impact of Offender Notification Meetings on Recidivism Among High Risk Offenders*, 33 *JUST. Q.* 1237, 1247 (2016).

⁴⁴⁶ See, e.g., Kraig L. Hays, Robert M. Regoli & John D. Hewitt, *Police Chiefs, Anomia, and Leadership*, 10 *POLICE Q.* 3, 11 (2007); T. Casey LaFrance & MaCherie Placide, *Sheriffs’ and Police Chiefs’ Leadership and Management Decisions in the Local Law Enforcement Budgetary Process: An Exploration*, 12 *INT’L J. POLICE SCI. & MGMT.* 238, 252–53 (2010) (comparing the decisionmaking and leadership of municipal police chiefs, who are generally appointed, with that of county sheriffs, who are elected).

⁴⁴⁷ Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 *NW. L. REV.* 1693, 1699–1700 (2017).

⁴⁴⁸ *Id.*

⁴⁴⁹ See Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 *NW. L. REV.* 1437, 1453 (2017); Catherine Crump, *Surveillance Policy Making by Procurement*, 91 *WASH. L. REV.* 1595, 1656 (2016); Friedman & Ponomarenko, *supra* note 427, at 1827; Eric J. Miller, *Challenging Police Discretion*, 58 *How. L.J.* 521, 525 (2015); Slobogin, *supra* note 427, at 91.

neighborhoods, thereby drawing boundaries around neighborhoods that have similar characteristics, or when segregation is diluted and officers are forced to confront and consider a diverse set of communities. The battle over the role of race in election districts has long centered on related questions: How much can, and should, race matter in districting?⁴⁵⁰ Is it just to create supermajorities of Black or Brown residents of voting age in a smaller number of districts, knowing that corraling sufficient numbers of Black or Brown groups into one district might make it harder for their group to influence outcomes in a neighboring district?⁴⁵¹ Would the ends of democracy be better served if communities of color were spread across other “crossover” and “influence” districts, where they might not be able to achieve descriptive representation from a member of their own racial group but might have more substantive impact on outcomes in a greater number of districts—or is this mere vote dilution?⁴⁵² Should districts be abandoned altogether, despite their seeming importance for assuring descriptive representation for racial and ethnic minorities?⁴⁵³ Debates over these and related topics in election law and political science rage on.⁴⁵⁴

⁴⁵⁰ See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 285–86 (2004) (Scalia, J.) (plurality opinion) (“The Constitution clearly contemplates districting by political entities By contrast, the purpose of segregating voters on the basis of race is not a lawful one”). Compare *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (holding that the Equal Protection Clause forbids the drawing of electoral districts solely on the basis of race), and *Shaw v. Reno*, 509 U.S. 630, 649 (1993) (same), with *Easley v. Cromartie*, 532 U.S. 234, 257 (2001) (holding that partisan gerrymandering, even where race and partisanship are closely correlated, does not necessarily violate the Equal Protection Clause).

⁴⁵¹ See *Cooper v. Harris*, 137 S. Ct. 1455, 1466 (2017); see also Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1101, 1132–33 & n.86 (2005) (considering whether creating more majority-minority districts harms the interest of people of color by hindering their ability to influence elections in adjoining districts).

⁴⁵² See *Cooper*, 137 S. Ct. at 1468–69; *Bartlett v. Strickland*, 556 U.S. 1, 13–14 (2009); *Georgia v. Ashcroft*, 539 U.S. 461, 468–70, 472–74, 477 (2003); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1559, 1579–85 (2018); Gilda R. Daniels, *Racial Redistricting in a Post-Racial World*, 32 CARDOZO L. REV. 947, 958–60 (2011).

⁴⁵³ See, e.g., Gerken, *supra* note 286, at 1680–81 (explaining how the fairness of the minority vote can be contingent on the theory of voting and representation employed). Compare *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986) (favoring electoral districts in ruling that, except in limited circumstances, “the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice”), with Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1135 (1993) (arguing that districting should be abandoned in favor of a semiproportional, multimember electoral system).

⁴⁵⁴ See, e.g., Sophie Schuit & Jon C. Rogowski, *Race, Representation, and the Voting Rights Act*, 61 AM. J. POL. SCI. 513, 513–14, 520 (2016); Joshua S. Sellers, *Election Law and White Identity Politics*, 87 FORDHAM L. REV. 1515, 1544–45 (2019).

However, the empowerment function of majority-minority electoral districts is not perfectly analogous to majority-minority policing districts, most centrally because police officers and most urban police leaders are not elected officials.⁴⁵⁵ Indeed, as described in Section II.C., drawing formal boundaries around segregated communities may be disempowering and seems to support conditions for harsh, racially disparate policing. The purpose of electoral districts is to provide democratic representation, but the purpose of police districts is usually thought to be the efficient and effective delivery of police services; democracy and community voice are considered by some to be a mere means to that end. But in segregated, subjugated communities where legal estrangement is intense, greater community control has to be central to twenty-first century policing not only as a means to the legitimacy or effectiveness of law enforcement, but as an end in itself.⁴⁵⁶

Much more empirical research is needed to understand exactly *how* police district organization matters for racial justice and desegregation across multiple settings. That research should use many methods and should occur across numerous cities. This Article proposes policymakers, community advocates, and police leaders at least *examine* district organization in their own areas; they should not instinctively legitimize segregation by unquestionably accepting formal boundaries that follow its contours. If, like the districts in Gordon's research, district organization is contributing to policy choices that guarantee racially disparate policing,⁴⁵⁷ districts should be reorganized so that racial disparity is no longer bureaucratically engraved into police administration.

It may be that more racially mixed police districts would do a better job of building community voice by making White and middle-class communities stakeholders in a wider array of districts, and by eliminating departmental fiefdoms in which officers with perceived "expertise" about marginalized communities get free rein over them. On the other hand, advocates would have to pay careful attention to ensure that racially mixed districts would provide space for deep democracy, and would not simply amplify the voices of the White and the wealthy within a diverse police district, which has often happened

⁴⁵⁵ See LaFrance & Placide, *supra* note 446, at 238.

⁴⁵⁶ See Bell, *supra* note 22, at 2083–88. To be sure, community voice is not necessarily an antidote to segregation, nor to other perversions of the American criminal legal system. See John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711 (2020).

⁴⁵⁷ See Gordon, *supra* note 255.

in gentrifying places.⁴⁵⁸ One aspect of an anti-segregation policing agenda might be to shift the concern in police redistricting from an operations-first perspective to an anti-segregation approach. This approach would not ignore operations concerns, but it could fuse them with broader concerns about urban governance, community power, and democracy.

D. *Reckoning, Past, Present, and Future*

Recognition of the racial harms of policing, including official apology and concrete community coproduction of police policies and practices, is central to anti-segregation policing. However, in contrast with much of the discussion of truth and reconciliation processes in other contexts,⁴⁵⁹ the type of reckoning this Article proposes does not focus on discrete past harms. Instead, reckoning would require a *perpetual governance process*. Though this Article focuses on policing, this process should be part of any system of social control that relies upon violence for enforcement.

Within the last decade, there has been increased consideration of official apology and truth and reconciliation processes in American policing.⁴⁶⁰ Efforts to include truth and reconciliation as part of police reform were already underway before the emergence of Black Lives Matter,⁴⁶¹ but the Obama DOJ-funded National Initiative for Building Community Trust and Justice (NICTJ), created in 2015 partly in response to Black Lives Matter, included reconciliation as one of

⁴⁵⁸ See *supra* Section III.A.

⁴⁵⁹ See, e.g., Martha Minow, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court*, 60 HARV. INT'L L.J. 1, 24–39 (2019) (discussing reconciliation processes in South Africa and Rwanda and noting that more than seventy countries have created truth commissions); Mtiangai V.S. Sirleaf, *The Truth About Truth Commissions: Why They Do Not Function Optimally in Post-Conflict Societies*, 35 CARDOZO L. REV. 2263, 2274–83 (2014) (analyzing truth commissions in Ghana, Sierra Leone, and Liberia); Jill E. Williams, *Legitimacy and Effectiveness of a Grassroots Truth and Reconciliation Commission*, 72 LAW & CONTEMP. PROBS. 143, 143–47 (2009) (describing the truth and reconciliation process in Greensboro, NC); see also Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. 263, 269–70 (2003) (proposing a truth and reconciliation process for lynchings of the late-nineteenth and early-to-mid-twentieth centuries).

⁴⁶⁰ See Sam Kuhn & Stephen Lurie, *Reconciliation Between Police and Communities: Case Studies and Lessons Learned*, NAT'L NETWORK FOR SAFE COMMUNITIES i, viii–ix, 5 (2018), https://nnscommunities.org/wp-content/uploads/2017/10/Reconciliation_Full_Report.pdf; ZOE MENDEL, U.S. DEP'T OF JUSTICE, RACIAL RECONCILIATION, TRUTH-TELLING, AND POLICE LEGITIMACY iii, 16–17, 19 (2012), <https://perma.cc/TP5G-U4SJ>.

