OFFICER OR OVERSEER?: WHY POLICE DESEGREGATION FAILS AS AN ADEQUATE SOLUTION TO RACIST, OPPRESSIVE, AND VIOLENT POLICING IN BLACK COMMUNITIES

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INTRODUCTION

On January 23, 2004, Timothy Stansbury, Jr., a nineteen-year-old Black[1] man, earned his GED. He planned to attend community college and start a family with his girlfriend. Hours later, Timothy met two of his friends and together they traveled to another friend's party. The three young men took a shortcut across the rooftop of Timothy's building because the intercom in the building where the party was held was frequently broken. As the trio approached the rooftop doorway, Timothy was gunned down by a White police officer who panicked upon seeing Timothy.[2] This incident occurred in the Louis Armstrong Housing Projects of Bedford-Stuyvesant,[3] a predominantly Black inner-city neighborhood of Brooklyn, New York. Both the police officer who

* Law Clerk to Hon. Sterling Johnson, E.D.N.Y.; J.D. 2004 New York University School of Law; B.A. 1999 Georgetown University. I dedicate this paper to all of my sisters and brothers who have been disrespected, antagonized, victimized, and ignored by police. To my precious daughter, Anaya Ihsan Rodgers, I pray that you are spared the pain and havoc that racist policing wreaks on so many of our lives, families, and communities, and I pray you will develop your own spirit and method of resistance.

1. I use the term "Black" to refer to people of African descent. I capitalize the "B" in "Black" because I believe that it is disrespectful not to do so given that many Black people consider ourselves to be an ethnic group. *See* Dorothy E. Roberts, *Foreword: Race Vagueness and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 776 n.4 (1999).

2. *See* Sheryl McCarthy, *Once Again, Living While Black Proves Fatal*, NEWSDAY (N.Y.), Jan. 29, 2004, at A36; Michele McPhee, Alice McQuillan & David Goldiner, *Dueling Views of Roof Shoot*, N.Y. DAILY NEWS, Jan. 26, 2004, at A7.

3. This paper grows out of my own experience growing up and still residing in Bedford-Stuyvesant, a predominantly Black inner-city neighborhood in Brooklyn, New York. Bedford-Stuyvesant is the second-largest Black community in the five boroughs of New York. "Comprised of roughly 2000 acres and 400,000 people, Bedford-Stuyvesant on its own would be among the 30 largest cities of America." City Legacy Web Site, Bedford-Stuyvesant Home Page, *at* http:///www.citylegacy.com/bkbedstuy/welcome.htm (last visited Mar. 19, 2004). For decades, the neighborhood has been looked down upon as a high-crime area and that reputation remains partly true today. Yet, the neighborhood is also renowned for its beautiful brownstones, historic landmarks, and tree-lined blocks. *Id.* In the last few years, a revitalization effort has been underway in Bedford-Stuyvesant and this, along with the skyrocketing rents in more highly regarded neighborhoods throughout New York City, has brought yuppies from all over the city flocking to the 'hood. This revitalization effort has overlapped with what has been termed "order-maintenance," "quality of life," or "zero tolerance" policing, the issue of which is discussed throughout this article. Adamma Ince, *Close-Up On: Bedford-Stuyvesant* (May 2, 2002), *at* http://www.villagevoice.com/nyclife/0219,ince,34525,15.html.

killed Timothy and the police officer's partner had their guns drawn, pursuant to a New York Police Department ("NYPD") policy, while on a routine vertical patrol.[4] Although NYPD Commissioner Kelly immediately characterized the shooting as unjustified, a grand jury cleared the officer of any wrongdoing.[5]

On the same day of Stansbury's murder, in Bensonhurst[6]—an historically Italian and Jewish neighborhood located in Brooklyn, New York—a subway rider complained to the police that a man on the subway had a gun. When police arrived at the subway platform, Kevin Tester, a thirty-eight-year-old security guard, fired three shots at them with his .38 caliber revolver. Instead of drawing their own guns and blasting off rounds, the police took cover, called for backup, and talked Tester into giving up his gun. Tester was subdued without injury before being taken into police custody. Mr. Tester, a White male who was illegally armed and violent, is alive today while Timothy Stansbury, a Black male who was unarmed and law-abiding, is dead.[7]

The blatantly inapposite police tactics employed in these two cases illustrate, in part, why members of the Black community[8] declare,"No justice, no peace, til the police are off our streets," and "Our kids are human too!"[9] Since our[10] existence in this country, we have been subjected to a dual system of law

4. According to Police Commissioner Kelly, the policy that allows cops to patrol housing project roofs with their guns drawn is now under review by department officials. *See* McPhee, McQuillan & Goldiner, *supra* note 2.

5. Imani Henry, *Cop Goes Free in Stansbury Slaying*, WORKER'S WORLD (N.Y.), Mar. 4, 2004, at 3.

6. *See generally*, Bensonhurst, at http://www.brooklyn.net/neighborhoods/bensonhurst.html (last visited Feb. 20, 2004). *See also* Felicia Mello, *Close-Up on Bensonhurst*, THE VILLAGE VOICE (N.Y.), Feb. 15, 2004, *available at* http://www.villagevoice.com/issues/0406/mello.php ("In the late 1980s and early 1990s, Bensonhurst gained infamy as a place where Italian residents guarded the gates against newcomers and walking while black was considered a punishable crime."). In 1989, Yusef Hawkins—a young Black man from Bedford-Stuyvesant who was inquiring about a used car in Bensonhurst, was killed by a mob of thirty youths who beat him with baseball bats before shooting him. *See* Life in Brooklyn: Bensonhurst, at http://www.geocities.com/Heartland/Ranch/7589/neighborhoods2.htm (last visited Feb. 20, 2004).

7. See Daryl Khan & Joshua Robin, *Cops Fired Upon, Make Arrest Without Firing*, NEWSDAY, Jan. 26, 2004, at A39.

8. "'The [Black] community' of which I write is in a constant state of flux because it is buffeted by challenges from without and from within. (The same is true for 'the dominant society,' but that is another story.) There are tensions at the border with the dominant society, at the frontier between liberation and oppression. There is also internal dissension over indigenous threats to security and solidarity." Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1770 (1992).

9. *See* Adamma Ince, *Spontaneous Combustion*, THE VILLAGE VOICE, Apr. 6, 2004, *at* http://www.villagevoice.com/news/0414,ince,52434,5.html.

10. I write in the narrative voice in order to centralize the marginalized perspective on which this article is grounded. "The narrative voice, the teller, is important to critical race theory in a way not understandable by those whose voices are tacitly deemed legitimate and authoritarian. The voice exposes, tells and retells, signals resistance and caring, and reiterates what kind of power is feared most—the power of commitment to change." Derrick Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 907 (1995). For further discussion and examples of the use of first-person in legal discourse, see also Margaret E. Montoya, *Celebrating Racialized Legal Narratives, in* CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY 243 (Jerome M. Culp,

enforcement in which we remain "at risk"[11] for police antagonism and violence while Whites enjoy service and protection. The police in our neighborhoods continue to operate as an "occupying force" established to police (not protect) us.[12]

In this article, I argue three main points. First, historically, White policymakers have mischaracterized the problem between police and the Black community as one of Black hostility and resentment rather than as one of police racism and misconduct. Second, the "solution" of police desegregation, which was recommended after nationwide disturbances erupted during the 1960s, fails to remedy the crisis of law enforcement in Black communities because of a misplaced focus on changing Blacks' perceptions of police as opposed to changing the police itself. Finally, desegregation is a formal rather than substantive remedy that may alter the face of the police but does not eradicate its subordinating nature and thus, serves White but not Black interests.

In Part I, I discuss, in the first subsection, the historical problems between law enforcement and the Black community and, in the second subsection, the manner in which the National Advisory Commission on Civil Disorders characterized those problems during the 1960s. In Part II, I explore the subsequent police response to the Commission's recommendations to increase the numbers of Black police officers. I use critical race theory in Part III to analyze why desegregation fails as an adequate solution to racist, oppressive, and violent law enforcement in Black communities. This part highlights so-called "reverse discrimination" claims by White police officers and the doctrine of "operational needs," which arose as a defense for police departments' voluntary affirmative action plans.

Angela P. Harris & Francisco Valdes eds., Temple University Press 2002) ("Autobiographical stories within legal discourse expose how the forces of domination are experienced at the individual level; how they are perceived from a given perspective, and how they make one feel."); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (Harvard University Press 1991); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991); Margaret Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 ASIAN PAC. AM. L.J. 4 (1995); John A. Scanlan, *Call and Response: The Particular and the General*, 2000 U. ILL. L. REV. 639 (2000).

11. Typically, the term "at risk," when used to describe Black people and/or our conditions, connotes the risks of gangs, drugs, and other criminal involvement. *See, e.g.*, Brent Pattison, *Minority Youth in Juvenile Correctional Facilities: Cultural Differences and the Right to Treatment*, 16 L. & INEQ. J. 573, 573 n.3 (1998) ("Black youths are especially at risk for incarceration."); Myrna S. Raeder, *Rethinking Sentencing and Correctional Policy for Nonviolent Drug Offenders*, 14 CRIM. JUST. 1, 54 (1999) ("African American women are particularly at risk in the war on drugs."). While I recognize the severity of "Black-on-Black" crime, I also am aware that "police-on-Black" crime is a real and grave fact of life in Black neighborhoods. Yet, while significant media and public attention has been paid to the issue of crime committed by Black people, the spotlight has never rested on crime committed *against* Black people—especially when police officers are the criminals.

12. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (THE KERNER COMMISSION), REPORT 301 (1968) [hereinafter KERNER REPORT].

I.
THE PROBLEM

"My sense, confirmed by survey research, is that despite [our] opposition to neighborhood crime, most African Americans believe that the criminal justice system is profoundly biased against [us] and do not trust the police to fairly enforce the laws."[13]

This paper is predicated on the recognition that one of the main problems that the Black community and law enforcement face is the legacy of slavery, which still infects police policies and practices toward Black people today. While some attention has been paid to strengthening police-community *relations*, there has been virtually no emphasis on reinventing the police institution itself and on reconceptualizing its design, culture, and function.[14] As the nation transitioned from a plantation-based slave economy, police in many states enforced "vagrancy" laws that, like the black codes, criminalized Blacks' behavior and punished us harshly for minor offenses.[15] Laws enforced in modern "order-maintenance" or "quality-of-life" policing bear a striking resemblance to vagrancy laws enacted after the "emancipation" of the slaves.[16]

From Reconstruction on through the Jim Crow period, many police officials were members of the Ku Klux Klan and other hate groups that targeted and terrorized the Black community.[17] During the Civil Rights Movement, police routinely assaulted Black children, women, and men with batons, blasted away at us with hoses, and sicced us with fierce dogs in order to terrify us and keep us from challenging White supremacy and privilege.[18] Today, police officers continue to harass, beat, torture, and kill Black people with overwhelming

13. Roberts, *supra* note 1, at 826.

14. *See, e.g.*, Remarks by President William J. Clinton (June 9, 1999), in U.S. Dept. Of Justice, Report On The Proceedings, Attorney General's Conference On Strengthening Police-Community Relationships; James Forman, Jr., *Community Policing and Youth As Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1 (2004); Jay Rothman and Randi Land, *The Cincinnati Police-Community Relations Collaborative*, 18 CRIM. JUST. 35 (2004).

15. *See, e.g.*, Sherrilyn A. Ifill, *Creating a Truth and Reconcilation Commission for Lynching*, 21 L. & INEQ. 263, 272 (2003) ("Vagrancy laws and 'apprenticeships' ensured that blacks could be essentially enslaved for minor infractions."); Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor*, 75 U. COLO. L. REV. 657, 680 (2004) (discussing vagrancy law as a method of labor regulation and class-control that is deeply rooted in policing and other enforcement techniques).

16. For a historical discussion of the theory underlying "order-maintenance" policing, see generally Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2261–62 (1998).

17. Roy L. Brooks, *Rehabilitative Reparations for the Judicial Process*, 58 N.Y.U. ANN. SURV. AM. L. 475, 492 (2003).

18. *See* Dan M. Kahan & Traci L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1156 (1998) (explaining the historical role of law enforcement to harass, intimidate and assault Blacks and other people of color from Reconstruction through the Civil Rights Movement).

immunity.[19] Indeed, "[t]he way cops perceive [B]lacks—and how those perceptions shape and misshape crime fighting—is now the most charged racial issue in America."[20] The problem of police-on-Black violence is such a fact of daily life in the Black community that "[s]ome parents and civic leaders are teaching [B]lack and Hispanic children to quickly display their hands during any encounter with the police, like little criminals. This is to show that the youngsters are not armed and therefore should not be blown into eternity at age 10 or 15 or 20 by a trigger-happy stranger in a blue uniform."[21]

A. Too Much Policing, But Not Enough Safety

Police racism and misconduct frequently are attributed to the over-enforcement of laws in Black communities. Over-enforcement[22] gives rise to an adversarial model of policing in which racial profiling,[23] pretextual stops, unlawful searches and arrests, botched raids,[24] excessive force, murder, and

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19. *See, e.g.*, Bryan Virasmi, *Zongo Widow's Plea/Asks Kelly for Help in Getting "Justice,"* NEWSDAY (N.Y.), Aug. 5, 2003, at A14 ("'Even though there is a very good police commissioner and a good mayor,' she said, her neighbors told her she may not get justice up to now."); Donna de la Cruz, *No Fed Prosecution of Diallo Cops*, ASSOCIATED PRESS ONLINE, 2001 WL 11948733, Feb. 1, 2001, (reporting Justice Department's failure to pursue civil rights charges against White New York City police officers who shot Amadou Diallo, an African immigrant, forty-one times when he reached for his wallet, and stating, "Federal civil rights prosecutions following state acquittals are rare"); Human Rights Watch, *Shielded from Justice: Police Brutality and Accountability in the United States*, June 1998 (providing a thorough account of police misconduct and the overwhelming lack of discipline and sanctions in cities such as Atlanta, Boston, Chicago, Detroit, Los Angeles, New Orleans, Philadelphia, and Washington, D.C.).

20. Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES MAG., June 20, 1999, at 52.

21. Bob Herbert, *In America; A Brewing Storm*, N.Y. TIMES, Feb. 11, 1999, at A33. *See also* Jodi Wilgoren & Ginger Thompson, *After Shooting, an Eroding Trust in the Police*, N.Y. TIMES, Feb. 19, 1999, at A1.

22. When police are over-enforcing the criminal laws in Black communities, they participate in a scheme which funnels Blacks into prison for mostly minor offenses. This, in turn, dilutes our political, economic, and social strength and assists in maintaining our oppression. *See* Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1007 (2001) (exploring the "group consequences of over-enforcement as well as the way it supports a racial hierarchy in America").

23. Racial profiling is flawed as a policy not only because of its harassing features but also because it fails as an accurate mode of uncovering criminal activity. Studies have shown that a non-racial focus on suspicious behavior is more likely to uncover criminal activity than when race or ethnicity is used as a factor in determining whom to stop and search. Donna Coker, *Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 835 (2003). The author points to studies concluding that, despite the entrenched practice of racial profiling, a non-racial focus on suspicious behavior is more likely to uncover criminal activity than when race or ethnicity is used as a factor in determining whom to stop and search. *Id.* at 836.

24. The death of Alberta Spruill, a 57-year-old Black woman who suffered a heart attack when police detonated flash grenades and handcuffed her inside her apartment, which was wrongly identified as a drug stash, is yet another tragic example of the aggressiveness of police tactics employed in Black communities. *See NYC Settles with Family of Woman Killed During Police Raid*, JET MAGAZINE, Nov. 17, 2003, at 47. *See also Better Planning Could Help Arrest Botched Police Raids*, USA TODAY, Apr. 26, 2004, at A17. *See generally* COMMISSION TO INVESTIGATE

corruption abound.[25] Over-enforcement rests on the racial stereotype of Black lawlessness and criminality.[26] "[P]olice officers, like many Americans, believe crime has a Black face . . . This belief in Black criminality causes police departments to over-police African American communities, seek to contain African Americans within high crime areas, and disproportionately subject African Americans to so-called 'quality of life' policing."[27]

ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, COMMISSION REPORT (1994), *reprinted in* NEW YORK CITY POLICE CORRUPTION INVESTIGATION COMMISSIONS, 1894–1994, VOL. VI, at 47 [hereinafter THE MOLLEN REPORT] (Gabriel J. Chin, ed., William S. Hein & Co. 1997) (finding "[B]rutality is a form of acceptance. It's not just simply giving a beating. It's [sic] the other officers begin to accept you more.").

25. *See, e.g.*, Ken Armstrong, Steve Mills, & Maurice Possley, *Cops and Confessions: Coercive and Illegal Tactics Torpedo Scores of Cook County Murder Cases*, CHI. TRIB., Dec. 16, 2001, at 1; William Glaberson, *Suit Accuses Police in Brooklyn of Strip-Searches in Minor Cases*, N.Y. TIMES, Oct. 30, 2003, at A1 (reporting lawsuit against NYPD officers for "routinely violat[ing] people's rights by strip searching those arrested for misdemeanors and lesser offenses in Brooklyn, often in front of crowds of other detainees" and a previous fifty-million-dollar settlement between the NYPD and civilians in Manhattan and Queens for illegal strip-searches); Michael Janofsky, *Philadelphia Police Scandal Results in Lawsuit and Racism Accusations*, N.Y. TIMES, Dec. 12, 1995, at D23; Salm Kolis & Don Mackle, *Bedford-Stuyvesant Residents Protest Killing of Black Youth by New York City Police*, THE MILITANT, Feb. 9, 2004, at 1 ("They're killing us like dogs out here, pure dogs! It's not right and it needs to stop." This statement was made by Phyllis Clayburne, the mother of Timothy Stansbury, Jr., a nineteen-year-old unarmed African American male who was killed on Jan. 24, 2004, by a White police officer.); Steve Mills, *One Step to Reform: 2 Steps Back to Corruption, Brutality Charges Still Tarnish Police*, CHI. TRIB., Feb. 11, 1999, at 1; Ronald Smothers, *Fifth Ex-Officer is Sentenced in a Deadly Brutality Case*, N.Y. TIMES, Mar. 20, 2004, at B5; Don Knowland & Gerrardo Nebbia, *The Los Angeles Police Scandal and Its Social Roots*, World Socialist Website, *at* http://www.wsws.org/articles/2000/mar2000/lapd-m13.shtml (Mar. 13, 2000) ("News reports have revealed a widespread pattern of unjustified arrests, beatings, drug dealing, witness intimidation, illegal shootings, planting of evidence, frame-ups and perjury at the CRASH unit of the Rampart Division of the LAPD. CRASH is the acronym for the Community Resources Against Street Hoodlums, an anti-gang program the LAPD implemented over a decade ago. The Rampart Division covers an [area], which is largely working class, heavily immigrant, and densely populated."). See also the findings of the Mollen Commission in 1994 of "evidence that numerous police officers committed theft, protected drug traffickers, sold and used drugs, falsified police reports, lied in court and treated citizens brutally and violently." THE MOLLEN REPORT, *supra* note 24, at 28–49.

26. Roberts, *supra* note 1, at 813–19. *See generally* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1508 (1988); Jeff Brazil & Steve Berry, *Color of Driver is Key to Stops in I-95 Videos*, ORLANDO SENTINEL, Aug. 23, 1992, at A1; Dirk Johnson, *2 out of 3 Black Men in Denver Are on Police List of Gang Suspects*, N.Y. TIMES, Dec. 11, 1993, at 8; Iver Peterson, *Whitman Concedes Troopers Used Race in Stopping Drivers*, N.Y. TIMES, Apr. 21, 1999, at A1; Sheryl Stolberg, *150,000 Are in Gangs, Report by D.A. Claims*, L.A. TIMES, May 22, 1992, at A1; Paul W. Valentine, *Maryland State Police Still Target Black Motorists, ACLU Says*, WASH. POST, Nov. 15, 1996, at A1.

27. Kenneth B. Nunn, *The "Darden Dilemma": Should African Americans Prosecute Crimes?*, 68 FORDHAM L. REV. 1473, 1490 (2000). *See also* Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153, 154 (2004) ("The criminal justice system reflects, and is driven by, often unstated assumptions about who commits crimes, who poses a danger, and who deserves fair treatment. These assumptions, in turn, animate choices about the allocation of resources, the deployment of law enforcement personnel, and the evaluation and implementation of policies.").

One common bond among members of the Black community is the experience of having unjustified and often demeaning encounters with police.[28] Many Black people share similar experiences of being stopped, questioned, and asked for identification while walking in our own neighborhoods; lying spread eagle on the hood of a police car during a "routine" traffic stop; having officers' guns trained on us without cause; and being directed to move along in areas where we are presumed—because of racism—to have no business. New York's Civilian Complaint Review Board ("CCRB") reports that Black people are most likely to be victims of alleged police misconduct.[29] In fact, fifty-three percent of alleged victims in CCRB complaints filed between January 2002 and June 2003 identified themselves as Black.[30] Although the crime rate has decreased, there has been a steady increase in the number of complaints to the CCRB.[31] In New York City, "[t]he level of daily harassment, capped by the

28. Wilgoren & Thompson, *supra* note 21.

29. NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD, STATUS REPORT 66 (Jan.–June 2003).

30. *Id.*

31. *Id.* The CCRB is an independent agency authorized to "receive, investigate, hear, make findings and recommend action on complaints against New York City police officers which allege the use of excessive or unnecessary force, abuse of authority, discourtesy, or the use of offensive language." *Id.* at v. In 1953, in response to the demands of Black and Latino lobbying groups, the NYPD established the CCRB. The CCRB was structured as a police organization—investigations of misconduct and racial discrimination were conducted by police officers themselves and disciplinary decisions were made by deputy police commissioners. NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD, HISTORY OF THE CCRB, *available at* http://home.nyc.gov/html/ccrb/html/history.html (last visited Mar. 19, 2004). In 1965, the CCRB was restructured to include civilians "in order to instill public confidence that investigations of civilian complaints were handled fairly." *Id.* The ensuing inclusion of civilians on the CCRB was met with a serious backlash by New York's police union—the Patrolmen's Benevolent Association ("PBA"). The union president said, "I'm sick and tired of giving in to minority groups with their whims and their gripes and shouting." *Id.* The PBA gathered enough support to force a ballot measure in order to prohibit civilians from having any oversight of police complaints, and the board returned to an all-police makeup. *Id.* "In 1988, an event helped sway public opinion in favor of more civilian control over the investigation of complaints made against NYPD officers. In response to complaints of drug trafficking and disorderly groups in Tompkins Square Park, the department chose to enforce an existing 1:00 a.m. curfew that had previously not been enforced. A rally protesting the curfew on July 31 turned into a confrontation with police in which four people were arrested and four officers were injured. On August 6, demonstrators were forced from the park in a series of violent incidents between the police, demonstrators, and bystanders. Video footage showed police officers striking people with nightsticks, kicking people who were on the ground, and covering their shields to hide their identity." *Id.* In 1993, Mayor David Dinkins—New York's first Black mayor—and the New York City Council "created the Civilian Complaint Review Board in its current, all-civilian form." *Id.* Its central mission is to "thoroughly and impartially investigat[e] all complaints it receives." *Id.* "The agency was granted subpoena power . . . and authority to recommend discipline in cases that the board substantiated. However, the agency was underfunded at its inception, leaving it unable to cope with the large number of complaints it received." *Id.* After the torture of Abner Louima, a Haitian immigrant, by White police officers in the 70th precinct in 1997, the CCRB's budget was "steadily increased." *Id.* New York's CCRB is now the largest civilian oversight agency in the country. *Id.* The CCRB has investigated thousands of complaints, leading to the discipline of hundreds of police officers. *Id.*

brutality of the [Abner] Louima and [Amadou] Diallo[32] cases, dramatically eroded support for New York City's quality-of-life initiative, especially among African Americans, and sparked demands for tough oversight of police conduct."[33]

However, some Black scholars contend that Black-on-Black crime outweighs the harm of police-on-Black crime, and thus believe that the police must have broad discretion in order to combat crime in Black neighborhoods.[34] They criticize police for turning a blind eye toward crime in Black areas, thus failing to ensure the safety of Black residents. This paper does not weigh in on the debate of whether over-enforcement or under-enforcement poses a greater risk to the well-being of the Black community. Rather, I suggest that both sides of the debate have largely overlooked a critical link between the practices, a nexus that may form the basis for an alliance between proponents and opponents of tougher law enforcement in the Black community. Under-enforcement and over-enforcement are flip sides of the same racist coin. The practices are rooted in police departments' failure to offer Black communities the model of non-adversarial and dignified policing enjoyed by Whites.

Randall Kennedy, the most influential proponent of the under-enforcement thesis, argues in his book *Race, Crime and the Law*, that "the principal injury suffered by African Americans in relation to criminal matters is not overenforcement but underenforcement of the laws."[35] Under-enforcement occurs when police officers avoid Black neighborhoods and thus fail to ensure public safety for Black residents. Frank Rudy Cooper labels this phenomenon "depolicing" and defines it as "the [systematic] withdrawal of proactive crime investigation in racial minority neighborhoods."[36] He attributes depolicing to police officers' lack of identification with certain racial groups and provides examples of how depolicing looks in practice.[37]

In the first example of under-enforcement, we find that police depolicing

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32. In 1999, an all-White squad from the New York Police Department's Street Crime Unit fired forty-one bullets at Amadou Diallo, an unarmed African immigrant from Guinea, killing him as he reached for his wallet. Diallo died inside the vestibule of his own apartment building. Three of the officers had been involved in previous shootings, including one fatality. Waseem Shehzad, *New York's Killer Cops Shoot Innocent Man Outside Apartment Block* (Mar. 5, 1999), *at* http://www.muslimedia.com/archives/world99/nycop.htm.

33. Roberts, *supra* note 1, at 814–15. *See also* David Rhode, *Crackdown on Minor Offenses Swamps New York City Courts*, N.Y. TIMES, Feb. 2, 1999, at A1.

34. Dan Kahan and Tracey Meares "present order-imposing laws . . . as a reflection of Black political strength" and "argue that constitutional standards used to evaluate these laws have outlived their utility and should be replaced by a new criminal procedure regime that is less hostile to police discretion." Roberts, *supra* note 1, at 820. *See also* Christo Lassiter, *The Stop and Frisk of Criminal Street Gangs*, 14 NAT'L BLACK L.J. 1 (1995) (urging police to stop and frisk suspected gang members as a means of addressing "Black-on-Black" crime).

35. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 19 (1997).

36. Frank Rudy Cooper, *Understanding "Depolicing": Symbiosis Theory and Critical Cultural Theory*, 71 UMKC L. REV. 355, 357 (Winter 2002).

