

# New Policing, New Segregation: From Ferguson to New York

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## INTRODUCTION

In popular and political culture, many observers credit nearly twenty-five years of declining crime rates to the “New Policing.”<sup>1</sup> Breaking with a past tradition of “reactive policing,” the New Policing emphasizes advanced statistical metrics, new forms of organizational accountability, and aggressive tactical enforcement of minor crimes.<sup>2</sup> The existing research and scholarship on these developments have focused mostly on the nation’s major cities, where concentrated populations and elevated crime rates provide pressurized laboratories for police experimentation, often in the spotlight of political scrutiny. An additional line of scholarship has looked more closely at how the tactics of the New Policing have become institutionalized in police–citizen interactions in the everyday lives of residents of poorer, often minority, and higher-crime areas of the nation’s cities.<sup>3</sup>

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1. See, e.g., Philip B. Heymann, *The New Policing*, 28 *FORDHAM URB. L.J.* 407, 413–14 (2000); see also FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK’S LESSONS FOR URBAN CRIME AND ITS CONTROL*, at x–xi (2011). For a review, see Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 *J. ECON. PERSP.* 163, 172–73 (2004).

2. See WILLIAM BRATTON WITH PETER KNOBLER, *TURNAROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC* 239 (1998); CHRISTOPHER DICKEY, *SECURING THE CITY: INSIDE AMERICA’S BEST COUNTERTERROR FORCE—THE NYPD 106* (2010); GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 188–91 (1996).

3. See, e.g., VICTOR M. RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* 3–5 (2011); David A. Harris, *The Dangers of Racialized Perceptions and Thinking*

These efforts have often overlooked how this New Policing has been woven into the social, political, and legal fabrics of smaller, less densely populated areas. These areas are characterized by more intimate and individualized relationships among citizens, courts, and police, as well as closely spaced local boundaries with a considerable flow of persons through administrative entities such as villages and towns. The New Policing models have had extensive reach into the everyday lives of citizens living in these areas, yet little research has been done on their effect. In popular discourse, small-town policing seems like a different world from urban policing; police–citizen interactions are both quantitatively less common and qualitatively distinct. It is an open question whether the processes of policing and the experiences of citizens in these more intimate spaces can be understood through the same framework as urban policing.

The New Policing provides a paradigm for understanding and comparing the practices of policing and the experiences of citizens in large and small areas. In cities, residents have frequent contact with police, often in the context of investigative stops or field interrogations based on low levels of suspicion.<sup>4</sup> High rates of misdemeanor arrests draw people into systems of legal sanctions and control, often for low-level, nonviolent offenses.<sup>5</sup> Whereas stops have consequences for socio-legal behaviors,<sup>6</sup> the consequences of the misdemeanor arrest prong of the New Policing go well beyond the dignitarian concerns of street stops.<sup>7</sup> Arrests for low-level

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by *Law Enforcement*, in *DEADLY INJUSTICE: TRAYVON MARTIN, RACE, AND THE CRIMINAL JUSTICE SYSTEM* 146, 155–56 (Devon Johnson et al. eds., 2015).

4. Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 168–69, 175–76 (2015).

5. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 639, 668 (2014); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1358–59 (2012).

6. CHARLES R. EPP ET AL., *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* 143 (2014); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 68–69 (2009); Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2323–25 (2014); K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 306–07 (2009); William J. Stuntz, *Terry's Impossibility*, 72 ST. JOHN'S L. REV. 1213, 1216–17 (1998); Tom R. Tyler, Jeffrey Fagan & Amanda Geller, *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization*, 11 J. EMPIRICAL LEGAL STUD. 751, 757–60 (2014).

7. Stuntz, *supra* note 6, at 1218; see also Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity,"* 66 STAN. L. REV. 987, 1035–39 (2014); Rod K. Brunson & Ronald Weitzer, *Police Relations with Black and White Youths in Different Urban Neighborhoods*, 44 URB. AFF. REV. 858, 865–68 (2009); Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and*

misdemeanors, as well as noncustodial citations or summonses, are a staple of this policing model.<sup>8</sup> The use of administrative codes and ordinances in these police practices often results in either custody arrests or summonses requiring court appearances. Few of these contacts result in jail time, but many result in monetary costs for fees as well as fines and other financial sanctions.<sup>9</sup> As discussed in Part I below, these regimes of misdemeanor arrests and summonses are influenced by, and draw justifying ideology from, practices common to “Broken Windows” models of policing that are now common in cities across the United States.<sup>10</sup>

The 2014 investigation into the events in Ferguson, Missouri, by the Department of Justice, raised social, legal, and political awareness of how the New Policing unfolds in less urban areas.<sup>11</sup> The Ferguson episode and related incidents have driven a painful national conversation about the New Policing: racially uneven enforcement of petty offenses, the use of lethal force, constraints on police accountability, indigent defense after *Gideon v. Wainwright*,<sup>12</sup> the political economy of policing and punishment, and the role of criminal justice in an era of declining crime both in cities and in many less urban areas. In particular, it revealed how monetary sanctions are deeply woven into local institutions and illuminated the path from noncriminal legal matters to deeper criminal liability and punishment. Still, even after the revelations in the Ferguson report, legal and social science scholarship about the New Policing in less populated areas has remained separate from research about the New Policing in urban settings.

This Article questions this separation. We observe surprising and troubling similarities in the conduct of the New Policing in two vastly different areas: the suburb of Ferguson and the metropolis of New York City. We compare the processes of investigative stops, intensive enforcement of municipal codes, arrest practices in high-discretion offenses, and—most importantly—how these cases are adjudicated and

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*Order Maintenance Policing: A Study of Inner-City Young Men’s Perception of Police Legitimacy*, 27 JUST. Q. 255, 256–57 (2010).

8. JACK MAPLE WITH CHRIS MITCHELL, *THE CRIME FIGHTER: PUTTING THE BAD GUYS OUT OF BUSINESS* 214 (2000).

9. Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1186–89 (2014). See generally ALEXES HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS A PUNISHMENT FOR THE POOR* 26–46 (2016).

10. Heymann, *supra* note 1, at 449–50; George L. Kelling & William J. Bratton, *Why We Need Broken Windows Policing*, CITY JOURNAL (Winter 2015), <https://perma.cc/HPJ4-VP8X>. But see BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 46–51 (2005); RALPH B. TAYLOR, *BREAKING AWAY FROM BROKEN WINDOWS* 93–94 (2000).

11. See U.S. DEP’T OF JUSTICE, *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2–6* (2015) [hereinafter FERGUSON REPORT].

12. 372 U.S. 335 (1963).

punished. We show that these low-level offenses—whether “public order” crimes, such as open container violations, or traffic violations for vehicle defects<sup>13</sup>—are the starting point for legal proceedings that over time evolve into tougher penalties that leave criminal records with lasting consequences. In particular, warrants provide the entry point for processes that move from civil fines to criminal punishment.

This Article also shows that the use of monetary sanctions, whether in pretrial stages or as punishments, has become a widespread practice that flies well below Eighth Amendment scrutiny. We show that in both large cities and small municipalities, there is a racial skew in the financial burdens of the New Policing. And, in particular, those least able to meet the financial obligations imposed by the New Policing are those with the most frequent contact with police and courts. These financial burdens can metastasize from simple fines to warrants, from warrants to arrests, and further to more severe penalties. In turn, exposure to criminal punishment imposes social and economic burdens with both near- and long-term impacts on employment, housing, and other social assets.

This Article unfolds in four Parts. We begin in Part I with a review of New Policing practices leading to court sanctions, as well as the evolution of fines from punishment alternatives to a practice deeply ingrained both in law and in the political culture of legal institutions. Parts II and III develop respective case studies of Ferguson and New York City. We conclude in Part IV with a discussion of how New Policing has been translated into a web of legal and financial controls that can only be appreciated as the new segregation.

## I. LEGAL FINANCIAL OBLIGATIONS AND THE NEW POLICING

### A. THE NEW POLICING

The literature in support of the New Policing is exemplified by a 2000 *Fordham Urban Law Journal* essay, in which Professor Philip Heymann credits the New Policing methods for the sharp crime decline of the preceding decade.<sup>14</sup> This supporting literature can be traced to the well-known theoretical essay on “Broken Windows” theory by Professors George Kelling and James Wilson.<sup>15</sup> In that essay, Professors Kelling and Wilson suggested that merely the appearance of disorder signaled vulnerability to would-be criminal offenders and thereby increased crime rates. Some empirical support for this theory came several years later from

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13. Such as broken taillights or expired registrations.