⁴⁶¹ See MENDEL, *supra* note 460, at 1 (reporting on the findings of a January 2012 executive session on “racial reconciliation and truth-telling”).

three pillars of its reform agenda.⁴⁶² The National Network for Safe Communities at John Jay College (NNSC), a leader organization within the NICTJ coalition, has taken on reconciliation as the central aspect of its contribution to the forward-looking police reform agenda.⁴⁶³ NNSC has supported reconciliation efforts in multiple cities, including six pilot cities through the NICTJ that have focused on injustices including racially disparate drug law enforcement and zero-tolerance policing.⁴⁶⁴

Many apology and reconciliation processes in other cities have, as in the human rights context, focused on discrete past events. In 2011, for example, the chief of Tulsa, Oklahoma's police department apologized for the department's participation in the 1921 Tulsa riot and massacre that killed dozens and burned Tulsa's central Black business district, Greenwood, to the ground.⁴⁶⁵ The commission report that ultimately culminated in the chief's apology identified numerous wrongdoings and potential wrongdoings by Tulsa police officers, including joining vigilantes in setting fire to Black businesses, arresting Black men who were not engaged in wrongdoing, arming vigilante White men, and so forth;⁴⁶⁶ however, the chief's apology focused only on the department's failure to protect Black Tulsans.⁴⁶⁷

In 2013, the chief of the Montgomery, Alabama Police Department apologized for failing to protect Freedom Riders who were attacked there in 1961, including Congressman John Lewis.⁴⁶⁸

In 2017, Chief Louis Dekmar of the LaGrange, Georgia Police Department officially apologized for their department's failure to protect teenaged Austin Callaway, a young Black man who was lynched in 1940 under accusations of attempted sexual assault (a common accusation leveled against young Black men during this period to jus-

⁴⁶² Procedural justice and recognizing implicit bias are the other two pillars. *Mission*, NAT'L INITIATIVE BUILDING COMMUNITY TR. & JUST., <https://trustandjustice.org/about/mission> (last visited Feb. 18, 2020).

⁴⁶³ See *Leadership*, NAT'L INITIATIVE BUILDING COMMUNITY TR. & JUST., <https://trustandjustice.org/about/leadership> (last visited Feb. 18, 2020).

⁴⁶⁴ Kuhn & Lurie, *supra* note 460, at 49–53.

⁴⁶⁵ A.G. Sulzberger, *As Survivors Dwindle, Tulsa Confronts Past*, N.Y. TIMES (June 19, 2011), <http://www.nytimes.com/2011/06/20/us/20tulsa.html>.

⁴⁶⁶ See Alfred L. Brophy, *Assessing State and City Culpability: The Riot and the Law*, in TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921, at 153–54, 157–60 (2001), <http://www.okhistory.org/research/forms/report.pdf>; Scott Ellsworth, *The Tulsa Race Riot*, in TULSA RACE RIOT, *supra*, at 50, 74, 76; Danney Goble, *Final Report of the Oklahoma Commission to Study the Tulsa Race Riot of 1921*, in TULSA RACE RIOT, *supra*, at 11–12.

⁴⁶⁷ See Kuhn & Lurie, *supra* note 460, at 40.

⁴⁶⁸ See, e.g., John M. Glionna, *Great Read: Police Chief's Apology Sows Healing, Friendship*, L.A. TIMES (Sept. 23, 2014), <https://www.latimes.com/nation/la-na-cl-civil-rights-friends-20140923-story.html>.

tify racial violence).⁴⁶⁹ Dekmar cited the continued collective memory of Callaway's death in LaGrange's Black community as the reason for his apology.⁴⁷⁰ Dekmar's acknowledgement is important, but he runs only one of the hundreds of police departments that likely either participated in lynching or tacitly consented to White mob terror through the mid-twentieth century.⁴⁷¹

In 2016, then-president of the International Association of Chiefs of Police Terrence Cunningham apologized on behalf of the profession for "the role that [it] has played in society's historical mistreatment of communities of color."⁴⁷² In Cunningham's apology address, he took great efforts to separate the racism of policing's past to the "noble profession" that exists today.⁴⁷³ Cunningham also softened police culpability for past racist policing, blaming the perception of racist policing on the fact that "the laws adopted by our society have required police officers to perform many unpalatable tasks, such as ensuring legalized discrimination or even denying the basic rights of citizenship to many of our fellow Americans."⁴⁷⁴ In other words, the

⁴⁶⁹ Alan Blinder & Richard Fausset, *White Police Chief Apologizes for a 1940 Southern Lynching*, N.Y. TIMES, Jan. 27, 2017, at A1; see also EQUAL JUSTICE INITIATIVE, *supra* note 78 ("White terror groups . . . target[ed] black men for perceived sexual transgressions against white women. Charges of rape . . . were 'routinely fabricated' and often extrapolated from minor violations of the social code, such as 'paying a compliment' to a white woman, expressing romantic interest in a white woman, or cohabitating interracially." (citations and internal quotations omitted)). Part of the terrible legacy of this misuse of rape accusation is that the collective memory of unjustified rape allegations against Black men may raise doubt about potentially justified claims of sexual assault against young Black men today. Cf. Jeannie Suk Gersen, *The Public Trial of Nate Parker*, NEW YORKER (Sept. 2, 2016), <https://www.newyorker.com/news/news-desk/the-public-trial-of-nate-parker>.

⁴⁷⁰ Blinder & Fausset, *supra* note 469. Whites in LaGrange were apparently unaware of the death, a product of institutional decisions to encourage collective forgetting—non-investigation of the case and thus non-recording of Callaway's life and death. See Barry Schwartz, *Collective Forgetting and the Symbolic Power of Oneness: The Strange Apotheosis of Rosa Parks*, 72 SOC. PSYCH. Q. 123, 123 (2009) ("Collective forgetting refers to what is unregistered in the imagination of individuals, unchronicled in research monographs and textbooks, and/or uncommemorated by monuments, relics, statues, and ritual observances.").

⁴⁷¹ Ifill, *supra* note 459, at 268; Ward, *supra* note 78, at 600; see also Charles Seguin & David Rigby, *National Crimes: A New National Data Set of Lynchings in the United States, 1883 to 1941*, 5 SOCIUS 1, 2–3 (2019) (mapping more than 1300 American lynchings).

⁴⁷² Tom Jackman, *U.S. Police Chiefs Group Apologizes for 'Historical Mistreatment' of Minorities*, WASH. POST (Oct. 17, 2016), <https://www.washingtonpost.com/news/true-crime/wp/2016/10/17/head-of-u-s-police-chiefs-apologizes-for-historic-mistreatment-of-minorities>.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* One might point out that although it is certainly true that officers enforce laws that have been adopted by representatives of the public, officers have long enforced laws selectively. See MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 14 (1980) ("Police behavior is so highly specified by statutes and regulations that police[] [officers] are expected to invoke the law selectively.

problem with policing are problems of past official, legal discrimination, not present ideologies.

The desire to situate police racial injustice in the past permeates conversations about truth and reconciliation. Police leaders lament that new, younger officers do not know the racial history of the United States or within their own cities and departments;⁴⁷⁵ various commentators have long argued that higher educational requirements might help police develop richer context for their work and help them exercise their discretion less punitively.⁴⁷⁶ Scholars and police leaders have sought to uncover more specific history of racist policing within various police departments, as well as identify historical events of racial violence that police participated in even if the department did not spearhead the events.⁴⁷⁷ Some departments are moving to incorporate historical education that is more specific to American racial injustice into their police training.⁴⁷⁸ However, these are still mostly ideas and are not fully implemented in many departments.

While it might be reasonable to quibble with particular aspects of these efforts, this new emphasis on history in police training and increasing acknowledgment of racial injustices from decades past is almost certainly beneficial: The collective memory of those injustices lives on, and acknowledgement can be a first step to collective healing, if not accountability.⁴⁷⁹ If implemented properly, one can even

They could not possibly make arrests for all the infractions they observe during their working day.”).

⁴⁷⁵ MENTEL, *supra* note 460, at 10.

⁴⁷⁶ E.g., BITTNER, *supra* note 261, at 79–87; Jason Rydberg & William Terrill, *The Effect of Higher Education on Police Behavior*, 13 POLICE Q. 92, 110 (2010). *But see* Eugene A. Paoline III, William Terrill & Michael T. Rossler, *Higher Education, College Degree Major, and Police Occupational Attitudes*, 26 J. CRIM. JUST. EDUC. 49, 66 (2015) (reporting mixed results and few apparent effects of higher education on better policing and job satisfaction).