37. *Id.* at 357–64.

can take the form of containment. After the Rodney King beating, the

> [Los Angeles Police Department] chose to merely contain the riots within racial minority neighborhoods. They lined up at a safe distance from the riots at points where rioters could have gained access to White neighborhoods. That left Blacks and Latinos to turn their anger on Koreatown, which the police knew was heavily armed. The implication was obvious: We will protect Whites, but not Blacks, Browns and Yellows. As a result, Black, Brown and Yellow neighborhoods were looted and burned, causing millions of dollars of damage, deaths and injuries.[38]

Depolicing may also involve police backlash against policies aimed at promoting racial equality. For example, when the Seattle City Council was considering a measure to study racial profiling that "included tracking the actions of individual officers," the Seattle Police Department's union responded that "officers might become less willing to make traffic stops."[39] Such strong opposition to the mere gathering of information suggests that police would likely revolt against actual police reform. This conclusion is likewise borne out by events in Cincinnati, when, "[a]fter the riots, Cincinnati's political leaders required officers to identify the race of *Terry*-stop suspects on a form . . . Cincinnati Police Department . . . officers developed an explicit policy of avoiding most crime in Black neighborhoods."[40]

Cooper argues that depolicing has three main functions, which jointly and severally pose a threat to racial minorities. First, depolicing allows officers to "avoid social sanctions for racist policing by avoiding any exercise of *Terry* discretion in racial minority communities."[41] Second, it "create[s] an implicit threat that if racial minorities criticize the police, officers will allow crime to go unchecked in racial minority communities."[42] Third, depolicing is a divide-and-conquer tactic, which pits interest groups against one another and forces politi-

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38. *Id.* at 364.

39. *Id.* at 362.

40. *Id.*

41. *Id.* at 363. In *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968), the Supreme Court held that police can stop and frisk civilians based on the officers' reasonable suspicion that criminal activitiy is afoot, a less stringent standard than the probable cause requisite for arrests and full-blown searches. For additional critiques of current Fourth Amendment law, see Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and* Arvizu, 47 VILL. L. REV. 851 (2002); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998) (claiming that unrestrained police discretion contributes to racist policing); Anthony C. Thompson, *Stopping the Usual Suspects*, 74 N.Y.U. L. REV. 956 (1999).

42. Cooper, *supra* note 36, at 369. For examples of depolicing in practice, see also Steve Miller, *Cincinnati in Grip of a Crime Wave Months After Riots: Profiling Fears Cited as Shootings Rise*, WASH. TIMES, July 18, 2001, at A6 (describing withdrawal of police from black neighborhood in the aftermath of race riots); Kery Murakami, *Racial Profiling: A Fine Line*, SEATTLE POST-INTELLIGENCER, Apr. 29, 2002, at 1 (describing police reluctance to make traffic stops in the wake of racial profiling regulations).

cians to choose between racist policing and no policing at all.[43]

In the contemporary debate about the criminal justice system, criticism of aggressive policing often is juxtaposed with praise for tougher law enforcement. My own experience with police leads me to conclude that the practices are not mutually exclusive. The Black community does not suffer from either over-enforcement or under-enforcement. We are harmed by both. Each stems from police racism against Black people and perpetuates Black subordination. Whereas over-enforcement arises from the myth of Black criminality, under-enforcement reflects police failure to regard Blacks as victims. Both practices limit the opportunities of Blacks and police to have non-adversarial interactions with one another, thereby reducing the potential for which each may alter its negative preconceptions of the other. Over-enforcement and under-enforcement persist because the Black community lacks the power to shape the law enforcement agenda, or any agenda, in this country.[44] Rather than engage in the current debate, this paper explores why—despite the increasing numbers of Black police officers—Black inner-city communities are forced to choose between racist policing or no policing at all.

B. The National Advisory Commission on Civil Disorders' Framing of the Problem

"[T]o many Negroes, police have come to symbolize [W]hite power, [W]hite racism, and [W]hite repression. And the fact is that many police do reflect and express these [W]hite attitudes. The atmosphere of hostility and cynicism is reinforced by a widespread perception among Negroes of the existence of police brutality and of a 'double standard' of justice and protection—one for Negroes and one for [W]hites."[45]

As the Black community increasingly challenged racism and oppression during the 1960s, conflict between Blacks and the police rose to unprecedented levels. Police mounted an aggressive defense of White supremacy against which the Black community was protesting. During this time, police forces primarily served to contain, suppress, and punish Black revolt, and officers used hoses, batons, and horses to subdue us. Attacks by White police officers against Black civilians triggered major disturbances, fanning the flames of uprising.[46] With

43. Cooper, *supra* note 36, at 367.

44. *See, e.g.*, Kim Taylor-Thompson, *supra* note 27, at 154 ("[Herein lies] an utterly common if nonetheless flawed pattern: top-down decision making in which the most powerful—the wealthy, the privileged, and the politically well-connected—define justice priorities and initiatives to the exclusion of the vast majority in our society . . . [L]egislators and political leaders routinely make sweeping claims about the latest campaign to reduce crime without having tested their operative assumptions, much less having invited informed and open debate. And the very communities in whose name and on whose streets these battles are fiercely fought rarely are permitted to play a role in evaluating such strategies or in determining whether they should be implemented at all. What results is a politically constructed vision of 'justice for all' imposed by the few.").

45. KERNER REPORT, *supra* note 12, at 206 (1968).

46. The Department of Justice's Community Relations Service characterizes such an encoun-

very few exceptions, the race riots of the mid- and late-twentieth century did not stem directly from confrontations between Black and White citizens, but instead from conflicts between Black citizens and the police department.[47]

For example, on July 18, 1964, after a White police officer working in Harlem killed fifteen year-old James Powell, Black demonstrators gathered to protest. The police responded by using force to break up the demonstration, initiating violence that resulted in one death, more than one hundred injuries, and hundreds of arrests.[48] Likewise, the beating of Marquette Frye, a Black motorist, by White police officers sparked the Watts Riot of 1965.[49] A riot erupted when members of the community gathered at the crime scene and were also beaten by the officers; by its end five days later, thirty-four people were dead and at least one thousand were injured.[50] In Detroit during July 1967, police stormed an illegal Black drinking establishment, in which a celebration for Black Vietnam veterans was being held. A disturbance ensued and the National Guard was called in to quash the riot, in which forty-three Black people were killed, 1189 were injured, and 7231 were arrested.[51] Similar confrontations between the police and Black communities developed into full-scale confrontations in other cities, such as Newark, Cleveland, Washington D.C., Chicago, and Atlanta.[52]

In July 1967, President Lyndon Johnson created the National Advisory Commission on Civil Disorders, also known as the "Kerner Commission," and charged it with explaining the riots and providing recommendations for how to prevent them in the future.[53] The Commission's 1968 report, commonly referred to as the Kerner Report, was highly publicized and received national attention. It warned that the nation was moving toward "two societies" in which Blacks and Whites were "separate and unequal."[54]

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ter between police and Black civilians as a "triggering incident," which is a "tension-heightening event that catalyzes discontent and turns it into civil disorder." U.S. DEP'T OF JUSTICE, COMMUNITY RELATIONS SERV., AVOIDING RACIAL CONFLICT: A GUIDE FOR MUNICIPALITIES 4 (1991).

47. *See generally* W. MARVIN DULANEY, BLACK POLICE IN AMERICA (1996).

48. Harlem Riot of 1964, *at* http://www.africanaonline.com/reports_harlem.htm (last visited Feb. 1, 2004). The protest, sponsored by the Congress of Racial Equality (CORE), began peacefully but became violent after clashes with the police. "The rioting in Harlem continued for two nights before spreading to Brooklyn's Bedford-Stuyvesant neighborhood." *Id.*

49. Watts Riot of 1965, Africa Online, *at* http://www.africanaonline.com/reports_watts.htm (last visited Feb. 1, 2004).

50. *Id.*

51. Detroit Riot of 1967, Africa Online, *at* http://www.africanaonline.com/reports_detroit.htm (last visited Feb. 1, 2004).

52. *Id.* A more recent example of White police terrorism against Black civilians occurred in 1980, when "a mob of white cops went on a rampage for several days in a black section of [New Orleans] in retaliation for the murder of a police officer. Four people were killed and as many as 50 injured. . . . [S]ome people were tortured and others were dragged out to the swamps, where mock executions were performed." Paul Keegan, *The Thinnest Blue Line*, N.Y. TIMES MAG., Mar. 31, 1996, at 32.

53. KERNER REPORT, *supra* note 12.

54. *Id.* at 1.

The Kerner Report made several significant findings about the problems between Blacks and police, most notably that the Black community's most prevalent complaints were of police aggression, disrespectful White attitudes, and the discriminatory administration of justice.[55] Yet, one of the Report's most basic flaws is its characterization of the primary causes of the riots as Blacks' perception of law enforcement in our neighborhoods rather than the police's own racist practices and adversarial model.[56] For example, the opening statement in the "police conduct" section of the Report refers not to actual police conduct but rather to Blacks' mentality; it states, "Negroes firmly believe that police brutality and harassment occur repeatedly in Negro neighborhoods. This belief is unquestionably one of the major reasons for intense Negro resentment against the police."[57] Such a framing of the problem led the Kerner Commission to recommend that police departments "intensify their efforts to recruit more Negroes" because "Negro officers [] can be particularly effective in controlling any disorders that do break out."[58]

Kerner's recommendation does not aim to abolish police as an "occupying force" in Black communities.[59] Instead, the proposal seeks merely to "counter the charge" or change Blacks' perception that police behave as an "occupying force."[60] Kerner's flawed framing of what underlies racial tension and civil disturbances is echoed today by the Community Relations Service ("CRS") of the Department of Justice. The CRS "assist[s] local jurisdictions in responding to riots, demonstrations, or civil disorder and assist[s] local law enforcement agencies to improve their service and relations with minority communities."[61] The CRS attributes civil disorder to "two volatile community dynamics known to create extraordinary tension"—"perceived disparity of treatment" and "lack of confidence in redress systems"—plus "a triggering incident."[62] By characterizing the causes of civil disorder in this manner, the CRS masks what the Black community knows and experiences as the real problem—disparate treatment and inadequate redress systems, both of which are institutional components of the criminal justice system.

And, as with the Kerner Report, the flawed framing of the issue has led to inadequate solutions. A 1979 law review article crystallizes the argument that desegregation was a formal means of changing Blacks' perceptions rather than a substantive solution to racist policing. The author wrote,

As one step toward increasing effective law enforcement in a racially

55. *Id.* at 91–93.

56. *See, e.g., id.* at 157 (observing that "abrasive relationships" between the police and Blacks "have been a major source of grievance").

57. *Id.* at 302.

58. *Id.* at 315–16.

59. *Id.* at 206.

60. *Id.*

61. U.S. DEP'T OF JUSTICE, *supra* note 46, at 3.

62. *Id.* at 3–4.

> tense city, the municipality may decide to increase the number of [B]lack police officers. Whether or not the municipality has previously discriminated against [B]lack applicants to the police force, the municipal government might reasonably conclude that increasing the number of [B]lacks enforcing, and standing as symbols of, law and order in [B]lack communities will be a positive step: *[B]lack residents will be less likely to react with rage* to a [B]lack officer than to a [W]hite officer, who symbolizes majoritarian oppression; *[B]lacks will have less reason to fear* brutality or needless harassment from [B]lack policemen; *[B]lack policemen may be more sympathetic to ghetto conditions* and social structures; and, to the extent that the municipality has made efforts to cease discriminating in the provision of enforcement services, *[B]lack policemen will serve as a visible symbol of the new governmental policy of repairing broken relations between the races.* Integrating the police department, therefore, *should help to assure the [B]lack community* that the department will no longer act in a discriminatory manner. This assurance, in turn, should encourage the community to have trust in and cooperate with law enforcement efforts in the municipality, thus increasing the effectiveness of these endeavors.[63]

The above passage illustrates that the desegregation of police forces had little to do with fulfilling Blacks' interests in equal opportunity for law enforcement employment and in fair, equitable policing. Rather, the employment of Black officers was designed to fulfill the White majority's interests in containing racial tension in order to maintain law and order in Black communities. Consequently, Black officers' main purpose was to lend legitimacy to the police department by virtue of their presence alone.

Of course, the desegregation of police forces was not imposed on the Black community against our will. Long before the Kerner Report recommendations, African Americans regarded the employment of Black police officers as a solid crime-prevention and community-relations measure. In fact, during the 1960s and thereafter, "Black citizens often requested that police departments assign only [B]lack police officers to [our] communities."[64] This request was based on a long-held belief among members of the Black community that only Black police officers "would provide [us] the protection of the law, and fair and equitable law enforcement."[65] Frequently, Black civilians looked to Black law enforcers to protect us from racist violence.[66]

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63. Note, *Race as an Employment Qualification to Meet Police Department Operational Needs*, 54 N.Y.U. L. REV. 413, 414 (1979) (emphasis added).

64. DULANEY, *supra* note 47, at 27.

65. *Id.* at 11. "The failure of Irish police officers to protect African-Americans from antebellum mobs" was so gross that blacks in Pittsburgh, Pennsylvania, seized on a "rare opportunity to participate in law enforcement." *Id.* at 4.

66. *Id.*

II.
DESEGREGATION AS THE POLICE "SOLUTION"

"[T]hey are better able to cope with the inhabitants of that zone, who on occasion become abusive and aggressive toward police officers during a disturbance . . . . [T]hey are able to communicate with the inhabitants of the Negro area better than white officers and are better able to identify Negroes and investigate criminal activities in that zone more effectively than [W]hite officers."[67]

While Black people had long recognized the value of having Blacks among law enforcement and had been demanding Black police officers be hired to serve in our neighborhoods, it was not until the 1960s—when racial conflict erupted in several cities across the nation—that politicians and police officials began to desegregate their departments.[68] Black women and men were not hired because of a police commitment to end racial oppression. Rather, many police departments were forced to hire and promote Black officers due to court orders and consent decrees prompted by litigation initiated by Black police officers and organizations.[69]

For example, in 1976, the Chicago Police Department was directed by court order to fill fifty percent of each officer training class with "[B]lack and Spanish-surnamed males."[70] In 1974, the North State Law Enforcement Officers entered into a settlement agreement directing the City of Charlotte to meet specific requirements for the promotion of Black officers.[71] Likewise, the City of Boston entered into a consent decree with the Massachusetts Association of Minority Law Enforcement Officers explicitly requiring the City to comply with the Equal Employment Opportunity Commission Uniform Guidelines on Employee Selection Procedure.[72]

When Black women and men were hired onto police forces, they were treated as second-class citizens and many departments experienced "massive

67. Baker v. City of St. Petersburg, 400 F.2d 294, 296 (5th Cir. 1968) (account of the testimony of Police Chief Harold Smith).