14. Heymann, *supra* note 1, at 413–16.

15. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <https://perma.cc/QL3S-RHDR>.

research on disorder and crime,<sup>16</sup> though later reanalysis of those data undermined Broken Windows claims.<sup>17</sup> The initial research showed that aggressive enforcement of minor crimes—usually through arrest—deterred crime by signaling the risks of detection and punishment to criminal offenders.<sup>18</sup> The New Policing combined these tactics with the use of statistical metrics of geospatial crime patterns to allocate police personnel optimally and to strengthen organizational accountability by linking police actions with crime rates.

Professor Debra Livingston described this vector of New Policing tactics in a 1997 essay but stopped short of crediting them for producing the crime decline.<sup>19</sup> Professor Heymann's essay took a broader view, endorsing both community engagement to solve the problems that generated persistent crime and prospective solutions that anticipated crime problems and took preventative measures.<sup>20</sup> Both Professors Livingston and Heymann highlighted aggressive street stops as an integral component of the new approach.<sup>21</sup>

A large strand of the criminology literature has followed that of Professor Heymann in crediting New Policing for the dramatic reduction in crime in the 1990s. Professors George Kelling and Catherine Coles cited the place-based policing tactics built on Broken Windows theory of disorder and crime<sup>22</sup> as the engine driving local crime declines in three case studies.<sup>23</sup> One study showed a sharp decline in gun violence in New York City in the early 1990s and gave partial credit to new police tactics.<sup>24</sup> Professors Hope Corman and Naci Mocan credited aggressive policing in the form of drug-related misdemeanor arrests for the reduction

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16. See, e.g., WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* 73–75 (1992).

17. See Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 312–27 (1998).

18. See Jacqueline Cohen & Jens Ludwig, *Policing Crime Guns*, in *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE* 217, 238–39 (Jens Ludwig & Philip J. Cook eds., 2003); Robert J. Sampson & Jacqueline Cohen, *Deterrent Effects of the Police on Crime: A Replication and Theoretical Extension*, 22 LAW & SOC'Y REV. 163, 183–85 (1988).

19. Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997).

20. Heymann, *supra* note 1, at 424.

21. *Id.* at 429; Livingston, *supra* note 19, at 589–90.

22. Kelling & Wilson, *supra* note 15.

23. KELLING & COLES, *supra* note 2, at 194–235.

24. Jeffrey Fagan et al., *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY 1277, 1297–98, 1313–16 (1998) [hereinafter Fagan et al., *Declining Homicide*].

in murder and other violence in New York City in the 1990s.<sup>25</sup> Others found small but measurable effects of misdemeanor arrests on crime,<sup>26</sup> while some studies simply rejected the causal claims of the New Policing advocates.<sup>27</sup> Other research challenged the core notions of the disorder–crime relationship, showing that the connections between crime and disorder are uncertain.<sup>28</sup>

Despite these doubts, “proactivity” became a core element of the New Policing.<sup>29</sup> *Terry* stops<sup>30</sup> and misdemeanor arrests were central to the notion of proactivity from the start.<sup>31</sup> Over time, proactivity became a

25. Hope Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J.L. & ECON. 235, 261–63 (2005).

26. See, e.g., Richard Rosenfeld & Robert Fornango, *The Impact of Economic Conditions on Robbery and Property Crime: The Role of Consumer Sentiment*, 45 CRIMINOLOGY 735, 750 (2007).

27. HARCOURT, *supra* note 10, at 8–11; ANDREW KARMEN, NEW YORK MURDER MYSTERY 117–21 (2000); Jeffrey Fagan, *Policing Guns and Youth Violence*, 12 FUTURE OF CHILD. 133, 142 (1995); Judith A. Greene, *Zero Tolerance: A Case Study of Police Policies and Practices in New York City*, 45 CRIME & DELINQ. 171, 177–78 (1999); Harcourt, *supra* 17, at 342; Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 317–20 (2006) [hereinafter Harcourt & Ludwig, *New Evidence*]; Ana Joanes, *Does the New York City Police Department Deserve Credit for the Decline in New York City’s Homicide Rates? A Cross-City Comparison of Policing Strategies and Homicide Rates*, 33 COLUM. J.L. & SOC. PROBS. 265, 302–03 (1999); Richard Rosenfeld et al., *The Impact of Order-Maintenance Policing on New York City Homicide and Robbery Rates: 1988–2001*, 45 CRIMINOLOGY 355, 377 (2007). *But see* ZIMRING, *supra* note 1, at 149; FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 155–56 (2006).

28. Compare TAYLOR, *supra* note 10, at 18 (finding no evidence that crime is related to disorder), Harcourt, *supra* note 17, at 309 (same), Bernard E. Harcourt & Jens Ludwig, *Reefer Madness: Broken Windows Policing and Misdemeanor Marijuana Arrests in New York City, 1989–2000*, 6 CRIMINOLOGY & PUB. POL’Y 165, 176 (2007) (same) [hereinafter Harcourt & Ludwig, *Reefer Madness*], and Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 637–38 (1999) (finding no direct link between disorder and crime), with GEORGE L. KELLING & WILLIAM H. SOUSA, JR., CTR. FOR CIVIC INNOVATION, DO POLICE MATTER? AN ANALYSIS OF THE IMPACT OF NEW YORK CITY’S POLICE REFORMS 18 (2001) (finding evidence that crime is related to disorder), SKOGAN, *supra* note 16, at 10 (same), Corman & Mocan, *supra* note 25, at 262 (same), and Rosenfeld et al., *supra* note 27, at 366–67 (same).

29. The term was first used without fanfare by Professors Jerome Skolnick and David Bayley in their description of policing innovations in the 1980s. JEROME H. SKOLNICK & DAVID H. BAYLEY, THE NEW BLUE LINE: POLICE INNOVATION IN SIX AMERICAN CITIES 178 (1986) (discussing a shift in police tactics from reacting to crime complaints to acting in response to chronic criminal problems in specific neighborhoods).

30. See *Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* permitted temporary stops and detentions based on reasonable suspicion that crime was “afoot,” supplanting the more demanding probable cause standard and memorializing police discretion as the gateway to street stops. *Id.* at 30.

31. The original Broken Windows essay, whose ideas informed the New Policing and its proactive prong, argued that arrest should be a last resort when other efforts failed to ameliorate the disorderly conditions that invite crime. See Kelling & Wilson, *supra* note 15. By 2000, Kelling had embraced the notion of using arrest authority

broad umbrella for a wide range of police tactics. One study defines “proactive policing” as the “vigorous enforcement of laws against relatively minor [misdemeanor] offenses.”<sup>32</sup> Other studies mention the use of stop and frisk, or investigative stops, as central to a proactive policing policy.<sup>33</sup> Still others portray a mixture of drug enforcement and community policing as proactive.<sup>34</sup>

#### B. POLICING RACE AND CRIME

In cities, the social and spatial demographics of crime made it inevitable that the New Policing would be concentrated in poor, and often minority, neighborhoods. Allocating police to places with higher crime rates is hardly an irrational response to public safety concerns and also to the politics of crime. But that rationality is potentially mediated by several factors. First, as practiced in New York, police presence and activity in minority neighborhoods seemed to have more to do with race than simply with crime.<sup>35</sup> After controlling for local crime rates, a neighborhood’s racial composition predicted the police response in terms of proactivity.<sup>36</sup> In other words, proactivity was about more than crime; it was also about race.

Second, the allocation is rational only to the extent that it can be connected to crime declines. As we show later on, proactivity resulted in very high rates of street stops, misdemeanor arrests, and court summonses, all of which potentially swept up neighborhood residents into legal controls, disproportionately to both racial composition and local crime

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systematically and aggressively to stop minor crime from growing into more serious crime patterns and problems. *See* KELLING & COLES, *supra* note 2, at 108–56.