⁴⁷⁷ For example, the Civil Rights and Restorative Justice Project at Northeastern University School of Law has deeply investigated hundreds of lynchings and other grisly episodes of racial violence against Black Americans in the South between 1930 and 1970, many of which were perpetrated by police officers. *See* CIVIL RIGHTS & RESTORATIVE JUSTICE PROJECT, RESURRECTING THEIR STORIES: A COMMUNITY-BASED ORAL HISTORY PROJECT, YEAR END REPORT 2017 (2018), https://repository.library.northeastern.edu/downloads/neu:m043bx47n?datastream_id. The United States Holocaust Memorial Museum offers a five-hour training program for police officers, through which officers visit the museum, discuss the central role of police in Nazi Germany, and then discuss the role of American policing in racial injustice. *Resources for Professionals and Student Leaders: Law Enforcement*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/professionals-and-student-leaders/law-enforcement> (last visited Feb. 18, 2020).

⁴⁷⁸ E.g., Glionna, *supra* note 468 (describing a “Policing in a Historic City” seminar developed by Montgomery, Alabama’s police chief).

⁴⁷⁹ *See* Katherine M. Franke, *The Uses of History in Struggles for Racial Justice: Colonizing the Past and Managing Memory*, 47 UCLA L. REV. 1673, 1681–82 (2000);

imagine a framework for police reckoning that ties in with the recent calls for reparations for slavery, redlining, and other racialized economic injustice.⁴⁸⁰

However, it is important to recognize that there are routine, *present-day* episodes of police violence that feed into the collective experience of racially unjust policing.⁴⁸¹ It is valuable, and in some contexts essential, that police leaders apologize for past roles in racial injustice. But for police reckoning to contribute to racial justice, there must also be continual recognition of the present-day harms of policing on communities of color, including the profession's structurally determined contributions to the reproduction of segregation. The violence exacted upon communities of color includes but is not only the physical brutality of the gun, the nightstick, or the chokehold. It is also, more insidiously, racially violent *ideology*—the routine questioning when entering “white space,” the perhaps well-intentioned but damaging organization of jurisdiction to align with racially and economically segregated space, and the other dynamics described in Part II.

There are structural and historical aspects of policing (certainly policing as we know it) that will make future injustice inevitable as well. For example, nearly all police officers carry weapons, regardless of whether they are on duty. If weapons are carried, they will inevitably be misused. Indeed, sworn officers who are not carrying weapons are sometimes viewed as less capable of performing their safety functions. For example, there has been a long-running battle in Baltimore, Maryland, over whether school police officers should be permitted to carry weapons on duty within schools.⁴⁸² Proponents of gun-carrying for Baltimore City school officers cite alleged safety ben-

Michael A. Lawrence, *Racial Justice Demands Truth & Reconciliation*, 80 U. PITT. L. REV. 69, 111 (2018).

⁴⁸⁰ See TA-NEHISI COATES, *WE WERE EIGHT YEARS IN POWER: AN AMERICAN TRAGEDY* 179, 200–02 (2017); KATHERINE FRANKE, *REPAIR: REDEEMING THE PROMISE OF ABOLITION* 130–32 (2019); see also Brentin Mock, *Are Reparations Baltimore's Fix for Redlining*, *Investment Deprivation?*, CITYLAB (Feb. 14, 2019), <https://www.citylab.com/equity/2019/02/reparations-baltimore-redlining-segregation-fix-race/582760> (interviewing Professor Lawrence Brown about his neighborhood reparations proposal); Sheryl Gay Stolberg, *At Historic Hearing, House Panel Explores Reparations*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/us/politics/slavery-reparations-hearing.html> (discussing House hearing of reparations bill).

⁴⁸¹ Some police leaders have acknowledged present-day injustice during their official apologies for past harm. See Kuhn & Lurie, *supra* note 460, at 47–48, 51–53. However, it can be difficult to observe whether there have been changes in strategy after recognizing the harm of present-day policing.

⁴⁸² See Luke Broadwater, *Should School Police Be Armed? Baltimore Delegates Say No*, GOVERNING (Mar. 19, 2019), <https://www.governing.com/topics/education/tns-baltimore-legislation-armed-police-in-schools.html>; Christina Tkacik, *Baltimore City School Board*

efits, even though there is no evidence to suggest that an officer promotes safety more effectively by carrying a gun or other weapon.⁴⁸³ As long as the carrying of weaponry is thought essential to American policing, there will be officers who use those weapons, and there will be officers who use those weapons unjustly and unnecessarily.

Yet, even beyond the inherent physical violence associated with weaponry, there are other forms of violence and inequities of power associated with systems of social control.⁴⁸⁴ Reckoning is a strategy through which power can be continually checked, through which policing (in whatever form it ultimately takes) can be perpetually subject to criticism and reconstitution. Thus, it has critical importance for avoiding the reproduction of segregation. Most of the practices described in Part II are subtle or are seen as normal aspects of policing. They are not the types of racialized violence that earn headlines. Thus, maintaining consistent awareness of the practices themselves and the harm they produce is essential to avoiding their reemergence in practice, even as policies may change.

Moreover, reckoning can send a different ideological message about the behaviors of police in particular areas, especially in suburbs or parts of cities that are predominantly White. When the leadership of a police department in a suburb, or the leader of a predominantly White precinct, takes responsibility for harsh policing and racial violence and sets the tone for a better approach, it can change how the place is seen as an appropriate home for people of color. It might even create conditions for the development of cross-racial awareness,⁴⁸⁵ thereby encouraging Whites to pause and ask themselves questions about the appropriateness of calling police. Thus, reckoning processes should take place routinely, as a way of recognizing previous injustice, being accountable for present injustice, and deterring future injustice.

Votes 'No' to Arming Officers, BALTIMORE SUN (Jan. 22, 2019), <https://www.baltimoresun.com/education/bs-md-ci-board-votes-20190122-story.html>.

⁴⁸³ See, e.g., Broadwater, *supra* note 482 (“Baltimore city would be the only jurisdiction in the entire state where our children are not protected.” (quoting former Maryland Delegate Cheryl Glenn, who sponsored the most recent bill)); Tkacik, *supra* note 482 (“Sekou Kasimu, 69, said that’s a violation of the 14th Amendment of the Constitution, which states that all citizens are entitled to equal protection under the law,” when referring to police officers not being able to carry their guns during the school day).

⁴⁸⁴ See, e.g., 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 92–93, 98–99 (Robert Hurley trans., 1990) (1976). Foucault distinguishes power from domination: Power is “produced from one moment to the next, at every point, or rather in every relation from one point to another,” subject to “[r]ules of continual variations,” while domination—what those who write about power in law usually mean—is “a system whose effects, through successive derivations, pervade the entire social body.” *Id.*

⁴⁸⁵ See, e.g., Lawrence, *supra* note 479, at 106–07.

E. Strategic Nonresponse

A large body of legal scholarship has recognized the centrality of officer discretion to policing and proposes various interventions to limit or direct officer discretion.⁴⁸⁶ There is increasing recognition that police leaders and agencies also have discretion at a departmental level that they can be using more robustly to advance justice.⁴⁸⁷ Several legal scholars have suggested limiting departmental discretion through the pursuit of official policymaking, especially through the administrative rulemaking process;⁴⁸⁸ other scholars have sought other strategies for community power over police, including civilian review boards and other intermediate bureaucratic bodies.⁴⁸⁹

In the hyperlocal world of policing, good policing is thought to be responding to community needs as the members of the most powerful elements of the public define them. For race- and/or class-marginalized neighborhoods and places, external stakeholders, or stakeholders who are relatively powerful individual or organizational brokers between the community and political officials,⁴⁹⁰ determine the priorities of local government agencies, including their police. For White middle-class neighborhoods and places, this means that police usually respond to their communities' needs as they define them.

But police need not respond to every whim of an anxious community member, particularly in communities that have historically excluded and abused people of color through narratives of criminality. Police can choose not to respond, or to respond slowly, to calls that seem to emerge from racial bias in such communities.⁴⁹¹ 9-1-1 dis-

⁴⁸⁶ E.g., Livingston, *supra* note 185, at 658–59; Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 594 (2000); see also LIPSKY, *supra* note 474.

⁴⁸⁷ Stephen Lurie, *Police Discretion to Address Violence, Guns, and Risk: Current State & New Directions*, Presentation at Joyce Foundation Working Session (Feb. 6, 2019).

⁴⁸⁸ E.g., Bierschbach, *supra* note 449, at 1452–53; Crump, *supra* note 449, at 1656; Friedman & Ponomarenko, *supra* note 427, at 1827; Miller, *supra* note 449, at 525; Slobogin, *supra* note 427, at 91.

⁴⁸⁹ E.g., SAMUEL WALKER, *POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT* (2001); Ponomarenko, *supra* note 311, at 45–49; Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437, 463–69, 475–77, 482–83; David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1812–13 (2005).