68. DULANEY, *supra* note 47, at xv.

69. *See, e.g.*, Holliman v. Price, 1973 WL 280, at *10 (E.D.Mich. 1973) (invalidating police department's discriminatory employment criteria and granting minority plaintiffs preliminary injunction compelling city to proceed with plans to hire new patrol officers and to reconsider previously rejected applicants for entry-level positions). During the 1970s, the Black Shield Police Association's suit against the Cleveland Police Department resulted in a consent decree in which the department was ordered to implement remedial measures for hiring and promotions. Black Shield Police Ass'n v. City of Cleveland, 838 F.2d 470 (6th Cir. 1988). "In 1976 the Indiana State Police Academy, following a selection process that had been mandated by a consent decree entered in *Bailey v. DeBard*, reserved 40% of the seats in each State Police Academy class for black applicants." Walker v. State of Indiana, No. 94-2962, slip op. at 1 (7th Cir. June 20, 1995). Likewise, in 1982, the Department of Justice and Nassau County Police Department entered a consent decree to resolve the police department's alleged employment discrimination. Feldman v. Nassau County, 349 F.Supp.2d 528, 531–32 (E.D.N.Y. 2004).

70. United States v. City of Chicago, 411 F. Supp. 218, 249 (N.D. Ill. 1976).

71. Hayes v. N. State Law Enforcement Officers Ass'n, 10 F.3d 207, 210 (4th Cir. 1993).

72. Cotter v. City of Boston, 193 F. Supp. 2d 323, 332 (D. Mass. 2002).

resistance to integration."[73] In Detroit, Black transfers to the Narcotics Division were "met with severe hostility and a campaign of harassment" from White colleagues, including the placement of Black officers in danger through investigation information leaks.[74] In Mobile, Alabama, Black police officers were prohibited from partnering with White officers in patrol cars.[75] Additionally, police departments across the country engaged in discrimination against Black police officers by "restricting them to beats or assignments in African-American neighborhoods."[76] The following case, *Baker v. City of St. Petersburg*,[77] illustrates the racist manner in which police departments employed Black police officers and regarded Black civilians. It also foreshadows the development of the "operational needs" doctrine. Finally, it reveals the degree to which a court will, or will not, scrutinize a police department's claim of what it needs in order to improve efficiency and effectiveness.

In *Baker v. City of St. Petersburg*, a group of Black patrolmen sought an injunction under the Fourteenth Amendment against the St. Petersburg Police Department[78] for its confinement of Black police officers to patrolling the "Black zone" and for its segregated locker room facilities. The Black officers were restricted to policing other Blacks, all of whom resided in the gerrymandered Zone 13. No White officer ever was assigned to Zone 13 and no Black officer was ever assigned to police any other zone.[79]

At the trial, the City claimed that its purpose in maintaining the race-based assignment scheme was to increase administrative effectiveness and efficiency.[80] The testimony of White Police Chief Harold C. Smith sheds light on the racist rationale on which the employment of Black officers was based. He claimed, "[T]hey are better able to cope with the inhabitants of that zone, who on occasion become abusive and aggressive toward police officers during a disturbance; and, further, that they are able to communicate with the inhabitants of the [N]egro area better than [W]hite officers and are better able to identify Negroes and investigate criminal activities in that zone more effectively than [W]hite officers."[81] Even more troublesome than the segregated and gerrymandered assignments is the stereotypical reasoning on which such practices stood.

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73. Baker v. City of Detroit, 483 F. Supp. 930, 943 (E.D. Mich. 1979).

74. *Id.*

75. Allen v. City of Mobile, 331 F. Supp. 1134, 1137 n.12 (S.D. Ala. 1971) (finding the city's justification for segregating assignments and patrol cars insufficient and noting that Black patrolmen were assigned detective work without the commensurate rank and pay).

76. DULANEY, *supra* note 47, at 21.

77. 252 F. Supp. 397 (M.D. Fla. 1966), *rev'd*, 400 F.2d 294 (5th Cir. 1968).

78. The record reveals that the St. Petersburg Police Department refused to hire Blacks until 1950. Fifteen years later when the case came before the district court, only 14 of 254 officers were Black. *Baker*, 252 F. Supp. at 397.

79. *Id.* at 398.

80. *Baker*, 400 F.2d at 296.

81. *Id.* (account of the testimony of Police Chief Harold Smith).

The record discloses no evidence in support of the chief's opinion. Nowhere does it suggest that the Black officers were trained or experienced in community relations, problem solving, conflict resolution, identification techniques, or investigation. Rather, the chief's testimony reveals his own belief that the Black officers—solely because they were Black—were inherently capable of performing such tasks. Furthermore, at the time when the case came before the district court, Blacks were overwhelmingly absent from top positions within the St. Petersburg Police Department.[82] Thus, the chief's testimony indicates his implicit presumption that Blacks' increased effectiveness and efficiency was valuable only at the patrol level—the bottom of police hierarchy.

The District Court ruled in favor of the City, finding "insofar as the racial classifications existed in the operations of the department, they were the product of the well-considered judgment of the Chief of Police."[83] The Fifth Circuit reversed and found that the City's segregated assignments violated the Black officers' Equal Protection rights.[84]

The policies and practices of the St. Petersburg Police Department indicated the existence of a dual system of policing. On the one hand, the Department continued to view Blacks as a "problem people"[85] whose behavior required constant surveillance, regulation, and overlapping patrol. On the other hand, it relegated Black officers to token race-workers by confining their duties exclusively to policing other Blacks.[86] By race-workers, I mean a system in which the role of improving race relations belongs solely to Blacks because of our "innate" ability to communicate with other Blacks. In this system, individual Whites and White institutions are allowed to escape responsibility for abolishing White supremacy. Furthermore, if racism did not infect the Police Chief's reasoning, then one might expect that Blacks' "superior" communication and problem-solving skills would be valued—not simply at the bottom patrol level—but also among the top ranks of the police department for the development of more pro-Black, or at least not anti-Black, police policies, practices, and tactics.

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82. *Id.* at 295 (noting that with the exception of one Black patrol officer ranked as sergeant, "none of the other Negroes is . . . in a command position").

83. *Id.*

84. *Id.* at 301.

85. Nearly a century ago, W.E.B. DuBois described how Black people are perceived by the majority as "a problem." W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 3–4 (Penguin Books 1996) (1903) ("Between me and the other world there is ever an unasked question: . . . How does it feel to be a problem?"). Cornel West reiterates and expands on this observation by using the phrase "problem people" to explain the predominant view of Black people as outsiders in American society. CORNEL WEST, RACE MATTERS 2 (1993) (quoting Dorothy I. Height, president of National Council of Negro Women).

86. *Baker*, 252 F. Supp. at 397–99.

III.
THE PROBLEM WITH THE "SOLUTION"

"The common denominator is [the view of] [B]lack people as a 'problem people'. . . . [W]e confine discussions about race in America to the 'problems' [B]lack people pose for [W]hites, rather than consider what this way of viewing [B]lack people reveals about us as a nation."[87]

A. Backlash by White Police Officers and the "Operational Needs" Defense

The racist attitudes of individual White officers and the institutional racism of police departments and unions pose a significant barrier to police reform and to the first-class treatment of Black police officers and civilians alike. White police officers and unions resisted the desegregation of their departments with fierceness and tenacity: "[T]he attempt to reform the historically racial policies of American police departments only engendered more problems—especially when reform meant challenging the hegemony of [W]hite officers for positions and promotions in policing."[88] For example, when the Detroit Police Department initiated a program to desegregate scout cars, the program was strongly opposed by [W]hite officers.[89] To indicate their opposition, the officers "staged a so-called 'blue flu' protest action by going on a ticket strike."[90] In a similar vein, during the 1960s, New York's police union—the Patrolmen's Benevolent Association ("PBA")—protested the inclusion of civilians among the police oversight board which was intended to ensure fair investigations of civilian complaints of misconduct.[91] Afterwards, the PBA president stated, "I'm sick and tired of giving in to minority groups with their whims and their gripes and shouting."[92] The PBA led a retaliatory campaign that forced a ballot measure, which won overwhelmingly, and returned the board to its previous all-police makeup. In fact, "[b]y the early 1970s, racial conflict was the norm in most American police departments."[93]

The backlash by some White officers, most evidently in the form of "reverse discrimination" lawsuits, poses one of the main threats to police desegregation and reform.[94] Such "reverse discrimination" suits demonstrate that "Whites

87. WEST, *supra* note 85, at 2–3.

88. DULANEY, *supra* note 47, at xvii.

89. Baker v. City of Detroit, 483 F. Supp. 930, 943 (E.D. Mich. 1979).

90. *Id.*

91. NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD, HISTORY OF THE CCRB, *available at* http://home.nyc.gov/html/ccrb/html/history.html (last visited Oct. 31, 2004) (citing VINCENT J. CANNATO, THE UNGOVERNABLE CITY: JOHN LINDSAY AND HIS STRUGGLE TO SAVE NEW YORK 155–188 (2001) as the primary source of information for former New York City Mayor Lindsay's term).

92. *Id.*

93. DULANEY, *supra* note 47, at xvii.

94. For example, the main opponent to New Orleans Police Chief Pennington was the

simply cannot envision the personal responsibility and the potential sacrifice inherent in [Charles] Black's conclusion that true equality for [B]lacks will require the surrender of racism-granted privileges for Whites."[95] In response to "reverse discrimination" claims by White officers, police departments and municipalities were forced to defend their affirmative action[96] plans. One such defense contends that a race-based classification is "job related for the position in question and consistent with business necessity."[97]

Another defense advanced by law enforcement institutions has been dubbed "operational needs."[98] With little variation, the operational needs defense asserts that police diversity increases police effectiveness and efficiency in Black communities by increasing community cooperation and reducing racial tension.[99]

"predominantly white Police Association of New Orleans, which lays blame for [corrupt] officers . . . and the decline of the department on an affirmative action program that began in 1987 and has quickly brought blacks to account for 45 percent of the police force, though they have still been largely shut out of ranking positions below the deputy chief level." Keegan, *supra* note 52, at 32, 35.

95. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 20, 22 (Kimberlé Crenshaw, Garry Peller & Cornel West eds., 1995) [hereinafter *Interest Convergence*].

96. Affirmative action generally refers to race-conscious decision-making in hiring, training, promoting, or union membership for the purpose of rectifying the under-representation of women or people of color in the workforce or unions. 4-100 LABOR AND EMPLOYMENT LAW § 100.01 (2000).

97. 42 U.S.C. § 2000e-2 (k) (1) (A) (i) (2000).

98. In the military context, the doctrine has been termed "military necessity." Black people's experiences in the military and law enforcement are somewhat parallel. Whereas during peacetime the U.S. excluded Black men and women from the military, Black people have fought for the U.S. in every war. Even when we were allowed military employment, Black people were restricted principally to racially segregated units and menial labor. F.M. Higginbotham, *Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of the Armed Forces*, 8 WM. & MARY BILL RTS. J. 273, 277–78 (2000).

99. Yet, a survey of newspapers across the country belies the notion that tension arising from police mistreatment of Black citizens declines as more Black officers join police departments. *See, e.g.*, Kevin Flynn, *Rights Panel Scolds Police on Race Issues*, N.Y. TIMES, Apr. 27, 2000, at B1; Kevin Flynn, *Shooting Raises Scrutiny of Police Anti-drug Tactics*, N.Y. TIMES, Mar. 25, 2000, at A1; Andrew Griffin, *City Councilman Says Incident Wasn't Racial*, ALEXANDRIA DAILY TOWN TALK, Feb. 21, 2003, at 5 ("In 1999, racial tensions became heated in the city following allegations of unfair treatment by the police in the [B]lack community."); Salm Kolis & Don Mackle, *Bedford-Stuyvesant Residents Protest Killing of Black Youth by New York City Police*, THE MILITANT, Feb. 9, 2004, at 1 ("Given the widespread outrage by area residents, city officials acted swiftly to suspend [the officer who killed unarmed Timothy Stansbury, Jr.] in order to head off the kind of mass protests that have taken place in the past around other incidents of police brutality and racism in recent years, like the shooting of Amadou Diallo, Malcolm Ferguson, and Patrick Dorismond, to name just three."); Ken Kolker, *Federal Mediator Will Hear Racial Concerns*, GRAND RAPIDS PRESS, Mar. 21, 2002, at B2 (planned Department of Justice mediation between "Grand Rapids police and residents to help ease tensions over recent complaints of racial profiling and police brutality"); Mike Mace, *Cops Engage in Racial Profiling*, CAMBRIDGE REPORTER, Aug. 2, 2002, at A4 ("For those not familiar with Cincinnati, it is a city charged with racial tension . . . Community relations between the [B]lack population and the police are like a powder keg caught in the crossfire of a constant flurry of sparks."); Richard Marosi, *Long Beach Chief Defends Fatal Shooting*, L.A. TIMES, Feb. 18, 2002, at B3 ("The shooting [of a 'knife-wielding' black woman by Long Beach Police officers] prompted a protest march last week and an unprecedented number of

The doctrine of operational needs as a valid, independent justification for a police department's affirmative action plan was popularized by the defense offered in *Detroit Police Officers' Ass'n v. Young*.[100] In that case, an association of police officers and individual White officers alleging that they had been denied promotions due to racial bias within the department challenged the city's affirmative action policy.[101] In 1979, the Sixth Circuit Court of Appeals upheld the city's voluntary affirmative action program in light of uncontroverted evidence of historical racial discrimination by the police department.[102] The Sixth Circuit remanded to the trial court the consideration of whether, among other issues, in the absence of intentional discrimination against Blacks, the affirmative action was justified on the alternative claim of "operational needs."[103]