32. Charis E. Kubrin et al., *Proactive Policing and Robbery Rates Across U.S. Cities*, 48 *CRIMINOLOGY* 57, 57 (2010).

33. *See, e.g.*, Jeffrey A. Fagan et al., *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, in *RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS* 309, 309–10 (Stephen K. Rice & Michael D. White eds., 2010) [hereinafter Fagan et al., *Broken Windows Revisited*].

34. *See, e.g.*, Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 *CRIMINOLOGY & PUB. POL’Y* 315, 318 (2004).

35. *See* Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L.J.* 457, 462 (2000); *see also* Floyd v. City of New York, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (claiming that police in New York City engaged in “indirect racial profiling” that focused policing in minority neighborhoods at rates higher than what the local crime rates would predict); Fagan et al., *Broken Windows Revisited*, *supra* note 33, at 310.

36. Report of Jeffrey Fagan, Ph.D. at 32, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034); *see also* Fagan et al., *Broken Windows Revisited*, *supra* note 33, at 310.

rates, and with little to show for it.<sup>37</sup> Stops rarely resulted in arrests or seizures of contraband.<sup>38</sup> The few stops that did result in arrests rarely involved serious crimes, and few resulted in convictions or punishment.<sup>39</sup> These inconsistencies raise questions of fairness, efficiency, and constitutionality.<sup>40</sup>

Third, there is a big difference between the number of police sent to a neighborhood and their actions when they get there. Under the New Policing methods, involuntary police–citizen contacts rarely were gentle or neutral, nor were they intended to be that way.<sup>41</sup> They were neither pleasant nor without emotional consequences.<sup>42</sup> The harsh tone and style of investigative stops raised fear and anger, as well as cynicism, toward police and law.<sup>43</sup> Policing framed this way, and carried out disproportionately in black and Latino neighborhoods, raised constitutional questions of disparate treatment.<sup>44</sup> This was not just a story about New York: civil rights litigation and federal court oversight spread

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37. See *infra* Part IV and accompanying notes.

38. See *Floyd*, 959 F. Supp. 2d at 558–59; Meares, *supra* note 4, at 164; Jeffrey Fagan, Greg Conyers & Ian Ayres, No Runs, Few Hits and Many Errors: Street Stops, Bias and Proactive Policing 22 (Nov. 2014) (unpublished manuscript) (on file with authors).

39. See ERIC T. SCHNEIDERMAN, N.Y. STATE OFFICE OF THE ATTORNEY GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT’S STOP-AND-FRISK PRACTICES 8–9, app. G (2013).

40. See *Floyd*, 959 F. Supp. 2d at 556.

41. See MAPLE WITH MITCHELL, *supra* note 8, at 151–52; Roger Matthews, *Replacing ‘Broken Windows’: Crime, Incivilities, and Urban Change*, in ISSUES IN REALIST CRIMINOLOGY 19, 38, 45 (Roger Matthews & Jock Young eds., 1992); see also PETER MOSKOS, COP IN THE HOOD: MY YEAR POLICING BALTIMORE’S EASTERN DISTRICT 114–15 (2008); Bernard E. Harcourt, *Unconstitutional Police Searches and Collective Responsibility*, 3 CRIMINOLOGY & PUB. POL’Y 363, 366–67 (2004) (describing how community police officers invoked a drug-enforcement rationale to stop a suspect without any indicia of drug use or possession and proceeded to conduct a fruitless cavity search); The Nation, *The Hunted and the Hated: An Inside Look at the NYPD’s Stop-and-Frisk Policy*, YOUTUBE (Oct. 9, 2012), <https://perma.cc/BFW8-NN8L> (presenting audio tape recorded by Alvin Cruz during one of his multiple stops. After a physical struggle instigated by the police officer and his sergeant, Cruz asked for the reason why the officers were arresting him. One replied: “For being a fucking mutt!”).

42. Tyler, Fagan & Geller, *supra* note 6, at 751; see also Geller et al., *supra* note 6, at 2321.

43. EPP ET AL., *supra* note 6, at 1–2, 75–84 (describing racial degradation and racially selective enforcement in stops and searches in vehicle highway stops); see also RONALD WEITZER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA: CONFLICT AND REFORM 74 (2006) (showing racial differences in evaluations of police based on perceptions and experiences with police misconduct); Tyler, Fagan & Geller, *supra* note 6, at 771; Ronald Weitzer & Steven A. Tuch, *Perceptions of Racial Profiling: Race, Class, and Personal Experience*, 40 CRIMINOLOGY 435, 449 (2002).

44. See *Floyd*, 959 F. Supp. 2d at 660–64; see also Fagan, Conyers & Ayres, *supra* note 38, at 8, 24.



across cities along with the proliferation of the New Policing model.<sup>45</sup> Consent decrees in Maryland, New Jersey, and Los Angeles, and a stipulated settlement in New York City, all were based on foundations of empirical evidence of racially selective police enforcement fraught with Fourth Amendment irregularities.<sup>46</sup> Racial profiling became a fundamental component of, and a social fissure in, both legal and popular culture.<sup>47</sup>

The New Policing remained a constant feature of urban policing in the United States throughout the broad, nearly twenty-five year crime decline that began nationally in 1993 and even earlier in some cities.<sup>48</sup> The New Policing regimes became entrenched in police practice and policy during this time, especially in poor, often minority neighborhoods.<sup>49</sup> Indigence characterizes the population that is most affected by the New Policing, making it difficult to provide even minimal criminal defenses for minor misdemeanors and violations.<sup>50</sup>

With less serious crime to manage, the excess bureaucratic capacity of proactive policing defaulted to an administrative regime. At the same time, the New Policing intersected with race and broadened the reach of policing and criminal justice, while its transformation to social regulation threatened to dilute the significance of the criminal sanction. The connection of these regimes to race and crime became more tenuous, as

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45. See David A. Harris, *Across the Hudson: Taking the Stop and Frisk Debate Beyond New York City*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 853, 855–56 (2013).

46. See *id.* at 871; see generally IAN AYRES & JONATHAN BOROWSKY, A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT (2008); EPP ET AL., *supra* note 6; BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (2007); R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571 (2003); Fagan & Davies, *supra* note 35; Jeffrey Fagan, *Terry's Original Sin*, 2016 U. CHI. LEGAL F. 43 (2016) [hereinafter Fagan, *Original Sin*]; David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010).

47. See Ronald Weitzer & Steven A. Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 SOC. FORCES 1009, 1017 (2003) (finding that black respondents in their survey were six times more likely than whites to believe that police prejudice is "very common in their own city"); See also EPP ET AL., *supra* note 6, at 152–55.

48. See Fagan et al., *Declining Homicide*, *supra* note 24, at 1319–20; Harcourt & Ludwig, *New Evidence*, *supra* note 27, at 317–20; Richard Rosenfeld, Robert Fornango & Eric Baumer, *Did Ceasefire, Compstat, and Exile Reduce Homicide?*, 4 CRIMINOLOGY & PUB. POL'Y 419, 420 (2005).

49. See Issa Koehler-Hausmann, *Detecting Discrimination in Policing*, BALKINIZATION (Aug. 13, 2015), <https://perma.cc/RNA4-KHKP>.

50. See, e.g., Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2181 (2013) (showing that even after *Gideon v. Wainwright* confirmed the right to counsel, the New Policing has compounded the very problems that *Gideon* was meant to solve).

did their connection to constitutional regulation. But the connection of these regimes to cash flow through the courts and correctional agencies became more visible and common throughout this era, signaling a new set of profit interests to push criminal justice from policing to corrections and even deeper into administrative law. We begin to connect the New Policing with these profit interests in the next section.

### C. LEGAL FINANCIAL OBLIGATIONS: A LATENT TAX ON ARRESTEES

#### 1. Punishment and the Undeserving Poor

The connection between money, crime, and punishment has a long history in common law countries.<sup>51</sup> In their famous treatise on punishment, historians Georg Rusche and Otto Kirchheimer showed how fines were integral to punishment regimes beginning in the Middle Ages.<sup>52</sup> Debtor prisons were a regular feature of American and European justice until their eradication from multiple countries in the nineteenth century.<sup>53</sup> But even today there are pathways to prison for debtors, in particular through civil contempt for failure to surrender assets or pay court-ordered fines.<sup>54</sup> In *Bearden v. Georgia*, the Supreme Court severely limited the practice of revoking probation for a defendant's failure to pay a fine or make restitution.<sup>55</sup> Yet in modern punishment practice, prisoners often accrue debt that creates barriers to re-entry upon release.<sup>56</sup> Prisoners are already likely to be poor entering prison, but once there they accumulate further debts administered by courts and correctional authorities as part of cost recovery.<sup>57</sup> In many instances, child support obligations also compound accruing debt to prisoners.<sup>58</sup>

In the United States, there is a long history connecting these regimes to race. David Oshinsky describes how free black men in the 1800s in

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51. HARRIS, *supra* note 9, at 19–23; *see also* Logan & Wright, *supra* note 9, at 1179–81.