⁴⁹⁰ MARY PATTILLO, *BLACK ON THE BLOCK: THE POLITICS OF RACE AND CLASS IN THE CITY* 113–47 (2007); ROBERT VARGAS, *WOUNDED CITY: VIOLENT TURF WARS IN A CHICAGO BARRIO* 22, 92 (2016); Jeremy R. Levine, *The Privatization of Political Representation: Community-Based Organizations as Nonelected Neighborhood Representatives*, 81 AM. SOC. REV. 1251, 1251–52, 1268–69, 1271 (2016).

⁴⁹¹ Strategic nonresponse is likely more appropriate in predominantly White or gentrifying communities than it is in marginalized areas. The legacy of police nonresponse in marginalized American communities, especially Black communities, yielded a sense of state abandonment and state failure. See sources cited *supra* note 293; see also Lisa L. Miller, *What's Violence Got to Do with It? Inequality, Punishment, and State Failure in US*

patchers can identify such calls. The incidents involving “BBQ Becky,” “Permit Patty,” and numerous other episodes when Whites deployed police to control people of color for their presence in public space⁴⁹² reveal the potential power of police discretion to resist racism and segregation. In the “BBQ Becky” episode, for example, police did not immediately respond to Jennifer Schulte’s call.⁴⁹³ The reportage of the incident tended to focus on the private racism at work in her attempt to deploy the police—indeed, some analysis even pointed out that police officers often do not want to respond to these calls but are often obligated to do so, and that dispatchers have limited discretion as well.⁴⁹⁴ Schulte insisted that police come to the scene, and in part because of the dispatcher’s concerns about her mental health, officers eventually responded.⁴⁹⁵

Critics of strategic nonresponse might argue that police should respond to every call and with equal concern because situations are unpredictable, and nonresponse or slow response could place human life and safety at risk. But even in the status quo, police do not respond to every call with a similar approach, in a similar timeframe. Out of necessity, emergency dispatchers must prioritize calls based on their seriousness, especially in urban areas where there is great demand.⁴⁹⁶ In part due to national politics during the Clinton era, many cities have added non-emergency call-for-service options, such as 3-1-1, to allow community members to facilitate this triage pro-

Politics, 17 PUNISHMENT & SOC’Y 184, 185, 197–202 (2015). The wisdom of strategic nonresponse will vary significantly by context.

⁴⁹² See *supra* note 215.

⁴⁹³ Nancy Dillon, *New 911 Audio Reveals Dispatcher Questioned ‘BBQ Becky’s’ Mental Health After She Called Cops on Group of Black People Enjoying Cookout in Calif. Park*, N.Y. DAILY NEWS (Aug. 31, 2018, 7:50 PM), <https://www.nydailynews.com/news/ny-news-bbq-becky-emergency-calls-released-20180831-story.html>.

⁴⁹⁴ See Rachael Herron, *I Used to Be a 911 Dispatcher. I Had to Respond to Racist Calls Every Day.*, VOX (Oct. 31, 2018, 12:08 PM), <https://www.vox.com/first-person/2018/5/30/17406092/racial-profiling-911-bbq-becky-living-while-black-babysitting-while-black> (“[T]hose cops on the video didn’t look happy to be forced to take the complaint seriously. They had way better things to do that afternoon than investigate some guys cooking out in a park.”); see also Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1647–49, 1714–15, 1718–19 (2019).

⁴⁹⁵ Dillon, *supra* note 493.

⁴⁹⁶ E.g., Lorraine Mazerolle et al., *Managing Citizen Calls to the Police: The Impact of Baltimore’s 3-1-1 Call System*, 2 CRIMINOLOGY & PUB. POL’Y 97, 102–03, 106 tbl.1 (2002) (discussing a call prioritization system used at the time of the introduction of the 3-1-1 nonemergency line in Baltimore, where about 3000 officers handled about 1.4 million calls each year during the relevant period); Dale K. Nesbary, *Handling Emergency Calls for Service: Organizational Production of Crime Statistics*, 21 POLICING 576, 576, 586 tbl.III (1998); see also Herron, *supra* note 494.

cess.⁴⁹⁷ Adding potential racial bias to the criteria used to determine whether and how a police officer should respond to a call is adaptable to normal protocol.

Approaches like strategic nonresponse might be perceived as politically risky and could lead to some backlash. Historically, criminal justice politics and policy has tended to ratchet up, not down, because fear of crime persists even when crime rates are relatively low.⁴⁹⁸ The public is often poorly informed about crime rates and the context of criminal activity.⁴⁹⁹ Thus, specific incidents of crime—especially violent crime—gain considerable weight in the formation of criminal law and policy by increasing the salience of crime to the public.⁵⁰⁰ Politicians, policymakers, and the media have frequently capitalized on these characteristics of the public's response to crime rhetoric.⁵⁰¹

Strategic nonresponse operates from a different perspective that considers the political and moral costs of unjustified state violence. Instead of focusing primarily upon the safety concerns of the most advantaged, strategic nonresponse asks police and political actors to consider the safety concerns of an increasingly vocal coalition of historically marginalized groups. Police activity of any kind involves risk: Nonresponse risks third-party crime, but response to racially motivated calls risks racism, state violence, and the deepening of legal estrangement. All of these risks are part of the political world in which police leaders operate, but historically, police leaders have almost exclusively attended to the third-party crime risk. But a new risk calculus is more conceivable today because of the broad decarceration movement, along with newly energized social movements against state violence and for power-building among groups that political leaders have often overlooked. In other words, movements may have the power to change how police and scholars should think about “harm efficiency” in policing.⁵⁰²

At least one police department in a predominantly White enclave has already taken up strategic nonresponse, at least within a limited

⁴⁹⁷ See, e.g., Mazerolle et al., *supra* note 496, at 99–103; see also Jeremy R. Levine & Carl Gershenson, *From Political to Material Inequality: Race, Immigration, and Requests for Public Goods*, 29 Soc. F. 607, 614 (2014) (discussing nonemergency numbers as a venue for historically marginalized populations' political engagement).

⁴⁹⁸ See RACHEL E. BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 106–09 (2019).

⁴⁹⁹ *Id.* at 106; Rappaport, *supra* note 456 (manuscript at 49–51).

⁵⁰⁰ BARKOW, *supra* note 498, at 108–09.

⁵⁰¹ *Id.* at 107–08; KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 40–43 (1997); BRUCE WESTERN, *PUNISHMENT & INEQUALITY IN AMERICA* 58–61 (1997).

⁵⁰² See Harmon, *supra* note 17, at 792–94 (arguing that scholars should lay theoretical and empirical groundwork for identifying harm efficiency in policing).

sphere. Residents of Piedmont, California, a tiny, affluent, and virtually all White and Asian suburb surrounded by racially diverse Oakland, heavily rely upon their police department to police the boundary between Piedmont and Oakland.⁵⁰³ Sociologist Devon Magliozzi has written about the demands of White Piedmonters, referring to their requests as “customer service” more than traditional crime control.⁵⁰⁴ Yet the Piedmont Police Department has declined to respond when residents called for reasons that were obviously racist, relying on their knowledge of the community to help them distinguish legitimate calls from racist calls.⁵⁰⁵

Greg Dunston and Marie Mckinzie, an older, formerly homeless Black couple with visible physical disabilities, moved to Piedmont due to the generosity of a Piedmont resident.⁵⁰⁶ Dunston and Mckinzie were initially hesitant to move there, even though the apartment was offered free of charge, in a place with *three* “A+” grades on AreaVibes.com.⁵⁰⁷ With a friend’s encouragement, they took the risk.⁵⁰⁸ Since they relocated to Piedmont, the police department has received multiple calls to report them. One caller, for example, used the racialized trope of public drug use to justify her call: “I just wanted to notify you that this woman is sitting at Lexford and Hampton . . . She’s smoking a cigarette—could be drugs.”⁵⁰⁹ Officers have refused to respond and instead explain to the callers that Dunston and Mckinzie are their neighbors. According to Piedmont Police Captain Chris Monahan, “When people have called, we’ve not even responded. We’ve called them and said, ‘Oh no, those are the people that live in the house.’”⁵¹⁰ Piedmont police officers and leaders had

⁵⁰³ See Jake Lefferman, *Why One California Resident Opened His \$4M Home and Heart to a Homeless Couple*, ABC NEWS (June 25, 2019, 11:25 AM), <https://abcnews.go.com/US/east-bay-resident-opened-4m-home-heart-homeless/story?id=63908137> (discussing 9-1-1 calls from residents of Piedmont after a Black homeless couple moved into another Piedmont resident’s house).

⁵⁰⁴ Magliozzi, *supra* note 259 (manuscript at 106–07).

⁵⁰⁵ Otis R. Taylor Jr., *A Homeless Oakland Couple Moved into a \$4 Million Piedmont Home. Then Came the Calls to Police*, S.F. CHRON. (May 2, 2019), <https://www.sfchronicle.com/bayarea/otisrtaylorjr/article/A-homeless-Oakland-couple-moved-into-a-4-million-13812019.php>.