The Supreme Court has yet to rule on operational needs, despite the fact that the issue has come before the Court. In *United States v. Paradise*,[104] White state

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complaint calls to the NAACP."); Jason Riley, *Convicting Police Called Uphill Fight; Experts Consider Possible Factors in Mattingly Case*, THE COURIER-JOURNAL (Ky.), Mar. 7, 2004, at 1A ("One mitigating factor in the Newby case, the experts said, is the racially charged climate surrounding it; the seventh fatal shooting of an African-American man by Louisville or metro police since 1998 escalated emotions."); Roger Roy & Anthony Colarossi, *Jury Clears Deputies in Shootings; Orange Jurors Found the Force Against Unarmed Suspects Was Justified*, ORLANDO SENTINEL TRIBUNE, Mar. 18, 2004, at A1 ("Orlando is never going to see justice until one of these officers is indicted and goes to jail [for the second murder this year of an unarmed, Black suspect by a White police officer]. If that doesn't happen soon, the kettle is going to explode. It's whistling now and it could boil. The black community is very upset about this."); Kevin Sack, *Despite Report After Report, Unrest Endures in Cincinnati*, N.Y. TIMES, Apr. 16, 2001, at A1; Don Walker, *Issues Still Loom for SPD*, SHREVEPORT TIMES, June 21, 2003, at 3 (quoting Rep. Cedric Glover (D-Shreveport) as saying, "[i]n terms of police-community relations, particularly the African-American community, things haven't been worse than at any point in history post-Civil War"); Jodi Wilgoren, *Diallo Rally Focuses on Call For Strong Oversight for Police*, N.Y. TIMES, Apr. 16, 1999, at B1; Armadeep Bassey & Sunday Mercury, *People Mowed Down My Son—Claim*, ICBIRMINGHAM (U.K.), Sept. 14, 2003, *at* http://icbirmingham.icnetwork.co.uk/0100news/0100localnews/page.cfm?objectid=13407691&method=full&siteid=50002 ("Now the shocking allegations [that white cops mowed down Michael Powell in their patrol car before spraying him with CS gas and beating him with batons, possibly causing his death two hours later] have led the leading [B]lack lawyer to warn of a possible backlash by the city's [B]lack community which he claims is becoming increasingly alienated by police 'strong arm' tactics.").

100. 608 F.2d 671, 695–96 (6th Cir. 1979).

101. *Id.*

102. *Id.* at 686–91.

103. *Id.* at 697. This case can be distinguished from cases such as *Police Officers' Fed'n of Minneapolis v. City of Minneapolis*, No. Civ.99-1048DWF/AJB, 2001 WL 856021, at *7 (D. Minn. July 27, 2001) and *Reynolds v. City of Chicago*, 296 F.3d 524 (7th Cir. 2002), in which courts have recognized operational needs as a compelling government interest but have decided the general case only on the interest of remedying past discriminatory practices.

104. 480 U.S. 149, 161–63 (1987). The United States had been a plaintiff in the lower employment discrimination cases but appealed the district court's order, alleging that the race-conscious relief was not narrowly tailored. Regarding the United States' claim that the promotion plan was not narrowly tailored, the Supreme Court found the scheme to be narrowly tailored due to its "ephemeral" nature. *Id.* at 178. The Court noted, "[T]he term of its application is contingent upon the Department's own conduct. The requirement endures only until the Department comes up with a procedure that does not have a discriminatory impact on [B]lacks—something the Department was enjoined to do in 1972 and expressly promised to do by 1980." *Id.*

troopers challenged a court-ordered affirmative action plan providing that fifty percent of promotions from trooper to corporal be allocated to Blacks. The Court did consider the United States' claim that the ordered race-conscious promotion relief violated the Equal Protection Clause.[105]

Amici argued that the state's promotional plan was justified on the basis of the police department's operational needs for diversity.[106] Various *amici* in that case, including the City of Birmingham, the City of Detroit, the City of Los Angeles, and the District of Columbia, also argued that the lingering effects of past discrimination had impeded police operations. They maintained that race-conscious hiring and promotion "restores community trust in the fairness of law enforcement and facilitates effective police service by encouraging citizen cooperation."[107] The Supreme Court did not reach the operational needs defense because the Court concluded that the court-ordered affirmative action plan was valid, given the Department's past discrimination against Blacks and that remedying such discrimination was a compelling government interest. In the opinion, the Court said, "[w]e need not decide if either the generalized governmental interest in effective law enforcement or the more particularized need to overcome any impediments to law enforcement created by *perceptions* arising from the egregious discriminatory conduct of the Department is compelling."[108] Like the Kerner Commission and the Department of Justice, the Supreme Court erroneously imputed ineffective law enforcement to Blacks' perceptions rather than the police department's egregious discriminatory conduct.

The Supreme Court's recent decision in *Grutter v. Bollinger*[109] may indicate how the Court might decide the issue that it did not address in *Paradise*. In *Grutter*, White applicants to the University of Michigan Law School filed a "reverse discrimination" claim alleging that the university's affirmative action policy violated their Equal Protection rights. The Court found in favor of the law school, essentially adopting an "operational needs" justification for voluntary affirmative action in higher education.[110]

The majority opinion emphasized the functional benefits of diversity: improving race relations, challenging stereotypes, and lending legitimacy to elite

105. *Id.* at 166.

106. *Id.* at 167–68 n.18.

107. *Id.*

108. *Id.* (emphasis added).

109. 539 U.S. 306 (2003).

110. The *Grutter* "victory" is mitigated by the holding in its companion case, *Gratz v. Bollinger*, 539 U.S. 244 (2003), in which the Supreme Court held that the University of Michigan's undergraduate admissions policy violated the Equal Protection Clause because its use of quotas was not narrowly tailored to achieve the asserted compelling state interest in diversity. *See generally* Garrick B. Pursley, *Thinking Diversity, Rethinking Race: Toward a Transformative Concept of Diversity in Higher Education*, 82 TEX. L. REV. 153 (2003) (demonstrating necessity of inclusion of critical theories in revealing and countering normative assumptions in legal discourse on race-consciousness and affirmative action).

legal education.[111] The Justices appeared to be impressed by the arguments of military *amici* that racially mixed armed services are vital to fulfilling their mission, essentially appealing to operational needs justifications.[112] Such reasoning is disturbing, considering that the military and police share similar histories of racism and discrimination. Cornel West articulates this perspective eloquently:

> [W]e have a fighting force disproportionately working class, disproportionately [B]lack and [B]rown. 48% of the women in the US Army are [B]lack women, though they're only 6% of the population. We need an army, no doubt about that. It could be rightly deployed to pursue justice. I'm not a pacifist, but on the other hand, we're asking who's actually bearing the cost and paying the price? Let's look at those thousand and more precious bodies that are coming back.[113]

IV.
BLACK OFFICERS AS TOKEN PATROLLERS, RACE WORKERS, AND UNDERCOVER AGENTS

"[R]acism [is] still the primary factor limiting the number of African-American police officers, and racism also ensure[s] that their status would be little more than tokenism."[114]

As I have previously stated, it was not until the 1960s—when a series of civil disturbances erupted throughout the country—that police departments began to make major desegregation efforts. Thus, police desegregation is inextricably linked to White policymakers' interests in maintaining race relations. The manner in which police departments employed Black officers indicates that the inclusion of Blacks was not intended to change the nature of policing but rather to change the public face of police forces. In other words, Blacks were hired to lend legitimacy to police departments during times of racial tension, despite the fact that this desire was couched in the more palatable terms of the operational needs doctrine.[115] Desegregation has been a largely formal process throughout

111. *Id.* at 330–33.

112. *Id.* at 331.

113. Terrence McNally, *Matters of Justice* (Sept. 29, 2004), *at* http://www.alternet.org/story/20017 (recounting discussion with Cornel West about his new book, *Democracy Matters: Winning the Fight Against Imperialism*).

114. DULANEY, *supra* note 47, at 19.

115. *See, e.g.*, Barhold v. Rodriguez, 863 F.2d 233, 238 (2d Cir. 1988) (defining the operational needs doctrine as "a law enforcement body's need to carry out its mission effectively, with a workforce that *appears* unbiased, is able to communicate with the public and is respected by the community it serves") (emphasis added); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 696 (6th Cir. 1979) (stating that "the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions"). One scholar's perspective on operational needs demonstrates that legitimacy, rather than sincerity, serves as the basis for employing Blacks in law enforcement. Martin D. Carcieri blames affirmative action for "the widespread mismatch of students with institutions, thereby setting up minority students for failure, high attrition rates, and the self-segregation that mocks the diversity

which Blacks still lack meaningful employment opportunities and Black civilians continue to be threatened by police racism and misconduct. Furthermore, the operational needs doctrine, originally intended as a justification for police departments' voluntary affirmative action, may contribute to the disproportionate assignment of Black officers to dangerous undercover work and also to race-based decision-making—in the absence of a remedial purpose—by police departments.

Black political power remains essential to the employment of Black police officers beyond token numbers and capacities. "Even today, with very few exceptions, [B]lacks have served in significant numbers as members and chief executives of law enforcement agencies only in those cities where the appointing authorities are [B]lack, or where significant and even overwhelming African-American political power or populations exist."[116] For example, in New York City, "[n]ot even the presence of a [B]lack mayor and [B]lack police commissioner changed the pattern [of discrimination within the department],"[117] indicating the strength of institutional and cultural racism.

In 2001, only nine of 465 NYPD captains were Black.[118] Five prestigious commands—Major Case detectives and Emergency Service, Mounted, Aviation, and Harbor Units—were almost entirely White.[119] The virtual absence of Black men and women in the police hierarchy and in elite assignments persists in police departments across the country.[120] Commenting on the NYPD's failure to desegregate its higher ranks, one White former police chief stated:

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rationale used to justify the preferences in the first place." Martin D. Carcieri, *Operational Need, Political Reality, and Liberal Democracy: Two Suggested Amendments to Proposition 209-Based Reforms*, 9 SETON HALL CONST. L.J. 459, 464 (1999). Despite this view, Carcieri proposes a temporary allowance for race preferences within the context of law enforcement and corrections employment. His argument cites scholarship about civil disorders fueled by racial tension between the police and Black community as evidence of the significance of including Blacks among law enforcement ranks. *Id.* at 466–76.

116. Reuben M. Greenberg, *Foreword* to W. MARVIN DULANEY, BLACK POLICE IN AMERICA, at xi (1996).

117. C.J. Chivers, *For Black Officers, Diversity Has its Limits*, N.Y. TIMES, Apr. 2, 2001, at A1.

118. *Id.* According to the author, "[p]ersonnel data show that the proportion of [B]lack males in uniform has increased to 9.2 percent from 7.7 percent since 1974, and that modest increase was almost entirely a result of the merger with the better-integrated housing and transit departments. Before the 1995 merger, the percentage of [B]lack men in the department had declined over two decades." *Id.* In 2001, David Leader, the NYPD's sole Black helicopter pilot, filed an internal complaint of discrimination claiming that he had been denied training because of his race. *Id.* The author also reported that former Mayor David N. Dinkins "said he found integration was difficult to accomplish because the city lacked a residency requirement, and thus [W]hite men from the suburbs dominated each academy class." *Id.*

119. *Id.*

120. *See, e.g.*, Tim Craig, *Black Troopers See Need for Recruitment: Gathered in Baltimore, National Convention Fears Police Forces Will Backslide*, BALT. SUN, Aug. 4, 2001, at 2B; Dean Narciso, *Panel Wants More Minority Police Officers, Firefighters*, COLUMBUS DISPATCH, Sept. 25, 2001, at 6B; Jonathan Schuppe, *Minority Outreach Seeks New Troopers—State Police Branch to Stress Community*, THE STAR-LEDGER (N.J.), Apr. 1, 2003, at 15; *Vermont Police Struggle to Recruit Minorities in a Nondiverse State*, ST. LOUIS POST-DISPATCH, May 2, 2004, at A6.

> The department finds [B]lack men good enough to do very, very sensitive jobs where they are needed to save the [W]hite bosses from being maligned, like in community affairs, or where they are needed to make cases, like breaking up [B]lack drug gangs in undercover narcotics duty. But somehow the department didn't find them good enough for the [elite] specialized duty?[121]

A. The Black Community's Interest in Fair and Equitable Policing Took a Backseat to White Policymakers' Interest in Controlling Black Hostility

The principle of "interest-convergence," innovated by activist, scholar, and law professor Derrick Bell explains the second-class citizenship of Black police officers and the continued subordination of Black civilians by racist, oppressive, and violent policing. Interest-convergence rests on two main parts. First,

> [t]he interest of blacks in achieving racial equality will be accommodated only when that interest converges with the interests of Whites in policy-making positions. This convergence is far more important for gaining relief than the degree of harm suffered by Blacks or the character of proof offered to prove that harm.[122]

Put another way, Black people's condition of subordination—no matter how bad—will be ameliorated only insofar as White policy-makers find it in their own interest to do so. Second, "[e]ven when interest-convergence results in an effective racial remedy, that remedy will be abrogated at the point that policy-makers fear the remedial policy is threatening the superior societal status of Whites, particularly those in the middle and upper classes."[123] Even when Blacks appear to have made some progress in our struggle for racial justice, the remedy will cease to exist or may be used against us, as demonstrated by recent police actions based on operational needs.

Professor Bell has developed an additional theory of racial fortuity[124] that, combined with his interest-convergence theory, explains the condition of Blacks in racial policy-making. He posits that "[W]hite policymakers adopt racial policies that sacrifice [B]lack interests or recognize and provide relief for discrimination in accordance with their view of the fortuitous convergence of

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121. Chivers, *supra* note 117.

122. DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 69 (2004).

123. *Id.*

124. Professor Bell describes "racial fortuity" as "[t]he two-sided coin, with involuntary racial sacrifice on the one side and interest-convergent remedies on the other." *Id.* He further states that "[r]acial fortuity resembles a contract law concept: the third-party beneficiary." *Id.* It is clear that "[t]he contracting parties must intend to confer a benefit on a third-party." *Id.* at 70. As noted by one court: "'[t]he test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract. If direct, the third party may sue on the contract . . . If the benefit were incidental, however, the third party has no right of recovery.'" *Id.* at 70 (internal citations omitted).

events."[125] Together, the principles of interest-convergence and racial fortuity explain why police racism and violence have persisted throughout history and remain a fact of life for members of the Black community; why the Black community is plagued by both over-policing and under-enforcement; why Black police officers are employed in token numbers and capacities; and why the inclusion of Black women and men among law enforcement has done little to alleviate the oppressive nature of policing in Black communities.

Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission[126] illustrates the danger of interest-convergent racial remedies. Even when a particular outcome is desired by Blacks and Whites, Black interests in the desired outcome are sacrificed in furtherance of White interests. The Bridgeport plaintiffs included the Bridgeport Guardians, Inc., a non-profit corporation whose members included nearly all the Black police officers of Bridgeport, the Housing Police Benevolent Association, a group of police who patrolled Bridgeport's public housing projects, and individual Black and Puerto Rican residents who had taken but failed the Bridgeport Police Department's patrolmen and promotions examinations.[127] The district court held that the plaintiffs had made a prima facie showing of discrimination in that between 1965 and 1970, some 644 persons took the police written examination, and, while fifty-eight percent of the 568 White candidates passed, only seventeen percent of the seventy-six Black and Puerto Rican applicants were successful.[128] The district judge also noted that, although Bridgeport had a combined Black and "Spanish-speaking" population of twenty-five percent, members of these groups represented only 3.6 percent of the police department.[129]

On appeal, the Second Circuit held the trial court abused its discretion by imposing quotas for promotions.[130] The holding opened the department's doors to Black and Latino *patrol* officers, but shut the doors of mid- and upper-level ranks to them. In affirming the hiring quotas, the appellate court stated that "perhaps the most crucial consideration in our view is that this is not a private employer and *not simply an exercise in providing minorities with equal opportunity employment.* This is a police department and the *visibility of the Black patrolman in the community is a decided advantage* for all segments of the public at a time *when racial divisiveness is plaguing law enforcement.*"[131] The court struck down the fifty/fifty quota of Black and Puerto Rican to White sergeants, declaring that "[t]he impact of the quota upon these [White police]men would be harsh and can only exacerbate rather than diminish racial attitudes.

125. *Id.*

126. 354 F. Supp. 778 (D. Conn. 1963), *aff'd in part, rev'd in part*, 482 F.2d 1333 (2d Cir. 1973).

127. *Bridgeport*, 354 F. Supp. at 782.

128. *See Bridgeport*, 483 F.2d at 1335.

129. *Id.*

130. *Id.* at 1341.

131. *Id.* (emphasis added).

Police morale is again a proper concern if the welfare of the whole community is to be considered. We see no purpose in curing a past mischief by imposing a new one which is deliberately tainted."[132]

The Second Circuit characterized equal opportunity for people of color as "simply an exercise" which, outside of the "racially divisive" law enforcement context, was a "past mischief" that was "deliberately tainted."[133] The language chosen by the court trivializes the historical subjugation of Black people in American society and efforts to remedy that discrimination. That the appellate court regarded the affirmative action plan in the negative, as "not simply an exercise in providing minorities with equal opportunity employment," suggests that it valued diversity only insofar as diversity would allow the department to fulfill its duty to maintain order. Thus, the police department's obligation to address its racist policies was not much of a concern. Furthermore, the court's description of the systematic exclusion of Black women and men from the ranks of the police department as simply a "past mischief" reveals how little gravity the court accorded such a history. The court's characterization of the city's affirmative action plan for promotions as "deliberately tainted" implies that the "past mischief" was inadvertent, unintentional, and merely coincidental. This misrepresentation flies in the face of what we know has been true and remains true today: the exclusion of Black people in law enforcement, especially at the higher ranks, was historical and purposeful.[134]

Despite the court's concern for the morale of White police officers, it did not strike down all use of quotas, only the imposition of quotas for promotions. By limiting Black policemen's presence and influence to the patrol level, the court, in effect, confined Black officers to maintaining order in the streets. The decision is particularly disturbing in light of the fact that "[t]he exclusion of African-American police officers from command positions has long coincided with their exclusive assignment to areas and neighborhoods where they would patrol only other [Blacks]."[135] The opinion also reflects a fundamental flaw in

132. *Id.* (citations omitted).

133. *Id.*

134. *See, e.g.*, United States v. Paradise, 480 U.S. 149, 156–57, 170 n.20 (1987) ("[D]efendants have, for the purpose of frustrating or delaying full relief to the plaintiff class, artificially restricted the size of the trooper force and the number of new troopers hired.") (quoting Paradise v. Dothard, No. 3561-N (M.D. Ala. Aug. 5, 1975)) ("The racial imbalances in the Department are properly characterized as the effects of the Department's past discriminatory actions and of its failure to develop a promotion procedure without adverse impact as required by the previous court orders and consent decrees."); NAACP v. Allen, 340 F. Supp. 703, 705–06 (M.D. Ala. 1972) ("[T]he defendants have engaged in a blatant and continuous pattern and practice of discrimination in hiring in the Alabama Department of Public Safety . . . . In the thirty-seven year history of the patrol there has never been a [B]lack trooper and the only Negroes ever employed by the department have been nonmerit system laborers . . . . The racial discrimination in this instance has so permeated the Department['s] . . . employment policies that both mandatory and prohibitory injunctive relief are necessary to end these discriminatory practices and to make some substantial progress toward eliminating their effects.").

135. DULANEY, *supra* note 47, at 27.

police desegregation and related "operational needs" discourse: that hostility and uncooperativeness among Black civilians, rather than racist and violent police, is to blame for ineffective law enforcement in Black communities and for poor police-community relations. Thus, the court expresses its perception that the "visibility of the Black patrolman" is critical to assuage White fears of Black rage and lawlessness.

The opinions in *Bridgeport* and in *Hayes v. City of Charlotte*[136] (particularly in the appellate opinion that vacated the injunction imposed by the trial court) reflect what Kimberlé Crenshaw refers to as a "restrictive vision" of antidiscrimination law which:

> treats equality as a process, downplaying the significance of actual outcomes . . . . [E]ven when injustice is found, efforts to redress it must be balanced against, and limited by, competing interests of [W]hite workers—even when those interests were actually created by the subordination of [B]lacks. The innocence of [W]hites weighs more heavily than do the past wrongs committed upon [B]lacks and the benefits that [W]hites derived from those wrongs. In sum, the restrictive view seeks to proscribe only certain kinds of subordinating acts, and then only when other interests are not overly burdened.[137]

In *Hayes*, White police officers sued the city alleging that its use of racial preferences in promotions to sergeant violated the Equal Protection Clause. The City relied solely on an operational needs defense and argued diversity enhanced civilian support and cooperation, thus increasing police effectiveness.[138]

The City's operational needs defense hinged on the opinion of its police chief, and, notably, three reports prepared in response to the 1960s uprisings—including the Kerner Report. The court dismissed the reports as containing "no *factual* support for the City's position that diversity at all ranks, or specifically at the rank of sergeant, was essential to effective law enforcement in Charlotte, North Carolina, in February 1991, when the City made these promotions."[139] The court dismissed the police chief's opinion as not rising to the necessary level of evidence and correctly recognized "the dangers of relying on subjective evidence to support utilization of racial classifications in employment promotion decisions."[140]

Instead of framing the city's promotion of the four Black officers in a positive light, the court characterized the issue negatively, as "denying promotions to

136. 802 F. Supp. 1361 (W.D.N.C 1992), *rev'd sub nom.* Hayes v. N. State Law Enforcement Officers Ass'n, 10 F.3d 207 (4th Cir. 1993) (vacating overbroad injunction).

137. Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1342 (1988).

138. Hayes v. N. State Law Enforcement Officers Ass'n, 10 F.3d 207, 213 (4th Cir. 1993).

139. *Id.* at 215.

140. *Id.* at 214.

[W]hite police officers exclusively because of their race."[141] Such framing—with a primary focus on the perceived harm to Whites—signals the holding in favor of the White officers. The court based its decision, in part, on the notion that "[s]uch a result would promote racial polarization and the stereotypical view that only members of the same race can police themselves."[142] Yet, even if it were true that affirmative action may contribute to racial stereotypes, it is far from true that Blacks are better off without the employment (and educational) opportunities that stem from the policy.

The appellate court rationalized its decision, in part, on the premise that affirmative action engenders hostility among those it does not benefit and stigmatization among its beneficiaries. The Fourth Circuit declared that "[c]lassifications based on race carry a very real danger of stigmatic harm; they threaten to stereotype individuals because of their race and incite racial hostility."[143] Furthermore, buried in a footnote, the court admitted that "there is no evidence in this record of any harmful effects from the City's actions, such as negative stereotypes or racial hostility."[144] To the contrary, it relied on the District Court's conclusion in *Detroit Police Officers Ass'n v. Young* that "the inclusion of race as a promotional criterion damages departmental morale and the quality of work of all officers."[145] This reliance on the subjective opinion of one judge is ironic given this court's dismissal of the police chief's opinion that police effectiveness required racial diversity.

The appellate court dismissed the operational needs defense for lack of sufficient proof that racial diversity is essential to effective law enforcement and constitutes a compelling state interest. It highlighted the fact that the City's operational needs defense was not supplemented by a showing of past discrimination within the Charlotte police department. Despite the fact that no unqualified candidate was considered for promotion, no White officer was deprived of her existing job (only an employment opportunity), and the twenty percent promotion goal was reasonable in light of the composition of Black patrol officers on the police force and the racial composition of the City of Charlotte, the Fourth Circuit ruled in favor of the "reverse discrimination" plaintiffs.[146]

141. *Id.* On appeal, the Fourth Circuit reviewed the City's promotions as voluntary affirmative action since the City had neither relied on its compliance with a 1974 consent order to remedy past discrimination nor claimed that the consent order should be continued into the indefinite future as a defense.

142. *Id.*

143. *Id.* at 216.

144. *Hayes*, 10 F.3d at 216 n.7.

145. *Id.* (citing Detroit Police Officers Ass'n v. Young, 446 F. Supp. 979, 1002 (E.D. Mich. 1978)).

146. *Id.* at 217.

B. *The Regression of Operational Needs from an Ameliorative Racial Remedy to Age-Old Racist Decision-Making*

"The presence of racism in policies intended to remedy racism is not generally recognized."[147] Yet, there is good cause to re-examine the doctrine of operational needs because police departments may rely on operational needs to the detriment of Black officers in order to justify the race-based assignment of Black officers to undercover and race relations work. Kimberlé Crenshaw cautions that "what at first appear[ed] an unambiguous commitment to antidiscrimination conceals within it many conflicting and contradictory interests. In antidiscrimination law, the conflicting interests actually reinforce existing social arrangements, moderated to the extent necessary to balance the civil rights challenge with the many interests still privileged over it."[148]

The following case illustrates that operational needs lends itself to cooption by police departments in a retreat from remedial race-based decision-making to age-old racism. In August 1997, four White police officers beat Abner Louima, a Haitian immigrant, outside of a Brooklyn nightclub. They continued assaulting him inside of the patrol car on the way to the precinct. At the stationhouse, the officers took Louima into the bathroom, held him down, plunged a wooden stick up his rectum, and then placed the stick inside of his mouth. All the while Louima was handcuffed and defenseless. He suffered a torn bladder and intestine and required several surgeries to repair the immense damage. In 1998, Mr. Louima filed a lawsuit against the New York Police Department, alleging officers in the 70th Precinct conspired to create a "blue wall of silence and lies to obstruct justice."[149] He settled with the city for $8.75 million, the largest police brutality settlement in New York City history.

Patrolmen's Benevolent Ass'n of New York, Inc. v. City of New York[150] arises from the the horrific assault and sodomy on Mr. Louima by the four White officers. After the attack against Mr. Louima, then-NYPD Commissioner Howard Safir transferred twenty-five Black and Black-Hispanic police officers into the 70th Precinct *against their will*.[151] Adding insult to injury, the NYPD characterized the involuntary transfers as "affirmative action" on the basis that, in a precinct that was approximately eighty percent Black before the incident, the percentage of minority officers in the 70th Precinct rose from eleven percent to seventeen percent after the transfers.[152] In this novel case, the NYPD argued that race-conscious decisions could survive strict scrutiny

147. Bell, *supra* note 122, at 140.

148. Crenshaw, *supra* note 137, at 1348.

149. True Crimes—Bad Cops Victim: Abner Louima, *at* http://www.karisable.com/crlebcal.htm (last visited Mar. 4, 2004).

150. 74 F. Supp. 2d 321 (S.D.N.Y. 1999), *aff'd*, 310 F.3d 43 (2d Cir. 2002).

151. *Id.* at 326.