52. GEORG RUSCHE & OTTO KIRCHHEIMER, *PUNISHMENT AND SOCIAL STRUCTURE* 8–11 (1939).

53. Gustav Peebles, *Washing Away the Sins of Debt: The Nineteenth-Century Eradication of the Debtors' Prison*, 55 *COMP. STUD. SOC'Y & HIST.* 701, 702 n.5 (2013).

54. Richard E. James, *Putting Fear Back into the Law and Debtors Back into Prison: Reforming the Debtors' Prison System*, 42 *WASHBURN L.J.* 143, 149 (2002).

55. 461 U.S. 660, 672 (1983) (holding that “sentencing court[s] must inquire into the reasons for the failure to pay”).

56. Kirsten D. Levingston & Vicki Turetsky, *Debtors' Prison: Prisoners' Accumulation of Debt as a Barrier to Reentry*, 41 *CLEARINGHOUSE REV. J. POVERTY L. & POL'Y* 187, 192–95 (2007); *see also* BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 87–89 (2007).

57. Levingston & Turetsky, *supra* note 56, at 187; Logan & Wright, *supra* note 9, at 1190–96.

58. Levingston & Turetsky, *supra* note 56, at 187.

Mississippi were subject to fines for vagrancy and “being a tramp.”<sup>59</sup> Convict leasing, which targeted mainly black prisoners in the South, was an economic boon both for private corporations and for the government from Reconstruction through the early 1950s.<sup>60</sup> In the modern era, the expansion of the use of monetary penalties has coincided with the expansion of the carceral state,<sup>61</sup> which in turn has disproportionately affected black and Latino young men and women.<sup>62</sup>

Monetary penalties have proven to be quite popular in state legislatures and in criminal legal institutions. Fines are seen both as a legitimate deterrent to wrongdoing and a means of internalizing the costs of criminal justice administration (courts, police, prisons, etc.) to the prisoner, which would otherwise fall on ostensibly law-abiding taxpayers. Further, administrative fees allow state and local legislators to get around tough rules on raising local taxes. Fines and administrative fees therefore provide a path to budgetary relief without court oversight. Professor Alexes Harris shows the penetration of the fine and fee regimes not only in (non-tax) statutes but also in the political culture of the courts in Washington State, as expressed in interviews with court officers and clerical staff about the purpose and justification of the fee regimes.<sup>63</sup> It is not simply fiscal interests in recuperating costs from poor defendants that seemed to animate the institutional postures; rather, Professor Harris shows how these fines are shaped by perceptions of criminal defendants—regardless of crime severity—as deserving of this extra burden beyond formal punishments. In effect, this view of defendants reflects a justifying ideology about the undeserving offender that links money to crime and punishment.<sup>64</sup>

The concentration of these measures and the animating views of legal actors suggest a certain exceptionalism of criminal matters, if not an enmity toward criminal offenders. Filing fees for wills and trusts, for marriage or incorporation papers, or any other civil action carries none of

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59. DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 42 (1996); see also DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME I* (2008).

60. BLACKMON, *supra* note 59, at 54–57.

61. See Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1755 (2010).

62. WESTERN, *supra* note 56, at 15–18; NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES 56–58* (Jeremy Travis et al. eds., 2014).

63. HARRIS, *supra* note 9, at 14–15.

64. See John T. Jost & Orsolya Hunyady, *Antecedents and Consequences of System-Justifying Ideologies*, 14 CURRENT DIRECTIONS PSYCHOL. SCI. 260, 260 (2005). For an example where moral status is ascribed to a less powerful group to justify legal treatment, see Maykel Verkuyten, *Justifying Discrimination Against Muslim Immigrants: Out-Group Ideology and the Five-Step Social Identity Model*, 52 BRIT. J. SOC. PSYCHOL. 345 (2013).

the association of wrongdoing that the language of the fee-authorizing criminal statutes connotes. Professor Harris and her colleagues point to the language of “accountability” as a linguistic bait-and-switch for punishment that is used to justify the imposition of fees for everything from an application for indigent defense to a motion to expunge a criminal record upon dismissal of a case.<sup>65</sup>

## 2. Taxing Criminals

Much of the regime of taxing criminals has developed with the rise in incarceration. But until recently, there was little research or scholarship on the rise of fee-based criminal justice.<sup>66</sup> Recent work by Professor Rachel Barkow shows how criminal procedure, from charging through adjudication and sentencing, has devolved to—and also, perhaps, defaulted to—administrative law,<sup>67</sup> granting broad discretion to agencies with little constitutional interest or oversight. The courts may regard the fee regimes as extrinsic to punishment and more accurately classified as civil requirements or civil penalties in the case of fines.<sup>68</sup> However, defaulting to agency autonomy is an equally compelling explanation, removing it from constitutional oversight. In general, the rise of administrative criminal justice seems consistent with the general drift toward actuarialism in criminal justice.<sup>69</sup>

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65. Harris et al., *supra* note 61, at 1757.

66. For an exception, see NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* (1990). See also Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52 (1982). It is possible that as part of the justifying ideology of the court staff and officers, they may view it as fairer that offenders pay for the costs of their criminal case rather than the general tax rolls that include their victims. But having offenders pay for pre-adjudication costs, including filing fees, and vetting their eligibility for indigent defense presumes that they are in fact guilty of a criminal offense or a civil violation. Given the high rates of plea bargaining in the lower criminal courts in misdemeanor cases, as well as the high rates of prosecutorial declination and court dismissal, this is an assumption fraught with risk and potentially error. Logan & Wright, *supra* note 9, at 1211–12.

67. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1334–35 (2008) (arguing that the transformation of criminal law and procedure to an administrative design has reduced sentencing discretion and given unfettered power to agencies); see also Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841 (2014); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 510 (2016) (claiming that “[a]d hoc instrumentalism and boundary organizations, in turn, are parts of a still larger movement toward greater flexibility and fluidity in governance, a movement that includes the broad categories of negotiated rulemaking”).

68. Harris et al., *supra* note 61, at 1757.

69. See JONATHAN SIMON, *GOVERNING THROUGH CRIME* 6 (2009).

New research in these fee-generating regimes followed from research and political interest in the growth of incarceration. After four decades of rising incarceration rates, legal scholars and empirical researchers focused attention on the consequences of incarceration, including features of incarceration that affected both jail and prison populations.<sup>70</sup> While the accrual of debt is an indirect consequence of incarceration in prison, the debt burdens of jail spells are only now gaining research and advocacy attention.<sup>71</sup>

The expansion of misdemeanor justice, driven in part by the New Policing, has imposed heavy fines and fees on jail populations.<sup>72</sup> As much as prison itself creates stigma and lingering collateral damage once released from confinement, the fines and fees of misdemeanor regimes also create disadvantages for the poor individuals who comprise the majority of the jail population. Failing to post bond leads to pretrial time in jail, risking loss of work and family disruption. The pressure to avoid jail leads to plea bargains and misdemeanor convictions that can adversely affect later applications for employment, housing, and education.<sup>73</sup> Again, while this burden falls on all those who plead out, the racial skew in policing and arrests can add further costs in the labor market.<sup>74</sup> It is not only fines as punishment that characterize the turn to monetary sanctions, but also the administrative regimes that require defendants—assuming they can afford them—to pay fees and costs for the very court processes that lead to their punishment.<sup>75</sup> The expansion of both incarceration and the financial costs of court processing contribute to the persistence of intergenerational poverty and economic inequality.<sup>76</sup>

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70. For a summary, see NAT'L RESEARCH COUNCIL, *supra* note 62, at 157–201.