⁵⁰⁶ *Id.*; see also Lefferman, *supra* note 503.

⁵⁰⁷ *Piedmont, CA Livability*, AREAVIBES, <https://www.areavibes.com/piedmont-ca/livability/?ll=37.82254+-122.23003> (last visited Feb. 18, 2020); see *supra* note 291 and accompanying text (describing AreaVibes’s scoring system).

⁵⁰⁸ Taylor, *supra* note 505.

⁵⁰⁹ Lefferman, *supra* note 503.

⁵¹⁰ Taylor, *supra* note 505.

the will and the legitimacy to push back when residents tried to use their department as a border patrol device.⁵¹¹

Another way that police departments can stop promoting segregation is by being more intentional in how they articulate the best approaches to promoting public safety. Although community relationships are important to the extent that they help respond to, solve, and possibly predict crimes, police are not meant to be general purpose bureaucrats for all nonmedical, non-fire situations. One anti-segregation policing strategy is to stop standing guard in this way, recognizing the consequences of an unnecessary standing police force in very low-crime areas. This means that policies like “Expanded Neighborhood Patrol” would be off-limits, as they allow for the channeling of scarce resources into communities that have the littlest need for public safety support and instead use officers to perform tasks that have only the most tenuous relationship—if any—to crime control or response. Police leaders can use their bully pulpit to push back when they believe a community-supported policing strategy would unnecessarily criminalize unharmed behavior or otherwise promote racial injustice. For example, in community meetings, police leaders can hear residents’ complaints and demands for further criminalization, explain that criminal legal responses are not well-suited to dealing with the issue, and then offer a less criminalizing alternative. Police leaders can also become advocates against the expansion of substantive criminal laws that criminalize poverty and homelessness,⁵¹² recognizing that these laws work against police credibility, fail to promote meaningful safety, and perpetuate segregation by functioning as legitimating tools for several mechanisms described in Part II.

As described in Part II, police sometimes cultivate segregation by being present to treat people as criminal in Black areas, while being present to provide “service” in many White areas, especially those within urban areas where Whites worry about their proximity to per-

⁵¹¹ Some have proposed prosecuting people for filing false reports or making unnecessary police calls. While I recognize the potential deterrent effect such an approach might have, I tend to be skeptical of measures that would produce outsized criminal justice responses for minor infractions, even if those infractions are racially tinged. In general, I support an approach to equity that would ratchet *down* punitiveness, not increase it for the sake of greater “accountability” (which can be achieved in other ways). However, civil suits are an alternative: Oregon, for example, recently advanced legislation through the state Senate that would allow victims of racially biased police calls to sue for up to \$250. The Associated Press, *Oregon Bill Cracks Down on Racially Motivated 911 Calls*, NBC NEWS (June 4, 2019, 4:05 PM), <https://www.nbcnews.com/news/nbcblk/oregon-bill-cracks-down-racially-motivated-911-calls-n1013721>.

⁵¹² See, e.g., Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1478–89 (2020) (describing expanding criminalization of homelessness and poverty).

ceived high-crime neighborhoods. Consider Lakewood, the Cleveland suburb discussed in Section II.F: As Suzy and Ron both noted, the police were highly visible in their low-crime neighborhood.⁵¹³ For Sally, the presence and proximity of the police were why she chose to live in Lakewood even though she struggled to afford a home there.⁵¹⁴ Police departments—especially departments in low-crime suburbs—should reflect upon why they need to operate as a standing presence in this service provision role. Are there non-racist reasons an armed and armored standing force should be constantly visible in a place with so little violent crime and in places that lack criminogenic social conditions?

Relatedly, police leaders can use their discretion to support expansion of noncriminal first response, so that other bureaucrats replace power lines that are down, or retrieve pets from trees, or assist in a mental health crisis. Cities with resources should cultivate an unarmed First Responder team that is administratively separate from the police department to meet these needs and desires. Armed police officers, especially given their symbolic meaning and direct capacity for exclusion, are not the appropriate stewards for this role. If people in whiter and more affluent neighborhoods want services that are not meaningfully related to serious crime, they should perhaps be able to call upon municipal responders of other types—particularly unarmed responders. However, currently, the only unarmed emergency responders in most places have specialized roles. They respond to fires, or they respond to health crises.

Abolitionist reformers have made similar arguments. For example, Critical Resistance, a national organization that calls to abolish “the Prison Industrial Complex,” has advocated for alternatives to traditional emergency response strategies, including by developing a “Healthworkers Cohort” that developed educational modules for the public to better understand options for health emergencies that do not require calling 9-1-1.⁵¹⁵ Some organizations already have strategies in place to respond to emergencies without engaging the

⁵¹³ See *supra* Section II.F.

⁵¹⁴ See *supra* note 346 and accompanying text.

⁵¹⁵ *About*, CRITICAL RESISTANCE, <http://criticalresistance.org/about> (last visited Feb. 18, 2020); *Know Your Options Workshops*, OAKLAND POWER PROJECTS, <https://oaklandpowerprojects.org/know-your-options-workshops> (last visited Feb. 18, 2020) (“Our goal is to reduce immediate contact with policing, to reduce utilization of emergency services that draw undesired police attention, such as 911, and to support someone accessing the care they need with dignity in case there is law enforcement already on the scene . . .”).

police.⁵¹⁶ However, most of that work thus far (for good reason) has focused on people and communities that have been marginalized through policing and incarceration, such as youth of color, people who have experienced homelessness, people who have experienced incarceration, and people who have been organizing around issues affecting Black and immigrant Bay Area residents.⁵¹⁷ Yet residents of White, affluent neighborhoods should also be trained not to treat police as a first resort for “suspicious” activity and should recognize that there are other, better ways of procuring general services. They will, of course, only learn this lesson if governmental decisionmakers force it by making it more difficult, less effective, or costlier to call the police for general services.

F. Structural Reform Litigation

As noted at the beginning of this Article, most of the forty-six cases that resulted in a Section 14141 consent decree originated in jurisdictions in areas that are marked by intense racial segregation. During the Obama Administration, the DOJ investigated and filed civil rights suits under Section 14141 of the Violent Crime Control and Law Enforcement Act of 1994 against police departments for patterns or practices of violating people’s constitutional rights more ambitiously and creatively than ever before.⁵¹⁸ Yet, the consent decrees generally did not contain much discussion of the segregated landscape in which police officers were operating, or of how police behavior and policy might perpetuate or even exacerbate residential segregation. Consent decrees and the DOJ investigation reports discuss many grounds for bias, but the relationship between racial bias and place is often omitted.⁵¹⁹ The DOJ’s Ferguson report discusses racial residen-

⁵¹⁶ CRITICAL RESISTANCE, PEOPLE FIRST! AN OAKLAND POWER PROJECTS REPORT ON POLICING AND EMERGENCIES 15–17 (2018), https://static1.squarespace.com/static/59ead8f9692ebee25b72f17f/t/5b6aae790e2e72497ad09ffc/1533718146254/CR_OPP2_SUS_report_final.pdf.

⁵¹⁷ *Id.* at 7.

⁵¹⁸ *E.g.*, Sunita Patel, *Toward Democratic Police Reform: A Vision for “Community Engagement” Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 812 (2016).

⁵¹⁹ *See, e.g.*, Settlement Agreement at 10, 70, *United States v. City of Cleveland*, No. 1:15-cv-01046-SO (N.D. Ohio June 12, 2015), https://www.justice.gov/sites/default/files/crt/legacy/2015/05/27/cleveland_agreement_5-26-15.pdf (directing the Cleveland police department to “administer all activities without discrimination on the basis of race, ethnicity, national origin, religion, gender, disability, age, sexual orientation, or gender identity” but never mentioning segregation in the 105-page document); Consent Decree Regarding the New Orleans Police Department at 48–49, *United States v. City of New Orleans*, No. 2:12-cv-01924-SM-JCW (E.D. La. Jan. 11, 2013), http://www.seattle.gov/Documents/Departments/CommunityPoliceCommission/New_Orleans_Consent_Decree.pdf; CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE NEW ORLEANS

tial segregation as part of its “historical backdrop” only, asserting that the preexisting segregation is not, on its own, probative of current day discriminatory intent.⁵²⁰ But that finding only runs toward the police department’s liability for racial discrimination. The Baltimore report takes a similar approach.⁵²¹

The DOJ could do more to situate its proposed reforms in the context of segregation, examining how unconstitutional policing and segregation reproduce each other in a localized and specific fashion and explicitly incorporating remedies to segregation into its agreements with police departments. Under President Obama, the DOJ’s pattern-or-practice work increasingly recognized and sought to address institutional failures outside of the police department.⁵²² For example, in Ferguson, Missouri, city ordinances about fines and fees created a situation in which policing violated individual rights. Accordingly, the Ferguson consent decree required the city to modify its ordinances.⁵²³ Portland, Oregon police tended to use excessive force against people in mental health crisis, which the DOJ surmised was partly due to a failed local mental health system.⁵²⁴ Thus, the

POLICE DEPARTMENT 34–51 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf (discussing in detail several types of biased policing behaviors observed during the investigation but failing to mention the role of biased policing in perpetuating segregation). *See generally* Consent Decree, *United States v. City of Los Angeles*, No. 2:00-cv-11769-GAF-RC (C.D. Cal. June 15, 2001), http://assets.lapdonline.org/assets/pdf/final_consent_decree.pdf (same); CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE & U.S. ATT’Y’S OFFICE FOR N. DIST. OF ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT (2017), <https://www.justice.gov/opa/file/925846/download> (omitting discussion of persistent residential segregation); CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE & U.S. ATT’Y’S OFFICE FOR DIST. OF N.J., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf (same).