152. *See id.* at 338.

for reasons other than remedying the ill effects of past discrimination.[153]

The NYPD conceded that the transfers were based solely on race but argued that exigent circumstances in the 70th Precinct community justified its actions.[154] The NYPD's operational needs defense alleged that community hostility impaired effective law enforcement and that its need to reestablish order was compelling.[155] Given the severity of the NYPD's rationale for transferring the Black officers against their will, one would have expected proof that there had been violent disturbances and looting in the 70th Precinct community, and, also, that the transferred Black officers would produce results that no other officers could. In actuality, the City's decision was based on stereotypes of Black lawlessness and on the myth that the mere presence of Black officers would suppress any community outcry.[156] In fact, there were never any violent protests or looting—only peaceful demonstrations by a Haitian and Black community whose outrage was justified given the brutal racist assault against one if its members by White police officers.[157]

White policymakers used the Black officers as a shield in order to deflect attention away from the fact that the 70th Precinct harbored racist and violent officers and had wreaked havoc on an entire community. In furtherance of the city's own interest in suppressing community protest, police officials disregarded the Black officers' interests in remaining in their existing assignments, which presumably were less racist than the 70th Precinct. The City demonstrated little understanding of the awkward position those officers were put in at having to mitigate the challenges of working in a blatantly racist precinct in an outraged Black community. The community's response to the transfer contradicted the City's assumptions that Black police officers would facilitate cooperation and trust from the community. "[F]ar from being welcomed by [B]lack residents of the 70th Precinct, the transferred officers endured frequent insults and epithets

153. *Patrolmen's Benevolent Ass'n*, 74 F. Supp. 2d at 328. Notwithstanding the strict scrutiny standard, the City contended that "'common knowledge' regarding the 'historical reality' of race relations in police work suffice[d] to justify [its] actions." 310 F.3d at 53.

154. *Id.* at 324.

155. *Id.* at 328. Specifically, NYPD Commissioner Howard Safir maintained that there was a "great potential for violence" which required the City "'to act quickly and as quickly as possible to put people in the community who would have a stake in the community.'" 310 F.3d at 48. Notwithstanding the City's purported exigency, "rather than ordering immediate, temporary transfers, [Safir] chose to enact permanent transfers through normal NYPD channels that took several weeks to take effect." *Id.* at 53. According to the City's expert, the race-based transfers were "a very important step in defusing the volatility that existed in the community" and in warding off the "danger of civil disturbance." *Id.*

156. The court noted that the City's position was "espoused in [*Race As An Employment Qualification*, *supra* note 63, at 413–14]" and the Kerner Report, both of which are critiqued in this article. *Id.* at 329.

157. *Id.* ("[The] Caribbean liaison for the NYPD [] testified that he canvassed the community following the incident and found no evidence of rioting, looting, or property damage. [Likewise] an officer in the Community Affairs Division assigned to monitor the community in the days after the incident, testified that she witnessed no community unrest.").

from community members angry about the Louima assault."[158] That the 70th Precinct community members did not readily embrace the transferred officers is not surprising and should have been anticipated by the NYPD, considering that one of Blacks' main interests in being represented in law enforcement is in protection from racist and violent police. In addition, the transferred officers experienced significant backlash from other officers in the precinct "who viewed the new officers with suspicion, believing they were part of an NYPD internal affairs investigation into the 70th Precinct."[159] One plaintiff testified that "he feared for his safety because the level of mistrust among the other officers in the precinct prevented the open communication necessary to effective police work."[160]

Even assuming that the City had a legitimate basis for fearing violence and disorder, it had other viable alternatives besides making the involuntary transfers. For example, plaintiffs' expert testified that:

> "[B]lack officers were not necessarily better at policing [B]lack communities than [W]hite officers, and that cultural similarities—such as language skills—were more important than race. He also suggested other ways the City could have responded to the crisis, such as providing incentives for officers to transfer voluntarily into the district, and reaching out to Haitian-American officers and officers of different ethnic groups with training in police-community relations . . . [in order to] more effectively [respond] to community concerns."[161]

The failure by New York City police officials to ensure that Haitian or Creole-speaking officers were transferred proves policymakers did not care what the *community* wanted. It is also a racist idea to think that one Black person can be substituted for another (and that we won't know the difference). In any event, the community wanted the police to cease business as usual and implement actual reform.

The plaintiffs sued under Title VII of the Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment.[162] The court ruled in favor of the plaintiffs, holding that the City's involuntary transfer of the Black and Black-Hispanic officers on the basis of their race was not a valid affirmative action program under Title VII.[163] The court also struck down the operational needs defense because the city was not seeking to remedy past discrimination that resulted in a racially imbalanced workforce.[164] Furthermore, the court ruled that

158. *Id.*

159. *Id.*

160. *Patrolmen's Benevolent Ass'n*, 310 F.3d at 51–52.

161. *Id.* at 48–49, 53.

162. *Patrolmen's Benevolent Ass'n*, 74 F.Supp. 2d at 324.

163. *Id.* at 338–39.

164. *Id.* at 338. *Compare* Wittmer v. Peters, 87 F.3d 916, 920 (7th Cir. 1996) (finding compelling interest in hiring Black correctional lieutenant instead of White candidates other than for curing present effects of past discrimination and holding that "[t]he [B]lack lieutenant is needed

the city could not justify remedying past discrimination by White officers against the Black community within the 70th Precinct.[165] Despite the plaintiffs' legal victory, much of the damage had already been done. The police department treated the Black and Latino officers like pawns in an effort to suppress the Black community's protest of yet another instance of brutality by White police officers against a Black person.

The actions of the NYPD in *Patrolmen's Benevolent Ass'n* are reminiscent of those of the St. Petersburg Police Department in *Baker v. City of Petersburg*, which preceded the doctrine of operational needs.[166] Although the court ruled in favor of the transferred plaintiffs, *Patrolmen's Benevolent Ass'n* suggests that operational needs may be manipulated to defend police retrenchment from the remedial purpose of operational needs into age-old racist, race-based decision-making.

In addition to the invocation of operational needs as a basis for assigning Black police officers to token "race-work," the doctrine may also be offered as a rationalization for the relegation of Black police officers to a disproportionate amount of dangerous undercover work.[167] Eric Adams, president of 100 Blacks in Law Enforcement Who Care, is outspoken about the dual system of law enforcement in New York City and also about the over-assignment of Black and Latino officers to dangerous undercover work.[168] He asserts,

> Eighty to ninety percent of the officers who are assigned to undercover work are either Black or Hispanic, while the opposite is true for those who are assigned as supervisors or investigators . . . Out of the list of units [that an officer] could be assigned to, the two most dangerous are those that require officers to work undercover to rid our communities of guns and drugs. It is in these two assignments that American police agencies' dark racist secret is lived out . . . The police department

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because the [B]lack inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some [B]lacks in authority in the camp . . . [Defendants' prison administration experts] opined that the boot camp in Greene County would not succeed in its mission of pacification and reformation with as [W]hite a staff as it would have had if a [B]lack male had not been appointed to one of the lieutenant slots").

165. *Patrolmen's Benevolent Ass'n*, 74 F.Supp. 2d at 338–39 (noting that remedying past discrimination by the police against the community is not a valid basis for an affirmative action plan).

166. 400 F.2d 294 (5th Cir. 1968).

167. *See, e.g.*, Bill Farrell and Dave Goldiner, *Terrifying End for 2 Detectives: S. I. Executions Detailed*, DAILY NEWS (N.Y.), Apr. 3, 2003, at 20.

168. Eric Adams, *The Law and You*, OUR TIME PRESS, Apr. 2003, at 14. Adams explains, "In many cases the initiative to become an undercover officer has much to do with how career advancement is carried out in the American law enforcement community . . . There are two primary tracks an officer could take to advance through the ranks of law enforcement. One way is to take a promotional examination to become a supervisor and the other is to following [sic] the investigator route, which leads to becoming a detective. If a police officer decides to take the detective route to advancement, he would be assigned to one of the police departments [sic] many investigator units." *Id.*

> justifies their [sic] assignment of Blacks and Hispanics to . . . dangerous [undercover] work by stating that only this group can successfully infiltrate the illegal world of dealers of drugs and guns. This reasoning is a terrible indication of the embedded racism in how police agencies fight crime: although a successful undercover operation is welcomed in communities of color, the small amounts of drugs and guns that are recovered are only the tip of the iceberg as compared to what is possessed in affluent communities. If there are no undercover operations taking place in all areas of the city, then the police department is ignoring a large portion of criminal behavior. FBI stats have long shown that drugs are used just as much in [W]hite areas of the city as in communities of color.[169]

An examination of police desegregation and subsequent operational needs case law suggests that police departments historically have connected Blacks with criminal behavior and the employment of Black officers to their goal in controlling perceived Black criminality. For example, in 1968, the Police Chief in *Baker v. City of St. Petersburg* testified that "[Black officers are] better able to identify Negroes and investigate criminal activities in that zone more effectively than [W]hite officers."[170] During 1979, the Detroit Police Department asserted that hiring Black officers pursuant to the city's operational needs "helped to accomplish necessary police duties such as undercover work or crowd control in [B]lack neighborhoods."[171] Similarly, in *NAACP v. Detroit Police Officers Ass'n*,[172] which involved the disproportionate layoffs of Black officers, the Detroit Police Chief testified that "[t]he layoff of [B]lacks has hampered the ability to fight narcotics, to do undercover work, to do surveillance work, and to work with organized crime and vice."[173]

In *Kane v. Freeman*, "[Tampa's] Police Chief Holder emphasized the need for diversity in [the Tampa Police Department's] work force, noting that it would be very difficult to enforce the laws when [the Department doesn't] have the capacity to do investigative work."[174] Likewise, in *Cotter v. City of Boston*,[175] a "reverse discrimination" suit based on the promotion of three Black officers to sergeant, the city's operational needs defense relied in part on the idea that "if

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169. *Id.* Of Black female officers, Adams claims, "In many cases when [they] are assigned to units such as the Vice unit, they only remain there for three months to be decoy prostitutes. After the three months are up they send them back to uniform assignments to avoid having to promote them to detectives." *Id.*

170. Baker v. City of St. Petersburg, 400 F.2d 294, 296 (5th Cir. 1968).

171. Baker v. City of Detroit, 483 F. Supp. 930, 995 (E.D. Mich. 1979), *aff'd sub nom.* Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1982).

172. 591 F. Supp. 1194 (E.D. Mich. 1984).

173. *Id.* at 1206 (recounting testimony by Police Chief).

174. No. 94-2019-CIV-T-17, 1997 WL 158315, at *7 (M.D. Fla. Mar. 19, 1997) (granting plaintiff's motion for summary judgment).

175. 193 F. Supp. 2d 323 (D. Mass. 2002), *aff'd in part, rev'd in part*, 323 F.3d 160 (1st Cir. 2003), *cert. denied*, 540 U.S. 825 (2003).

there is an *African American drug distribution network* developing in a community, an *African American officer, acting in an undercover capacity*, is much more likely to be able to develop intelligence about the drug dealers involved than a [W]hite undercover officer could."[176]

C. *Black Officers as Participants and Victims of Racist Policing*

"[The first Black police officers] served in a racist, slave society and implicitly accepted the oppression of African Americans in order to carry out their duties. By accepting the racial status quo and the legal oppression of other [B]lacks, these law enforcement officers became the first African Americans to confront the paradox of policing a society where the color of a person's skin often determined guilt or innocence. They also became the first to accept such roles because they believed that they could improve their own precarious position in a society where status was based on skin color."[177]

For many members of the Black community, the increasing numbers of Black police officers has had little impact on the racist nature and repressive feel of policing in our communities. The face of the police has changed slightly through desegregation, but its racially subordinate nature remains. Furthermore, some Black police officers participate in the racist policing of the Black community.[178] As one commentator noted, "the police force . . . has become more integrated, but one finds [B]lack police are sometimes involved in the worst cases of police brutality. Perhaps the original theory of civil rights movement that integration would bring about changes was somewhat naïve. What brings about change more swiftly is the action of authority figures who will not tolerate such action by their police force."[179]

When interviewed about their experiences with the police, a number of people of color explained that many officers, regardless of their race, have a "superiority complex" that has "nothing to do with the officer's race."[180] Some Black officers submerse themselves, or cannot resist their indoctrination, into a racially subordinating police culture and behave as some of their White counterparts do. There are several theories regarding the phenomenon of racism and racist violence among people of color.

One such theory posits that many officers of color find that their identity as a police officer tends to squeeze out their other identities in that their "'Blue'

176. *Id.* at 341 (citing expert report of Jack McDevitt) (emphasis added).

177. DULANEY, *supra* note 47, at 7.

178. KENNETH MEEKS, DRIVING WHILE BLACK 63–69 (2000) (recounting profiling incident involving [B]lack agents and quoting victim as saying "[B]lack men get stopped by [W]hite officers, but [B]lack officers stop [B]lack women").

179. Ron Walters, *Black Elected Officials and Police Brutality*, July 9, 2001, *at* http://www.academy.umd.edu/aboutus/news/articles/07-09-01.htm.

180. Amy Waldman & Michael Cooper, *When a Badge Is Seen, Views Vary*, N.Y. TIMES, July 24, 2001, at B1.

identity includes a psychological sense of privilege."[181] Another contends that "[p]olice officers in poor urban minority neighbourhoods may come to see themselves as 'law enforcers in a community of savages, as outposts of the law in a jungle.' 'Us versus them' collapses into 'us versus the nonwhites . . . In such a context, a racial minority man has an opportunity to engage in violence against other racial minorities without feeling . . . 'that he has betrayed his race.'"[182] The findings of the Mollen Commission, aimed at uncovering the nature and extent of corruption within the NYPD, may also shed some light on why some Black police officers may exhibit the same racist and discriminatory behaviors of some White officers.[183] The Mollen Commission claimed that the Blue Code of Silence perpetuates misconduct by making loyalty to one's fellow police officers, right or wrong, to be the most important value.[184]

Perhaps another reason that some Black cops employ racist policing practices is that they, like many members of this society, believe crime has a Black face. This symbolic association of criminals with "Blackness" is what sociologist and law professor Jerome Skolnick refers to as the "symbolic assailant."[185] According to Skolnick, today's image of a criminal is that of a young, Black male.[186] This association of Black people with criminality causes police departments to tolerate and promote racial profiling and the over-policing—spending more time and resources than circumstances warrant—[187]of Black communities. Kenneth B. Nunn has written that "[t]his is not a matter of the police meeting the needs of the community and controlling crime. It is an instance of the police repressing the community by conducting more stops and intimidating and mistreating the residents of the community."[188]

The comments of several Black police officers throughout various urban departments to a journalist reporting on racial profiling illustrate that Black police officers are also guilty of racial profiling and pretextual stops. "I see a 16-year-old white boy in a Benz, I think, 'Damn, that boy's daddy is rich.' I see

181. Cooper, *supra* note 36, at 368.

182. Sherene Razack, *"Outwhiting the White Guys:" Men of Colour and Peacekeeping Violence*, 71 UMKC L. REV. 331, 342–43 (2002) (quoting Angela Harris).