71. *See, e.g.*, HUMAN RIGHTS WATCH, PROFITING FROM PROBATION 34 (2014), <https://perma.cc/SJ2W-TVZR>.

72. Logan & Wright, *supra* note 9, at 1185; *see also* HARRIS, *supra* note 9, at 18, 42. Although there are monetary burdens associated with felony case processing, such as taxing offenders to pay for probation or drug treatment or electronic monitoring in lieu of jail, these measures affect a smaller population facing prison. *See* E. ANN CARSON, BUREAU OF JUD. STAT., PRISONERS IN 2014, at 1 (2015), <https://perma.cc/QX6K-EC2F> (showing that 1,561,500 persons were held in state and federal correctional facilities, a fraction of the total population under correctional supervision including probation and parole); *see also* NAT'L RESEARCH COUNCIL, *supra* note 62, at 40–42, 50–51 (showing that only a fraction of all sentenced offenders each year are sent to prison compared to sentences to probation).

73. *See, e.g.*, William Glaberson, *In Misdemeanor Cases, Long Waits for Elusive Trials*, N.Y. TIMES (April 30, 2013), <https://perma.cc/4GS8-BNEU>.

74. *See, e.g.*, Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 959–60 (2003).

75. Logan & Wright, *supra* note 9, at 1190–92.

76. *See, e.g.*, Robert J. Sampson & Jeffrey D. Morenoff, *Durable Inequality: Spatial Dynamics, Social Processes, and the Persistence of Poverty in Chicago Neighborhoods*, in POVERTY TRAPS 176 (Samuel Bowles et al. eds., 2006).

The legal status of these sanctions as pre-adjudication processing fees technically exempts them from constitutional scrutiny under the Eighth Amendment. They may, however, interfere with a defendant's due process rights under the Sixth Amendment.<sup>77</sup> Poor defendants may be unable to pay for filing fees to determine their eligibility for indigent defense. Exercising the right to obtain a lawyer at the state's expense cannot constitutionally be conditioned on ability to pay.<sup>78</sup> In arguing their case, poor defendants may be unable to pay fees to obtain documents such as medical, employment, or housing records. If these imposed processing fees—taxes, in effect—are skewed racially by selective enforcement targeting black or Latino persons—or neighborhoods with high concentrations of black and Latino residents—the Sixth Amendment concerns multiply, raising both due process and equal protection claims under the Fourteenth Amendment.<sup>79</sup>

The inability to post bail raises issues both before and after adjudication. Defendants charged with minor misdemeanors may have difficulty retaining counsel if required to pay a fee to establish indigency, or the assignment of counsel may be delayed during the scramble to post bond in the interim between their arrest and first appearance. The risk of fee default at that stage leading to pretrial delay or—worse—pretrial detention in turn leads to the risk of an adverse court outcome in terms of charging and sentencing. Empirical studies confirm that defendants who are detained pre-trial are more likely to be convicted by plea or trial, and also receive harsher sentences.<sup>80</sup> Failure to pay the latent taxes of fees, in effect, prejudices court outcomes and all the burdens that come with either a monetary fine or a criminal conviction.

### 3. The Menu of Defendant Taxes

Recent work has shown the extent of this structure of fees and fines, and recent litigation has shown how deeply integrated these structures are with the political and fiscal structure of the institutions of criminal

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77. Logan & Wright, *supra* note 9, at 1224.

78. Gideon v. Wainwright, 372 U.S. 335, 343–44 (1963).

79. *See, e.g.*, HARRIS, *supra* note 9; Butler, *supra* note 50, at 2192.

80. Paul Heaton, Sandra G. Mayson & Megan Stevenson, *The Downstream Consequences of Pretrial Detention*, 69 STAN. L. REV. 711, 717 (showing evidence that detained defendants are 25% more likely than similarly situated releasees to plead guilty, 43% more likely to be sentenced to jail, and receive jail sentences that are more than twice the average); *see also* Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 18 (Univ. of Pa. Law Sch., Working Paper, 2016), <https://perma.cc/F69J-E7WM> (showing that that pretrial detention leads to a 13% increase in the likelihood of being convicted compared to similarly situated persons who were released before adjudication).

justice.<sup>81</sup> Accordingly, we adopt the term Legal Financial Obligations (LFOs) to describe the array of fees and monetary costs now associated with each step in the criminal justice process, from securing an attorney to having one's record expunged or sealed following completion of correctional sentences.<sup>82</sup> The similarity in the statutes authorizing these fees across the states strongly hints that these features of LFOs have spread somewhat contagiously across the states in a relatively short time. We draw on several recent works simply to array the types of monetary fees and fines that have developed over the past two decades.<sup>83</sup> This development corresponds with the rise of misdemeanor justice and the New Policing that disproportionately affects the poor, in turn both raising profits for agencies while deepening and criminalizing poverty for those swept up in the dragnet.

*a. Usage Fees or Pre-Judgment Fees.*

Arrestees face several types of fees, including those associated with processing the arrest and obtaining indigent defense. Local governments charge fees for police investigation, booking fees for any pretrial detention (however brief), prosecution costs to compile case folios, trial costs including the production of transcripts and other document costs, daily fees associated with the operation of the courtroom, and a variety of filing fees. Booking fees often apply even if charges are eventually dropped or dismissed.<sup>84</sup> Until recently, when a conviction is overturned, defendants in Colorado were required to file a lawsuit to recover fines and restitution that were levied in the original sentence.<sup>85</sup> The standard in the lawsuit to recover funds was clear and convincing evidence, a formidable procedural

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81. See, e.g., FERGUSON REPORT, *supra* note 11, at 9–15, 52–54; Julia Laurie & Katie Rose Quandt, *How Many Ways Can the City of Ferguson Slap You with Court Fees? We Counted*, MOTHER JONES (Sept. 12, 2014), <https://perma.cc/23J7-5WHC>.

82. HARRIS, *supra* note 9, at 8–9; Logan & Wright, *supra* note 9, at 1176–77.

83. HARRIS, *supra* note 9, at 28–41; Logan & Wright, *supra* note 9, at 1185–96; *Developments in the Law—Policing and Profit*, 128 HARV. L. REV. 1723, 1727–33. Harris's compendium of statutes is the most exhaustive of these reviews.

84. See, e.g., *Mickelson v. Cty. of Ramsey*, 823 F.3d 918, 921 (8th Cir. 2016). Corey Statham was arrested on a charge of disorderly conduct with \$46 on his person. *Id.* at 922. He was released two days later when all charges were dropped. *Id.* Ramsey County, the court district for the arrest, kept \$25 of his money as a “booking fee.” *Id.* The balance was returned on a debit card, subject to fees to maintain the debit card, to withdraw the funds using an automated teller, to transfer the funds to his checking account, and to check the balance remaining on the card at the time of issuance. *Id.* at 921–22. He never received the \$25 booking fee. *Id.* The petition for certiorari in this case was denied on April 17, 2017. *Mickelson v. Cty. of Ramsey*, 137 S. Ct. 1578 (2017) (mem).