⁵²⁰ CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERUGSON POLICE DEPARTMENT 76 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferugson_police_department_report.pdf [<http://perma.cc/FF7V-XCCL>] (“On its own, Ferguson’s historical backdrop as a racially segregated community that did not treat African Americans equally under the law does not demonstrate that law enforcement practices today are motivated by impermissible discriminatory intent. It is one factor to consider . . .”).

⁵²¹ *See* CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 12–14, 70–73 (2016), <https://www.justice.gov/opa/file/883366/download> [<https://perma.cc/6RNF-GFXM>] (similarly discussing racial residential segregation as history and background and not meaningfully linking it to policing).

⁵²² CIVIL RIGHTS DIV., PATTERN AND PRACTICE, *supra* note 2, at 33–34 (2017), <https://www.justice.gov/crt/file/922421/download>.

⁵²³ *See* Consent Decree at 9–11, 78, *United States v. City of Ferguson*, No. 4:16-cv-000180-CDP (E.D. Mo. Apr. 19, 2016), <https://www.justice.gov/opa/file/833431/download>; CIVIL RIGHTS DIV., PATTERN AND PRACTICE, *supra* note 2, at 33–34.

⁵²⁴ CIVIL RIGHTS DIV., PATTERN AND PRACTICE, *supra* note 2, at 34; Memorandum from Thomas E. Perez, Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, and Amanda Marshall, U.S. Att’y, Dist. of Or., to the Honorable Sam Adams, Mayor, City of

Portland consent decree required the city to work with mental health organizations to restructure its mental health support system.⁵²⁵ Yet housing and segregation—bedrock issues that contribute to and are reinforced by unconstitutional policing—have not yet been a specific focus of reform through the Section 14141 process. For this reason, future consent decrees with police departments in highly segregated areas should include specific directives to work against segregation. This approach is similar to calls for community engagement provisions in consent decrees which, according to Professor Sunita Patel, were common in the Obama DOJ (albeit with mixed success).⁵²⁶ At least community engagement is recognized as an essential aspect of sustainable reform. In contrast, residential segregation, despite its status as both a cause and consequence of unconstitutional policing, has not been incorporated into these more capacious DOJ efforts.

The usefulness of Section 14141 is highly dependent upon the political environment of the Presidency, at the DOJ, and within the localities at issue.⁵²⁷ Generally speaking, Republican administrations do not use Section 14141, or use it as more of a threat to persuade departments to pursue change or as a mode of providing technical assistance.⁵²⁸ The Trump Administration has been particularly hostile to structural reform litigation in the policing context.⁵²⁹ Thus, at the federal level, this approach will have to wait for a future administration.

State consent decrees provide a potential alternative approach. Some states, such as California and Illinois, have statutorily authorized their attorneys general to sue municipal police departments that have a pattern or practice of discrimination and other rights viola-

Portland, Re: Investigation of the Portland Police Bureau 1–2, 8 (Sept. 12, 2012), <https://www.justice.gov/iso/opa/resources/9362012917111254750409.pdf>.

⁵²⁵ Settlement Agreement Pursuant to Fed. R. Civ. P. 41(a)(2) at 32–37, *United States v. City of Portland*, No. 3:12-cv-02265-SI, 2013 WL 12309780 (D. Or. Dec. 17, 2012), <https://www.portlandoregon.gov/police/article/506328>.

⁵²⁶ See Patel, *supra* note 518, at 795–97.

⁵²⁷ RUSHIN, *supra* note 5, at 126–34, 129 tbl.3.4, 130 figs.3.1 & 3.2 (discussing the decline in DOJ actions brought under Section 14141 during the second term of President George W. Bush’s administration and considering various explanations for DOJ inaction).

⁵²⁸ See, e.g., Harmon, *supra* note 6, at 17 & n.60, 20–21, 55 (observing that technical response letters can be a signal of an impending Section 14141 action, noting agreement among scholars that the Bush administration, in particular, failed to maximize Section 14141’s reform-inducing potential, and arguing that the Bush administration’s policy position on Section 14141 was inefficient); see also RUSHIN, *supra* note 5, at 125, 131 & n.139 (discussing the relationship between Section 14141 and nonbinding technical assistance letters during the second term of the Bush administration); Patel, *supra* note 518, at 812 (noting that the Bush administration scarcely used Section 14141).

⁵²⁹ See, e.g., Memorandum from Jefferson B. Sessions III, *supra* note 2.

tions.⁵³⁰ Advocates have argued that preexisting state law in Louisiana and Massachusetts can similarly be interpreted to authorize state attorney general-initiated structural reform litigation, though their claims are untested.⁵³¹ Professor Samuel Walker and Morgan Macdonald have constructed model legislation to authorize state-level pattern-or-practice suits.⁵³² State-initiated structural reform litigation remains understudied and undertheorized; however, it might prove valuable to reform in periods when the politics surrounding Section 14141 remove federal oversight from the police reform toolkit.

CODA: IS ANTI-SEGREGATION POLICING POSSIBLE?

This Article has argued that police reformers and police leaders should adopt an anti-segregation approach to policing. It has set forth a comprehensive account of residential segregation, clarifying the distinction between easily measurable proxies for segregation and the types of segregation with which law and racial justice should be concerned. It has identified and illustrated six mechanisms through which American policing, especially in metropolitan areas comprised of urban and suburban police departments, perpetuate residential segregation. It has explained that any effort to reform policing that does not pay close attention to residential segregation will fail. It has offered potential legal rationales and procedures for advancing an anti-segregation policing agenda. Finally, it has provided some legal

⁵³⁰ See CAL. CIV. CODE § 52.3(b) (West 2019), for California's authorization of state attorneys general to pursue pattern-or-practice suits, a power granted through Assembly Bill 2484, which the California Legislature passed in 2000. See Assembly Bill No. 2484, 2000 Cal. Legis. Serv. Ch. 622 (West) (codified at CAL. CIV. CODE § 52.3 (West 2001)). See Act of Aug. 24, 2004, Pub. Act 93-1017, § 10-104(A), 2004 Ill. Laws 4086, 4086-87 (codified at 775 ILL. COMP. STAT. ANN. 5/10-104(A)(1) (LexisNexis 2019)), for Illinois's grant to the state attorney general of *parens patriae* authority to pursue pattern-and-practice cases. The first such case originated in California in 2001, against the police department of the City of Riverside. *People ex rel. Lockyer v. City of Riverside*, No. 355410 (Cal. Super. Ct. Mar. 5, 2001), <https://www.clearinghouse.net/chDocs/public/PN-CA-0014-0001.pdf>; Tina Daunt, *Police Win Praise in Riverside*, L.A. TIMES (Dec. 26, 2002, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2002-dec-26-me-decree26-story.html> ("Lockyer's order was the first in which the state directed a law enforcement agency to make changes as part of a consent decree.")

⁵³¹ Connor Maxwell & Danyelle Solomon, *Expanding the Authority of State Attorneys General to Combat Police Misconduct*, CTR. FOR AM. PROGRESS (Dec. 12, 2018, 9:02 AM), <https://www.americanprogress.org/issues/race/reports/2018/12/12/464147/expanding-authority-state-attorneys-general-combat-police-misconduct> (discussing the potential statutory authority for such lawsuits but suggesting that it is not indisputable).

⁵³² Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U. C.R.L.J. 479, 536-37 (2009) (proposing a model statute for states that substantially reflects its federal counterpart).

and policy frameworks that police leaders might pursue to construct a police force that is anti-segregation and pro-racial justice.