183. *See also* Jerome H. Skolnick, *Corruption and the Blue Code of Silence*, 3 POLICE PRACTICE AND RESEARCH 1, 7–19 (2002).

184. THE MOLLEN REPORT, *supra* note 24.

185. *See* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 45–47 (1966).

186. *Id. See also* ELIJAH ANDERSON, STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY 208 (1990) ("The public awareness is color-coded: [W]hite skin denotes civility, law-abidingness, and trustworthiness, while [B]lack skin is strongly associated with poverty, crime, incivility, and distrust."); KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS (1998).

187. *See* Cooper, *supra* note 36, at 375 ("[R]acial profiling and depolicing do not simply 'happen' to target racial minorities, they are uniquely suited to that purpose. Racial profiling works best on people who are politically powerless to respond. Ditto depolicing.").

188. Nunn, *supra* note 27, at 1490.

a 16-year-old [B]lack, I think, 'That boy's slinging drugs,'' says Robert Richards, a Black police sergeant in Baltimore who admits that tunnel vision is a hazard of the job.[189] One Black anti-gang officer in Boston said "Sometimes, I hate the young [B]lack males because of what they do to their community . . . . But then I think to myself, 'If this is the way I feel, and I'm [B]lack, what must [W]hite officers think about [B]lacks?'"[190] The officer's use of the phrase "their community" may indicate a sense of detachment from, and a lack of racial solidarity with, the community in which young, Black males live.

Chief Bernard Parks of the LAPD, who is Black, claims that racial profiling is not racist but rather is rooted in statistical reality: "It's not the fault of the police when they stop minority males or put them in jail . . . . It's the fault of the minority males for committing the crime. In my mind it is not a great revelation that if officers are looking for criminal activity, they're going to look at the kind of people who are listed on crime reports."[191] The Chief's statements highlight two main problems. First, they reflect his internalization of statistics within the crime reports and failure to question the types of criminality on which police departments and politicians have chosen to focus.[192] Second, the Chief's categorization of minority males reveals his assumption that they are lawbreakers and reflects what may be a profound distance he feels between himself and those "kind[s] of people."

While some Black officers engage in the same racist policing that has plagued the Black community throughout history, others may find it uncomfortable to balance solidarity with other Black people and allegiance to the police departments. Many of them have felt the glass ceiling and are aware of their disproportionate assignments to undercover and vice work. Perhaps they have been offended by racist comments. Some have been affected by White cops' racism towards Black people or been the victim of racial profiling themselves.[193] In a series of extended interviews with male black NYPD officers and detectives, "[a]ll but three of the several dozen officers interviewed . . . said that at some point in their careers they [had] been unnecessarily stopped or hassled, when in civilian clothes, by their [W]hite peers. Many spoke of being repeatedly asked to produce identification at night on subway platforms."[194] An officer,

189. Goldberg, *supra* note 20, at 85.

190. *Id.*

191. *Id.* at 53–54.

192. Such statistics often are misleading and are insufficient measures of criminality. For example, some crimes, such as sexual assault, domestic violence, drug possession, and trafficking in White middle-class enclaves, frequently are underreported. *See e.g.*, Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in* Bostick v. Florida, 67 TUL. L. REV. 1979, 2036-38 (1979); Marc D. Goodman, *Why Police Don't Care About Computer Crime*, 10 HARV. J. L. & TECH. 465, 484 (1997).

193. C. J. Chivers, *Alienation Is a Partner for Black Officers*, N.Y. TIMES, Apr. 3, 2001, at A1.

194. *Id.*

because he was Black, was treated as a suspect in a police raid.[195] It is clear that police officers understand that their addition to the police force has not ended the racism within the department.[196]

Another NYPD officer sensed that "[B]lack men have little chance at promotion" and also that "minority neighborhoods are policed one way and [W]hite neighborhoods another."[197] The officer reported that his being stopped at gunpoint by a fellow officer caused him to file a complaint with the Civilian Complaint Review Board.[198] Summarizing his experiences as an officer, he stated: "I've been around long enough to know that there are two police departments here, the one above 110th Street [i.e. in Harlem] and the one below it . . . Some of the routines you see above Central Park—the stop-and-frisks, the boxed-in cars, the buy-and-busts at the doorways—would not be tolerated in the [W]hite neighborhoods.'"[199]

One NYPD recruiter who is Black expressed his frustration with attracting Blacks, particularly Black males, to law enforcement employment. "Everywhere we go, there is at least one person who has a derogatory comment about the N.Y.P.D., and that person is almost always an African-American," he reported. "We don't get it nearly as much from Hispanics, and just about never from [W]hites. Out there on the streets, young [B]lacks are as wary of us as can be."[200] For example, during interviews with dozens of Black male officers and detectives, the interviewees almost invariably said that the satisfactions of the job were undercut by the department itself.

D. Judicial Racism Enables Oppressive Policing

The judiciary has been complicit in the crisis of racist and subordinating policing in Black communities, which stems from its own racism and slave-holding legacy.[201] Judicial officers have conspired in White supremacy by allowing police to treat all Blacks as criminals and by insulating police from accountability. It is precisely this deference to police decision-making that enables police to engage in racist behavior with broad immunity. For example,

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195. *Id.* "'I can't be any more clear about this,' he said. 'I almost lost my life. If I had gotten my gun out, I would have been dead, and for no other reason except I am black.'"

196. *Id.*

197. *Id.*

198. Chivers, *supra* note 193, at A1.

199. *Id.*

200. *Id.*

201. Roy L. Brooks, *Rehabilitative Reparations for the Judicial Process*, 58 N.Y.U. ANN. SURV. AM. L. 475, 477, 479 (2003) (stating that "[j]uridical subordination is one of the lingering effects of slavery[,]" and proposing that the judiciary incorporate Black values in its decision-making as "a type of rehabilitative reparation that has received very little attention in the debate over slave reparations"). *See also* Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1275 (1999) (exploring why "[c]ourts tend to portray incidents of police brutality as anecdotal, fragmented, and isolated rather than as part of a systemic, institutional pattern").

the Supreme Court in *Whren v. United States* held that the actual motivations of individual officers are irrelevant to the validity of a search or seizure.[202] Police officers thus are permitted to profile and harass Black people and can rely on immunity from discipline.[203] Whereas *Whren* disregards an officer's motivations in the determination of whether a search or seizure is valid, *United States v. Leon* established a so-called "good faith" exception to the Fourth Amendment exclusionary rule.[204] *Leon* held that unlawfully obtained evidence is admissible, provided police were acting in good faith,[205] a fiction in too many Black communities.

The myth of the good-faith cop underlies other judicial opinions, such as *Illinois v. Wardlow*.[206] Mr. Wardlow fled upon seeing police and was chased, stopped, and frisked by the officers.[207] The Supreme Court held that the officer's pursuit and *Terry* pat-down did not violate the Fourth Amendment.[208] The majority emphasized that Mr. Wardlow's location was known to police for heavy drug trafficking and other criminal activity and that "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."[209] Consequently, police can continue to use "Black" as a relevant characteristic and Black people can continue to be targeted, harassed, and assaulted—on the basis they "fit the description."

CONCLUSION

Dynamics between the police and the Black community remain highly charged and may even be as electric as they were during the 1960s. Despite nearly forty years of desegregation, the Black community can cite countless stops, frisks, strip-searches, botched raids, and certainly unanswered calls as evidence of business as usual. The dual system of law enforcement that so many Black people struggled to eradicate remains. While Whites are met with courtesy, professionalism, and respect, Black residents are forced to endure a system that is hostile, sub-par, and offensive.

The current crisis of law enforcement in Black communities flows from the failure of policymakers to correctly assess the causes of tension between Black

202. 517 U.S. 806, 811–13 (1996).

203. Several scholars have criticized *Whren* for its failure to provide the Black community with a legal remedy for racist stops by the police. *See, e.g.*, Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998).

204. 468 U.S. 897, 912–24 (1984).

205. *Id.* at 918–22.

206. 528 U.S. 119 (2000).

207. *Id.* at 121.

208. *Id.* at 125–26.

209. *Id.* at 124.

people and police. It should have been obvious—even to those who would rather not have noticed—that since racist and aggressive policing in the Black community was primarily responsible for the loss of life and economic and social devastation that followed from urban riots, a total reconstruction of police was necessary. But rather than consider what the riots indicated about the police departments, policymakers concerned themselves with what the riots signified about Black people. Those in power blamed Black hostility for the widespread destruction and focused on changing Blacks' perception of police instead of rethinking the police itself. The flawed framing of the problem inevitably infects the solution and is directly responsible for the continuance of police business as usual.

Hindsight reveals that a desegregation model of police reform is inept to address what is really the problem—oppressive and repressive policing in Black communities. As we were during the 1960s and before, Black children, women, and men today are targeted, humiliated, and brutalized by police. Black officers still lack meaningful employment and are concentrated in bottom-level positions. Recently, Black NYPD officers felt the ill-effects of operational needs and its deterioration from a justification for affirmative action to a basis for racist decision-making. Desegregation also fails because it is too simple to address the complexities of racism among those who are racially subordinated. And while police and politicians have benefited from hiring Black officers to perform undercover and race relations work, the Black community has yet to realize what it deemed valuable in having members of our own in law enforcement.

Certainly, the Black community has not agreed on the law enforcement policies that will best serve our interests. But the constant failure of policymakers to consider our input shows that it is wise for us to take control of the debate. As a very preliminary manner, this paper hopes to inspire a new framework for implementing and evaluating police reform in which the best interests of the Black community remain central. Still yet, the Black community must decide the issue of whether police and criminal justice reform is preferable and viable absent a model for Black liberation and self-determination.[210]

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210. *See, e.g.*, AUDRE LORDE, SISTER OUTSIDER 112 (1984) ("For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change."); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 363 (1992) ("The struggle by [B]lack people to obtain freedom, justice, and dignity is as old as this nation . . . In spite of dramatic civil rights movements and periodic victories in the legislatures, [B]lack Americans by no means are equal to [W]hites. Racial equality is, in fact, not a realistic goal. By constantly aiming for a status that is unobtainable in a perilously racist America, [B]lack Americans face frustration and despair."); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 359 (1991) (stating that "[t]hroughout American history, [B]lack and [W]hite Americans have had radically different experiences with respect to violence and state protection[,]" and "the failure of most constitutional scholars and policymakers to seriously examine that history, is in part another instance of the difficulty of integrating the study of the [B]lack experience into larger questions of legal and social policy"); Peggy C. Davis, *Law As Microaggression*, 98 YALE L.J. 1559, 1559

(1989) ("With striking regularity minority people, in New York and elsewhere in the United States, report conviction that the law will work to their disadvantage . . . Those who perceive the courts as biased admit that incidents of alleged bias are usually ambiguous; that systematic evidence of bias is difficult to compile; and that evidence of bias in some aspects of the justice system is balanced by evidence that the system acts to correct or to punish bias in other sectors of the society."); Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model*, 89 MICH L. REV. 1222, 1223–24 (1991) ("Minorities are hired or promoted not because we have been unfairly treated, denied jobs, deprived of our lands, or beaten and brought here in chains. Affirmative action neatly diverts our attention from all those disagreeable details and calls for a fresh start. Well, where are we now?"); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 2 (1991) (arguing that "the United States Supreme Court's use of color-blind constitutionalism—a collection of legal themes functioning as a racial ideology—fosters [W]hite racial domination"); Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709, 1713–14 (1993) ("Even though the law is neither uniform nor explicit in all instances, in protecting settled expectations based on [W]hite privilege, American law has recognized a property interest in [W]hiteness that, although unacknowledged, now forms the background against which legal disputes are framed, argued, and adjudicated."); Alex M. Johnson, Jr., *Bid Whist, Tonk, and* United States v. Fordice*: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1402 (1993) (arguing that the "intergrationism" articulated by *Brown v. Board of Education* and *United States v. Fordice* has failed and it is "seriously flawed because it conflates the process of integration with the ideal of integration"); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985); Ali Khan, *Lessons From Malcolm X: Freedom by Any Means Necessary*, 38 HOW. L.J. 79, 80, 83 (1994) (examining the legal system's failure to protect the freedom of the oppressed and informing that "Malcolm [X] recognized that when law carries out the will of the oppressor, law perpetuates an unjust and cruel society . . . . For Malcolm, the concepts of formal equality, desegregation, and civil rights were the language of acquiescence, not liberation; for him, the concepts of identity, self-reliance, and human rights were the language of liberation"); Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Brandon Lofton, *Fifty Years after* Brown, *The Civil Rights Ideology and Today's Movement*, 29 N.Y.U. REV. L. & SOC. CHANGE 719, 722 (2005) (advocating for "an alternative ideology whose core beliefs more fully reflect the complexity of African American identity and freedom"); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 760 (1990) (arguing summarily that "the boundaries of today's dominant rhetoric about race were set in the late 1960s and early 1970s, in the context of an intense cultural clash between [B]lack nationalists on one side, and integrationists ([W]hite and [B]lack) on the other. Current mainstream race reform discourse reflects the resolution of that conflict through a tacit, enlightened consensus that integrationism—understood as the replacement of prejudice and discrimination with reason and neutrality—is the proper way to conceive of racial justice, and that the price of the national commitment to suppress [W]hite supremacists would be the rejection of race consciousness among African Americans"); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1423 (1991) (providing that "examining legal issues from the viewpoint of those whom they affect most helps to uncover the real reasons for state action and to explain the real harms that it causes").