85. COLO. REV. STAT. § 13-65-102 (2016) (describing the process by which a defendant may file a petition to recover fines and seek compensation). The U.S. Supreme Court found that the statute violated the Due Process Clause of the Fourteenth Amendment. See *Nelson v. Colorado*, 137 S. Ct. 1249, 1257–58 (2017).

and evidentiary bar for a person who cannot afford civil representation.<sup>86</sup> Despite *Gideon's* promise that defendants would not be denied representation because they could not afford to pay counsel,<sup>87</sup> several jurisdictions charge fees either to file proof of indigency to obtain a public defender, or to pay for the services of a court-appointed lawyer.<sup>88</sup>

Additional fees include filing fees to offset clerk costs, fees to resolve a bench warrant in the case of a failure to appear for a scheduled court date, fees for deferred prosecution (in effect, to stall a case), crime analysis or DNA analysis fees, and jury service fees.<sup>89</sup> Defendants who cannot post bail and are in jail awaiting trial might have to pay daily fees for their room at the jail. Some prosecutors attach conditions to a deferred prosecution, such as supervision, drug testing, or probation reporting, which can also be associated with additional fees.<sup>90</sup> If a defendant is diverted to drug court, fees are levied for monthly (or more frequent) drug testing to monitor compliance, as well as fees to cover the costs of third-party drug treatment. Upon completion of drug court or drug diversion, fees may be collected to offset provider costs of court notification and clerical costs of entering the judgment in the drug court database.<sup>91</sup>

Despite the pre-judgment or pre-adjudication stage at which these fees are levied, they are binding and non-recoverable even for the innocent or for those whose cases are dismissed by the court for legal insufficiency.<sup>92</sup> These are legally binding debts, subject to the defendant's ability to pay, and failure to pay can prolong a case or lead to interest and late fees.<sup>93</sup> In some cases, it can lead to incarceration: 18% of all commitments to the Rhode Island Department of Corrections in 2007 (2446 incidents) "were

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86. COLO. REV. STAT. § 13-65-102(b) (2016); *see also* Adam Liptak, *Charged a Fee for Getting Arrested, Whether Guilty or Not*, N.Y. TIMES (Dec. 26, 2016), <https://perma.cc/7DGF-HJHF>. The State of Kentucky also "bills people held in its jails for the costs of incarcerating them, even if all charges are later dismissed." *Id.*

87. *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963); *see also* Henry P. Monaghan, *Gideon's Army: Student Soldiers*, 45 B.U. L. REV. 445, 445–46 (1965).

88. *Developments in the Law—Policing and Profit*, *supra* note 83, at 1726–27.

89. HARRIS, *supra* note 9, at 77.

90. Logan & Wright, *supra* note 9, at 1187.

91. *See id.* at 1204–05 & n.227.

92. *See, e.g.*, OR. REV. STAT. §151.505 (2015) (allowing a court to require the defendant to repay certain costs irrespective of the outcome of the criminal matter).

93. Logan & Wright, *supra* note 9, at 1204 (citing *Bearden v. Georgia*, 461 U.S. 660, 670 (1983); *Tate v. Short*, 401 U.S. 395, 397–99 (1971); *People v. Pacheco*, 115 Cal. Rptr. 3d 220, 223–28 (Cal. Ct. App. 2010) (as Logan and Wright explain, "applying California statute which expressly states that the imposition of fines and fees are subject to the defendant's ability to pay"); *Del Valle v. State*, 80 So. 3d 999, 1015 (Fla. 2011) ("[B]efore a probationer can be imprisoned for failure to pay a monetary obligation such as restitution, the trial court must inquire into a probationer's ability to pay and make an explicit finding of willfulness based on the greater weight of the evidence.")).



solely the result of the defendant missing an Ability to Pay hearing.”<sup>94</sup> “Only after finding that a particular defendant has the financial ability to pay,” as in the case of the Rhode Island hearings, and if the defendant “willfully disobeys the judicial order to pay, is incarceration permitted.”<sup>95</sup> Incarceration can also be prolonged by an inability to pay parole supervision fees. Pennsylvania law makes inmates ineligible for parole release if they cannot pay the \$60 court costs fee.<sup>96</sup> These measures compound the LFOs into a legal burden that attaches only to those too poor to pay the initial fees. The piling on of these fees compounds the regressivity of this revenue policy and exacerbates the economic disadvantage that already attaches to many misdemeanor arrestees, deepening the poverty traps where many already reside.<sup>97</sup>

In the event of a trial, there are a large set of fees associated with adjudication that arguably interfere with the right to an attorney and the right to a trial. There are often application fees for indigent defense—one may have to pay serious sums for a public defender.<sup>98</sup> In addition, some jurisdictions require defendants to pay fees associated with the investigation of their case,<sup>99</sup> while others assess fees for preparation of transcripts necessary for a retrial or filing an appeal.<sup>100</sup> In several states, court fees associated with trial—paying for the judge, bailiff, and jury—may also be imposed, though some states have prohibited their imposition.<sup>101</sup>

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94. R.I. FAMILY LIFE CTR., COURT DEBT AND RELATED INCARCERATION IN RHODE ISLAND FROM 2005 THROUGH 2007 11 (2008), <https://perma.cc/4YNB-YD8Q>.

95. Logan & Wright, *supra* note 9, at 1200. However, some states have moved to restrict the use of incarceration to coerce payments of fines and fees. *See, e.g.*, MO. REV. STAT. § 479.360(3) (2016) (prohibiting incarceration of a defendant to coerce payments “unless found to be in contempt after strict compliance by the court with the due process procedures”).

96. 18 PA. CONS. STAT. § 11.1101 (2016); *see also* ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 22 (2010), <https://perma.cc/UQD9-KAPT>.

97. COUNCIL ON ECON. ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 1–2 (2015) (showing that these fines and fees disproportionately affect poor defendants and often either prolong or increase the likelihood of incarceration based on a defendant’s ability to pay).

98. *See, e.g.*, REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, THE HIDDEN COSTS OF FLORIDA’S CRIMINAL JUSTICE FEES 7 (2010); Logan & Wright, *supra* note 9, at 1211 n.274.

99. Courts generally defer to legislatures whose statutes require payment of specific fees associated with juries, non-incarceration supervision, prosecution expert witnesses, or DNA evidence collection and analysis. *See* Logan & Wright, *supra* note 9, at 1207.

100. *Id.* at 1204 (citing *Trinkle v. Hand*, 337 P.2d 665 (Kan. 1959); *State v. Gill*, 342 A.2d 256 (R.I. 1975); *State v. New England*, 363 S.E.2d 725 (W. Va. 1987)).

101. *See, e.g.*, *State v. Ayala*, 623 P.2d 584, 586 (N.M. Ct. App. 1981) (stating that jury and bailiff costs cannot be imposed); *Arnold v. State*, 306 P.2d 368, 376 (Wyo.

Finally, there is bail. Bail is paid either to the court or to a commercial bail bond dealer. Defendants who fail to appear at a court hearing after posting bail or a bond forfeit the cash or collateral they have put up, a windfall for bond dealers or courts. A few states impose fees for simply posting a bond, on top of whatever fee a private bond dealer might impose.<sup>102</sup> And as in deferred prosecution, any supervision attached to bail conditions can generate fees to offset the costs of that supervision. Defendants facing lengthy pretrial delays have little choice but to pay these costs or else remain in jail pending a court date and case resolution.<sup>103</sup>

*b. Punishment Fees.*

Fees for the court proceedings are assessed upon conviction, apart from the fines that are part of the sentence. These fees can depend on the offense: traffic cases are less expensive than felony offenses, for example.<sup>104</sup> Additional fees can mandate payments to crime victim restitution or compensation funds, crime prevention funds (for example, “Crimestoppers” programs), or other fees to reimburse crime labs for forensic analyses.<sup>105</sup> Here, as with pretrial fees, late payment fees also can be levied.

The traditional form of the LFO is fines: direct monetary penalties for infractions. An individual might be fined \$25 for parking without paying the meter, \$50 for drinking at a public park, \$100 for speeding, or \$500 for drunk driving. These fines remain prevalent and have increased in value on average.<sup>106</sup> Convicted sex offenders are required in some states to pay for enrollment in the state’s sex offender registry.<sup>107</sup>

Several states levy fees for post-adjudication incarceration. The rates vary depending on whether incarceration takes place at the state or local level. In a report to the New York State Bar Association, the Brennan Center for Justice in New York reported that New York recovered \$22 million from inmates serving in state prisons and county jails during the

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1957) (stating that expenses paid for bailiff services are not a part of the costs of prosecution).

102. HARRIS, *supra* note 9, at 48; Logan & Wright, *supra* note 9, at 1189 & n.91.

103. *See, e.g.*, Glaberson, *supra* note 73.

104. Logan and Wright report a conviction fee of \$60 for a traffic offense to \$225 for a felony conviction in Florida. Logan & Wright, *supra* note 9, at 1190. Harris reports a similar fee structure in Washington State. HARRIS, *supra* note 9, at 106–07.