There remains a fundamental question, however, that most of this Article sets aside: *Is anti-segregation policing possible?* If one of the purposes of policing in the American racial context is to maintain racial inequity, is it coherent to contemplate policy changes within policing to promote racial justice? As Dr. Martin Luther King, Jr. famously observed in his *Letter from Birmingham Jail*, even when police behave legally, policing still deserves condemnation if one of its purposes is “[t]o preserve the evil system of segregation.”⁵³³

These are questions that abolitionist reformers today helpfully ask. Abolitionist reformers argue that institutional racism is not a dysfunction within policing but a fundamental purpose of policing, at least in its current manifestation. As such, reforming it is not possible. As Professor Keeanga-Yamahtta Taylor has written, “The racism of the police is not the product of vitriol [I]f the task of the police is to maintain law and order, then that role takes on a specific meaning in a fundamentally racist society.”⁵³⁴ As Professor Amna Akbar has contended, “If police are centrally an anti-democratic force . . . democratizing the police is a contradiction in terms.”⁵³⁵ One could make a similar claim about segregation. If policing metes out access to space in ways that consolidate the interests of the racially and economically dominant, “anti-segregation policing” might be an oxymoron.

⁵³³ Martin Luther King, Jr., *Martin Luther King Jr.’s ‘Letter from Birmingham Jail,’* ATLANTIC (Mar. 1, 2018), <https://www.theatlantic.com/magazine/archive/2018/02/letter-from-birmingham-jail/552461>.

⁵³⁴ TAYLOR, *supra* note 398, at 108; *see also* ALEX S. VITALE, THE END OF POLICING 221 (2017) (“We do indeed need new training regimes, enhanced accountability, and a greater public role in the direction and oversight of policing. . . . That said, . . . [a]s long as the basic mission of police remains unchanged, none of these reforms will be achievable.”); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1469 (2016) (“If . . . the system is working the way it is supposed to, as a means to control African-Americans and devalue their lives, the system should be resisted.”).

⁵³⁵ Amna A. Akbar, *An Abolitionist Horizon for Police Reform*, 108 CALIF. L. REV. (forthcoming 2020) (manuscript at 45) (on file with author); *see also* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1167, 1219–20 (2015) (championing prison abolition and proposing structural preventive measures as an alternative to policing, criminalization, and incarceration); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1604 (2017) (arguing that abolition, rather than reform, of criminal law is necessary because of criminal law’s inherently anti-democratic nature); Derecka Purnell, *What Does Police Abolition Mean?*, BOS. REV. (Aug. 23, 2017), <http://bostonreview.net/lawjustice/derecka-purnell-what-does-police-abolition-mean>; *cf.* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003) (arguing prisons serve no valid purpose).

Both the ideology undergirding anti-segregation policing and the ideology of penal abolition straddle pessimism and utopianism. The pessimism of penal abolition centers on the inevitable racism and violence of all institutions that touch the carceral state. The pessimism that motivates a call for anti-segregation policing centers on the inevitable tendency toward authoritarianism under systems of social control, even in a post-carceral world. The utopianism of penal abolition imagines a world without police and prison. The utopianism that motivates a call for anti-segregation policing imagines a world where people have the power to rein in and reorient all institutions of power, be they carceral or not, be they formal or informal. These utopian and pessimistic visions are compatible, but they may yield different legal and policy strategies.⁵³⁶

In the status quo, we have a large, ideologically entrenched policing apparatus that seems unlikely to disappear anytime soon. Policing is not just part of the traditional carceral regime—it has suffused or supplanted many of the ostensibly non-carceral systems that are meant to provide social welfare.⁵³⁷ In economically depressed cities where virtually all other services are defunded, police departments are often one of few entities that remain, usually in weakened form.⁵³⁸ Moreover, the institutions that largely comprise the noncriminal “social safety net,” such as schools, welfare, child welfare, and housing, are often just as rigid, punitive, and degrading as the carceral system—and they always have been.⁵³⁹

⁵³⁶ I believe anti-segregation policing is compatible with an abolitionist agenda, but that will be for others to decide. See Butler, *supra* note 534, at 1474 (“One goal of activists has to be making the police stop policing in ways that devalue the lives of people of color.”); McLeod, *supra* note 535, at 1167–68 (“Prison abolition, on this account, is an aspirational ethical, institutional, and political framework that aims to fundamentally reconceptualize security and collective social life, rather than simply a plan to tear down prison walls. As such, abolition seeks to ultimately render ‘prisons obsolete.’” (quoting DAVIS, *supra* note 535)). Anti-segregation policing seeks to ameliorate the effects of pro-segregation policing. Yet, the ambitions of this project are not limited to that outcome. Anti-segregation policing more broadly seeks to interrupt the reproduction of segregation, nurture the capacity of collective social life, and, through that pathway, decenter carceral approaches to governance.

⁵³⁷ See STUART, *supra* note 230, at 37–77 (discussing the mutually reinforcing relationship between private welfare provision and a punitive policing model); Bell, *supra* note 230, at 335–38 (describing how disadvantaged Black mothers initiate interactions with the police as a way of engaging with social welfare institutions); Lara-Millán, *supra* note 230, at 880–81 (discussing the participation of police in managing emergency room overflow and emergency room staff’s gestures of professional courtesy to police).

⁵³⁸ See Anderson, *supra* note 349, at 1121 (“Where police departments are understaffed, other public services are understaffed.”).

⁵³⁹ See, e.g., KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 51–70 (2011) (discussing the welfare system as a surveillance, policing, and punishment mechanism and the paths to criminalization it

Community-led organizations are vital for violence reduction⁵⁴⁰ and critical to community flourishing and the exercise of collective power.⁵⁴¹ But “community” is also a concept that is vulnerable to misappropriation, false morality, and strategic deployment for the purpose of gaining authority.⁵⁴² This is to say, there is no type of institution that is categorically immune from the temptations of authoritarianism or—in America—White supremacy, antiblackness, and racism.⁵⁴³ Even community-based and community-led organiza-

creates); RIOS, *supra* note 307, at xiv (defining the “youth control complex” as “a system in which schools, police, probation officers, families, community centers, the media, businesses, and other institutions systematically treat young people’s everyday behaviors as criminal activity”); CARLA SHEDD, *UNEQUAL CITY: RACE, SCHOOLS, AND PERCEPTIONS OF INJUSTICE* 80–81 (2015) (explaining that the process of entering an urban high school, which involves requirements such as going through metal detectors, is “very similar to the processes of entry and enmeshment in overtly carceral institutions” and arguing that “the modern public high school is the extension of our larger ‘disciplinary society’” (quoting John Devine, *Can Metal Detectors Replace the Panopticon?*, 10 *CULTURAL ANTHROPOLOGY* 171, 188 (1995))); Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers’ Institutional Engagement*, 97 *SOC. FORCES* 1785, 1803–05 (2019) (examining low-income mothers’ perceptions of child protective services as linked to a system of widespread surveillance); Spencer Headworth, *Getting to Know You: Welfare Fraud Investigation and the Appropriation of Social Ties*, 84 *AM. SOC. REV.* 171, 189–90 (2019); *cf.* Purnell, *supra* note 535 (“How can we re-center an entity as a public good if it never was one?”). I sometimes ask Purnell’s question, except about the social arm of the state.

⁵⁴⁰ See Patrick Sharkey, Gerard Torrats-Espinosa & Delaram Takyar, *Community and the Crime Decline: The Causal Effect of Local Nonprofits on Violent Crime*, 82 *AM. SOC. REV.* 1214, 1234 (2017).

⁵⁴¹ SAMPSON, *supra* note 26, at 209 (“[C]ommunity-based organizations strongly predict collective efficacy and collective civic action, durably so.”); Jocelyn Simonson, *Copwatching*, 104 *CALIF. L. REV.* 391 (2016) (discussing community-organized copwatching, which seeks to hold police accountable for their treatment of the community); Van C. Tran et al., *Participation in Context: Neighborhood Diversity and Organizational Involvement in Boston*, 12 *CITY & COMMUNITY* 187, 188–89, 205–06 (2013) (noting that local organizations can provide a venue for forging vital interpersonal and community bonds).

⁵⁴² See, e.g., Jeremy R. Levine, *The Paradox of Community Power: Cultural Processes and Elite Authority in Participatory Governance*, 95 *SOC. FORCES* 1155, 1156, 1170–75 (2017) (observing how nonresident elites appropriate the words and notion of “the community” in public redevelopment planning meetings); Simonson, *supra* note 541, at 398 n.31 (noting previous scholarship’s exploration of the shifting meaning of the word “community” in law enforcement and criminal law’s relationship to the policed); Robert Weisberg, *Restorative Justice and the Danger of “Community,”* 2003 *UTAH L. REV.* 343 (discussing the mental health deinstitutionalization movement’s appropriation of “the community,” in part due to political expediency, and suggesting that restorative justice may engage in a similar failure to identify whose interests this notion represents).

⁵⁴³ See Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 *VA. L. REV.* 449, 480 (2019) (“[T]hose of us who are interested in racial justice must always be on the lookout for new mechanisms of racial subordination. It is naïve to expect that the tools that evidenced and maintained the racial hierarchy in the past will continue to be used in the future.”). See generally IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* (2016) (explaining the deep

tions are at risk. The normative impulse that supports anti-segregation policing recognizes the phoenix-like resilience of institutional racism as well as the perpetual seduction of authoritarianism within all institutions—even ones that appear primed to be nonviolent.