105. Logan & Wright, *supra* note 9, at 1190.

106. HARRIS, *supra* note 9, at 23–24.

107. *See, e.g.*, OHIO REV. CODE ANN. §311.171(B) (West 2016) (allowing the sheriff to charge a fee for each time a person either enrolls in the sex offender registry or makes changes to the registration).

years 1995–2003.<sup>108</sup> States also can levy fees for parole supervision, and for any drug testing that may be ordered as part of parole release.<sup>109</sup>

Probation is the most common sentence under the New Policing for misdemeanor cases.<sup>110</sup> Until recently, probation officers were either court employees or agents of a local correctional service. Privatization of probation displaces these government agents with business staff whose purpose is profit maximization rather than offender rehabilitation or public safety. This is not to say that local government agencies should avoid fees to offset costs. However, it is quite different when local government retains private contractors to supervise probationers because the contractors' motivations depart from the governmental interests of probation. One review of these practices suggests that the private entities charge nothing to government for their services, and rely on payments from probationers to generate revenue and profit.<sup>111</sup>

The fees are levied for the duration of supervision terms, with the fee varying by the conviction offense and the terms of supervision that the sentencing court imposes.<sup>112</sup> Costs of geospatial monitors for electronic surveillance also are shifted to the offender, which in effect becomes a form of non-refundable post-trial bail.<sup>113</sup> Community service terms may require that probationers post an insurance bond. Because private contractors increasingly run these supervision programs, there is no limit on the extent to which those private entities can tack on their own above-cost fees for providing the service.

In these private regimes, the rules of supervision, including the fee and fine structures, are delegated to local government, creating a wide space for divergent rules that work outside court oversight.<sup>114</sup> In at least two locations, probationers are supervised by a private contractor and required to pay the firm for this supervision. The burdens of the financial obligations that accompany punishment also have been challenged in

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108. BRENNAN CTR. FOR JUSTICE, NEW YORK BAR RE-ENTRY REPORT CHAPTER ON FEES AND FINES 178 (2006).

109. *See, e.g.*, KY. DIV. OF PROBATION & PAROLE, OFFENDER HANDBOOK 3 (2012), <https://perma.cc/5GDU-PK3B> (“You may be required to pay fees and other money based upon your court order or parole certificate. These include supervision fee, restitution, Crime Victim’s Fund fee, and drug testing fee.”).

110. In 2014, there were 3,864,100 persons on probation supervision in the U.S., compared to 2,224,400 incarcerated in prisons or local jails. DANIELLE KAEUBLE, ET AL., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014 2 & tbl.1 (2015) (revised 2016), <https://perma.cc/J7R8-GVS3>. Most probationers and local jail populations were persons convicted of misdemeanors.

111. *Developments in the Law—Policing and Profit*, *supra* note 83, at 1729–30.

112. *Id.*

113. Logan & Wright, *supra* note 9, at 1189 & n.92.

114. HUMAN RIGHTS WATCH, *supra* note 71, at 56–57.

litigation in states including Alabama<sup>115</sup> and Georgia.<sup>116</sup> The court filings allege systematic abuses of the fee-levying authority to the point where economically disadvantaged probationers accrue even deeper debts that transform probation into a mechanism for deepening impoverishment.

*c. Civil Punishment through Forfeiture.*

A more well-known and controversial example of an LFO is in the realm of civil asset forfeiture.<sup>117</sup> If charged with a crime, police can seize assets—monetary or otherwise—and sell them to fund police department activities, or share them with prosecutors. Forfeiture can take place in conjunction with a criminal sentence, but it also can be disconnected from any criminal proceeding.<sup>118</sup> The seizure depends on the plausibility of the claim that the seized assets were linked to a crime. Seizure can take place even if the person whose property is seized is not charged with a crime. Often, valuable assets or large sums of money are seized, and the loss or prolonged deprivation of those assets can become a hardship. Prosecutors have strong advantages in these cases, and can often extract an agreement from defendants to forgo an asset claim in return for dropping the prosecution.<sup>119</sup> As with the revelations in the investigation of the Ferguson Police Department and the municipal court,<sup>120</sup> some jurisdictions anticipate revenue from seizures that they structure into agency budgets.<sup>121</sup>

D. THE NEW POLICING MEETS THE LATENT TAX

The onset of the New Policing and its broad reach into urban communities coincided with the expansion of latent taxation of criminal offenders and extension of monetary sanctions. This collision of two faces

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115. *Burdette v. Town of Harpersville*, No. CV 2010-900183, 2012 WL 2995326, at \*1 (Ala. Cir. Ct. July 11, 2012) (order granting a motion for a preliminary injunction hearing); see also Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, N.Y. TIMES (July 2, 2012), <https://perma.cc/U3AH-QDUE>.

116. *Cash v. Sentinel Offender Servs.*, No. 2013-RCHM-001, slip op. at 10 (Richmond Cty. Super. Ct. Sept. 16, 2013) (affirming in part Plaintiffs' claims that Sentinel unlawfully collected probation supervision fees from plaintiffs and violated their due process rights); Sandy Hodson, *Georgia High Court Grants Sentinel Request*, AUGUSTA CHRONICLE (Oct. 24, 2013), <https://perma.cc/UBS3-WTFZ>.

117. See generally Catherine E. McCaw, *Asset Forfeiture as a Form of Punishment: A Case for Integrating Asset Forfeiture into Criminal Sentencing*, 38 AM. J. CRIM. L. 181 (2011).

118. Logan & Wright, *supra* note 9, at 1195 & n.151.

119. *Id.* at 1195 (citing Sarah Stillman, *Taken*, NEW YORKER (Aug. 12, 2013)), <https://perma.cc/AJ8W-RLG2>.

120. FERGUSON REPORT, *supra* note 11, at 9.

121. Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2117 (2007).

of deregulated criminal law created a managerial regime with a deep reach into the lives and the pockets of mostly poor and predominantly minority citizens,<sup>122</sup> deepening any pre-existing impoverishment<sup>123</sup> while aggravating racial disparities in criminal justice.<sup>124</sup> The New Policing method produced extensive activity in the form of widespread investigative or *Terry* stops, high rates of misdemeanor arrests and convictions, and extensive use of the summons authority to bring non-criminal offenders through the first gates of the criminal court. Because these developments coincided with a transformation of criminal procedure to bureaucratic and administrative regimes, the prospects of constitutional regulation in all but the most extreme practices became remote. The net result has been a fundamental transformation of the adjudicative model of justice into a set of managerial processes with the goal of social management and regulation of populations who are the targets of these tactics.<sup>125</sup>

Who are the targets? Data show that these developments are consistently more likely to affect non-whites compared to whites. Data on the New Policing in New York, for example, showed that misdemeanor arrests from 1990–2012 rose more than twice as fast for blacks as compared to whites, and more than three times as fast for Hispanics as compared to whites.<sup>126</sup> All of this took place in an era of declining crime rates. The same racial skew is evident in *Terry* stops, another cornerstone of the New Policing. Two investigations of the stop and frisk tactics in New York, one in 1999<sup>127</sup> and a second in conjunction with the *Floyd* litigation,<sup>128</sup> showed that stops were racially concentrated in minority neighborhoods well above what local crime rates or other social conditions would predict.

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122. HARRIS, *supra* note 9, at 11–12; *see also* Logan & Wright, *supra* note 9, at 1177.

123. AMERICAN CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 6–10 (2010), <https://perma.cc/3TDS-4X27>; *see also* Katherine Beckett & Alexis Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 516–17 (2011).

124. HARRIS, *supra* note 9, at 14–15, 156; *see also* Logan & Wright, *supra* note 9, at 1177.

125. Kohler-Hausmann, *supra* note 5, at 692; Natapoff, *supra* note 5, at 1319, 1325–27.

126. Kohler-Hausmann, *supra* note 5, at 633, 634 fig.3.

127. N.Y. STATE OFFICE OF THE ATTORNEY GEN., THE NEW YORK CITY POLICE DEPARTMENT'S STOP & FRISK PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL 101 (1999), <https://perma.cc/L5QH-HB7R> [hereinafter OAG REPORT].

128. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 589 (S.D.N.Y. 2013); *see generally* Report of Jeffrey Fagan, Ph.D., *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034).