The perspective underlying anti-segregation policing is neither pollyannaish about policing nor naïve about institutional racism. I have experienced such racism throughout my own life, at times involving police. Several years ago, a neighbor in East Rock, New Haven, a neighborhood full of Yale affiliates, called the police to report me for standing on my porch too long. As I clumsily attempted to enter my apartment, hands and arms weighted with bags of books and detritus after a day away from home, a neighbor must have decided that I was trying to pick the lock of my front door. As the police floodlight shined into my squinted eyes; as I heard the officers explain, in polite but scripted monotone, that there had been break-ins in the area; as I haltingly responded to their presumptuous, suspicion-laden questions (“Did your boyfriend lock you out? Whose newspapers are on the porch?”), my chest fluttered with fear and rage—at them, at my neighbors, at the East Rock neighborhood, at the entire segregated city. I am grateful, and profoundly lucky, that the episode stopped there; I was able to leave East Rock a few months later, and I pledged never to live there again. I am fortunate that my other experiences with publicly policed racial boundaries have not been as notable. For many Black and Brown people, this type of experience is routine.⁵⁴⁴

Interlocking systems of violence and racism are real. Real people suffer mightily, daily, because of them. While they should ideally end, it is also vital and honorable to pursue ways to shift those institutions, in small ways and at limited moments, to be a little less violent, less harmful. This is not the same as believing these institutions are a necessary social good.⁵⁴⁵ Consider the perspective of advocates for harm reduction, a public health-based approach that has focused primarily on drug use and sex work.⁵⁴⁶ In the sphere of drug use, advocates for

intellectual and ideological roots of racist ideas in America, which are broad-ranging and cross-institutional).

⁵⁴⁴ See, e.g., VICTOR M. RIOS, *HUMAN TARGETS: SCHOOLS, POLICE, AND THE CRIMINALIZATION OF LATINO YOUTH* 114–39 (2017); cf. Nikki Jones, “*The Regular Routine*”: *Proactive Policing and Adolescent Development Among Young, Poor Black Men*, 143 *NEW DIRECTIONS FOR CHILD & ADOLESCENT DEV.* 33 (2014).

⁵⁴⁵ Cf. Akbar, *supra* note 535 (manuscript at 26–27) (arguing that those who propose policing reform, as opposed to abolition, fail to understand policing’s systemic untenability or, if they do, perhaps accept policing as inevitable).

⁵⁴⁶ See, e.g., Susan E. Collins et al., *Current Status, Historical Highlights, and Basic Principles of Harm Reduction*, in *HARM REDUCTION: PRAGMATIC STRATEGIES FOR*

harm reduction adopt a perspective that “[a]ccepts, for better and or [sic] worse, that licit and illicit drug use is part of our world and chooses to work to minimize its harmful effects rather than simply ignore or condemn them.”⁵⁴⁷ One could make a similar analysis with regard to policing. But mere condemnation and retreat are unacceptable. Harm reduction is not a “horizon” for police reform, in the same way that methadone, naloxone, syringe exchange, and safe injection sites are not horizons for drug law reform.⁵⁴⁸ But harm reduction is an ethical foundation upon which reformers can approach a horizon of racial justice and community flourishing.

People committed to racial justice can reasonably disagree over whether harm reduction is valuable in the policing sphere. It may be that harm reduction will ultimately entrench and legitimate American

MANAGING HIGH-RISK BEHAVIORS 3, 6 (G. Alan Marlatt, Mary E. Larimer & Katie Witkiewitz eds., 2d ed. 2012) (defining harm reduction as involving an “attitude” with “a humanitarian stance that accepts the inherent dignity of life and facilitates the ability to ‘see oneself in the eyes of others’” (quoting G. Alan Marlatt, *Highlights of Harm Reduction: A Personal Report from the First National Harm Reduction Conference in the United States*, in HARM REDUCTION: PRAGMATIC STRATEGIES FOR MANAGING HIGH-RISK BEHAVIORS 3, 6 (G. Alan Marlatt ed., 1998))); Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 112–13 (1999) (“[Harm reduction adherents’] focus is on designing policies that will reduce the overall harm associated with drug use and drug interdiction policies. . . . [H]arm, not morality, now structures the debate.” (emphasis omitted)); Emani Walks, Note, *The Paradox of Policing as Protection: A Harm Reduction Approach to Prostitution Using Safe Injection Sites as a Guide*, 26 DUKE J. GENDER L. & POL’Y 157, 172 (2019). Here, I am not using “harm reduction” to argue that police should seek to reduce the harms of drug use and sex work through diversion policies and programs. See Katherine Beckett, *The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing*, 10 HARV. L. & POL’Y REV. 77 (2016). Instead, I am referring to reduction of the harms of policing itself.

⁵⁴⁷ *Principles of Harm Reduction*, HARM REDUCTION COALITION, <http://harmreduction.org/about-us/principles-of-harm-reduction> (last visited Feb. 18, 2020); see also Devin Race, *Using Harm Reduction to Resist Legal Violence Against Sex Work and Drug Use* (2018) (unpublished manuscript) (on file with author) (discussing the adoption of harm reduction principles in New York and New Haven in response to the AIDS crisis and a current New Haven organization that links harm reduction principles to protection of sex workers).

⁵⁴⁸ See, e.g., Barbara Andracka-Christou, *What Is “Treatment” for Opioid Addiction in Problem-Solving Courts? A Study of 20 Indiana Drug and Veterans Courts*, 13 STAN. J. C.R. & C.L. 189, 221–27 (2017) (discussing methadone, naltrexone, and buprenorphine as methods of opioid addiction treatment); Barbara Fedders, *Opioid Policing*, 94 IND. L.J. 389, 414–15 (2019) (describing how harm reduction fundamentally accepts the fact that drug use is likely to continue and employs strategies involving needle exchanges, safe injection sites, and naloxone distribution); Alex Kreit, *Safe Injection Sites and the Federal “Crack House” Statute*, 60 B.C. L. REV. 413, 420–28 (2019) (providing an overview of safe injection sites and U.S. proposals to create them); Melissa Vallejo, Note, *Safer Bathrooms in Syringe Exchange Programs: Injecting Progress into the Harm Reduction Movement*, 118 COLUM. L. REV. 1185 (2018); cf. Akbar, *supra* note 535 (manuscript at 8) (“I use ‘horizon’ as a metaphor: to place the society that does not depend on prisons and police or other forms of penal control as the anchor for our approach to reform.”).

policing in its current, needlessly violent form.⁵⁴⁹ I believe success requires a movement that operates on many fronts.⁵⁵⁰ For some, that will involve organizing around abolition, giving little attention to the technocratic inner workings of carceral institutions. For others, that will mean trying to work within current institutions to shift their dynamics so that community flourishing and non-carceral accountability are more achievable and sustainable. Others will move betwixt and between. American policing is institutionally racist, but not every police officer set out to become entangled in a racist institution.⁵⁵¹ They, too, can have a role in a robust movement for change if they take bold steps toward antiracism.

One can recognize the scourge of carceral ideology even while pursuing practical, even technocratic, harm reduction measures. One can propose change within police departments even as one recognizes that much deeper structural changes, including the decentering of carceral responses to need and the eradication of segregation, are necessary for healing and justice. Delineating between more or less accurate frames for reform is important for aiming policy change in the most just and productive directions, and it is something I have done in other work.⁵⁵² But fundamental transformation will require allies in every corner—perhaps even within police departments. Anti-segregation policing can be a tool for constructing those alliances.

To answer the question more squarely: I am not certain that the full promise of anti-segregation policing is realizable in the status quo. But I am certain that police reformers and racial justice advocates would be wise to pursue it.

⁵⁴⁹ Cf. Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 *YALE L.J.* 2176 (2013) (arguing that the recognition of the right to counsel in criminal cases merely provides procedural cover for and thereby legitimates the criminal legal system's persistent targeting of the poor).

⁵⁵⁰ See Butler, *supra* note 534, at 1471–73 (positing a “[d]ivision of [l]abor” among organizations advocating for liberal reform and those advocating criminal justice overhaul).

⁵⁵¹ People become police officers for all kinds of reasons. See, e.g., Pamela F. Foley, Cristina Guarneri & Mary E. Kelly, *Reasons for Choosing a Police Career: Changes over Two Decades*, 10 *INT'L J. POLICE SCI. & MGMT.* 2, 5, 5 tbl.1 (2008); Shaun L. Gabbidon, Everette B. Penn & Winston A. Richards, *Career Choices and Characteristics of African-American Undergraduates Majoring in Criminal Justice at Historically Black Colleges and Universities*, 14 *J. CRIM. JUST. EDUC.* 229, 233–34 (2003).

⁵⁵² See Bell, *supra* note 22, at 2089 (distinguishing between legitimacy-based approaches to police reform and my legal estrangement-based approach).