The racial component of arrest decisions generalizes well beyond New York. Professor Tammy Kochel and her colleagues showed that across twenty-seven independent datasets, non-whites were nearly one-third more likely (26% as compared to 20%) than whites to be arrested, controlling for a rich set of covariates.<sup>129</sup> Other empirical studies confirm racial or community influences on the decision to arrest.<sup>130</sup>

The expansion of misdemeanor justice collided with the new forms of taxation on criminal offenders to multiply the reach of the New Policing to penetrate minority communities significantly more often and more intensively than in predominantly white communities. The consequences of a misdemeanor arrest or a summons now include financial obligations that weigh heavily on the population groups most affected by the New Policing. Failure to meet those obligations can raise the stakes of criminal liability in the form of warrants for missed court dates, and escalating fiscal penalties that reach deep into the economic lives of these groups. The economic consequences go beyond the criminal stigma and the weight of LFOs to include burdens on work, family, and housing that can multiply the disadvantage by spilling over to family members.

Until now, most of this discussion was based on theory and evidence from urban areas. In this Article, we compare two places that are symbolic of the regimes of managerial criminal and civil justice and the new taxation of criminal offenders: New York City, New York, and Ferguson, Missouri. Each has been extensively studied in terms of policing, community, and law. At first glance, we might assume that any comparison would be pointless. Ferguson is a small municipality, surrounded by dozens of other small municipalities, with relatively low crime rates and a small police force.<sup>131</sup> New York City was the epicenter of the New Policing, and has influenced policing strategies and tactics for over two decades.<sup>132</sup> On the other hand, many of New York City's seventy-five police precincts are socially and spatially configured similarly to Ferguson: small in size and population, manageably low crime

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129. Tammy Rinehart Kochel, David B. Wilson & Stephen D. Mastrofski, *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473, 490–91 (2011).

130. See, e.g., David S. Kirk, *The Neighborhood Context of Racial and Ethnic Disparities in Arrest*, 45 DEMOGRAPHY 55 (2008); Karen F. Parker, Brian J. Stults & Stephen K. Rice, *Racial Threat, Concentrated Disadvantage and Social Control: Considering the Macro-Level Sources of Variation in Arrests*, 43 CRIMINOLOGY 1111 (2005); Douglas A. Smith, Christy A. Visher & Laura A. Davidson, *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234 (1984).

131. FERGUSON REPORT, *supra* note 11, at 6–7.

132. See Heymann, *supra* note 1, at 429–32.

rates, primarily residential, with busy through streets connecting precincts to adjacent and distant areas.<sup>133</sup>

Differences and similarities aside, this comparison shows the connections of these two new developments in policing across different social and political spaces. In the case studies that follow, we show that these two places can both be seen as full expressions of the New Policing. In cities large and small, we see tens of thousands of offenders brought into flourishing punishment and taxation systems. The connections across these two places illustrate what we might see across a spectrum of cities and suburbs in the modern era of managerial and administrative criminal justice.

## II. FERGUSON, MISSOURI

Long before the protests erupted in Ferguson over the shooting of unarmed black teenager Michael Brown by white officer Darren Wilson, the Ferguson Police Department (FPD) practiced its own version of the New Policing.<sup>134</sup> At first glance, that version was quite different from the policing model that had spread across U.S. cities over the past two decades. The urban expression of the New Policing model developed in response to an historic epidemic of violent crime from the late 1980s through the early 1990s.<sup>135</sup> Officers in cities were assigned to neighborhoods with elevated crime rates. Once there, they were encouraged to use their stop authority under *Terry* to search “suspicious persons” for weapons, guns, and drugs.<sup>136</sup> Deployments were closely monitored with analytics to redeploy officers as crime conditions changed.

Officers working under the New Policing regime used arrest authority in minor crimes to justify searching offenders for weapons and conducting background checks with the goal of identifying—or deterring—those who might be engaged in violent crimes.<sup>137</sup> The use of investigative stops had been a staple of American policing for decades.<sup>138</sup> The racial skew in the use of those stops, and the harsh treatment of minorities during those stops, produced recurring tensions between police and black communities.

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133. Fagan et al., *Broken Windows Revisited*, *supra* note 33, at 321, tbl.13.1.

134. FERGUSON REPORT, *supra* note 11, at 3–5.

135. Heymann, *supra* note 1, at 408; *see also* ZIMRING, *supra* note 27, at 175–77.

136. *See, e.g.*, Stuntz, *supra* note 6, at 1224 n.23.

137. Heymann, *supra* note 1, at 429; *see also* Natapoff, *supra* note 5, at 1364.

138. Earl C. Dudley, Jr., *Terry v. Ohio, the Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891, 892–93 (1998) (noting that many states had authorized “stop and frisk” tactics during the 1960s, and the courts in those and other states recognized the police right of inquiry under the “common law and state constitutional rubrics”); *see also* David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 3–6, 23–40 (1994); Dasha Kabakova, *The Lack of Accountability for the New York Police Department's Investigative Stops*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 539, 541 (2012).

The Kerner Commission identified this skew as a spark for several of the urban riots in the United States in the 1960s.<sup>139</sup> Summonses and civil violations were not initially a central feature of the New Policing, but they gradually became more important as felony arrests and overall crime rates declined.<sup>140</sup>

Ferguson, like many small towns and communities, did not fit the urban prototype of a city under siege from violent crime. Ferguson was not plagued by high rates of violent crime; in fact, violent crime rates were declining in Ferguson for several years preceding the Michael Brown shooting and the protests.<sup>141</sup> So, the crime-control motivation to adapt the New Policing in Ferguson seems to have been distinct from the motivations and justifying ideologies that animated the New Policing in the cities. Instead, the saturation of misdemeanor enforcement and enforcement of civil codes reflected a variation of the New Policing that more closely resembles the type of managerial justice that characterized misdemeanor enforcement in urban areas.

The reliance on code enforcement, traffic enforcement, and misdemeanor arrests suggests a thread connecting the order-maintenance prong of the New Policing in cities with New Policing in less urban locales such as Ferguson. In addition, the racial dimension of policing in Ferguson also connects the Ferguson model to the urban version of the New Policing.<sup>142</sup> What made Ferguson unique was the profit motive that had been injected into the policing regime.<sup>143</sup> The policing regime was designed to extract revenue not only from Ferguson residents, but also from people passing through Ferguson from nearby municipalities. Figure 2 shows the proximity of Ferguson to these neighboring areas, a spatial concentration that broadens the reach of FPD policing to non-residents.

FPD enforcement was tailored to this revenue-generating goal. The offenses cited by FPD officers in traffic stops and other citizen contacts generated a volume of fees and fines that were integrated into the municipal budget.<sup>144</sup> When persons failed to pay these financial penalties,

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139. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, THE KERNER REPORT: THE 1968 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 116–21 (1988); see e.g., Anthony Daniel Perez, Kimberly M. Berg & Daniel J. Myers, *Police and Riots, 1967-1969*, 34 J. BLACK STUD. 153, 159, 168 (2003) (concluding that inflammatory police behavior was one of the primary causes of urban riots in Boston and San Francisco in the study period).

140. See Livingston, *supra* note 19, at 638–40 (characterizing order maintenance as a critical prong of the New Policing in the mid-1990s).

141. FERGUSON REPORT, *supra* note 11, at 7 n.7 (indicating that the records of the FPD and the FBI “show[ed] a downward trend in serious crime” from 2004–2014).

142. See generally Fagan et al., *Broken Windows Revisited*, *supra* note 33.

143. FERGUSON REPORT, *supra* note 11, at 2; see also *Developments in the Law—Policing and Profit*, *supra* note 83, at 1734–35.

144. FERGUSON REPORT, *supra* note 11, at 2.



further fees and interest followed, compounding debt. These non-criminal court actions often grew into criminal matters when failures to pay led to criminal warrants. Once arrested for the outstanding warrants, the compounding of LFOs that we described earlier sank these individuals, already poor, deeper into poverty.<sup>145</sup> The racial component of these policing dynamics compounded the historical racial inequalities in Ferguson.<sup>146</sup>

#### A. SOCIAL AND ECONOMIC CONTEXT

##### 1. The Segregation of Ferguson

In the early 1960s, the first African-Americans bought homes in Ferguson, creating what at the time was a tiny section of the town that was physically separated from the more well-off, white sections.<sup>147</sup> The other towns near Ferguson had either been integrated before that, or had become nearly all black earlier that decade.<sup>148</sup> Parts of Ferguson were “sundown towns,” where blacks were only permitted to enter the segregated white areas during the daytime.<sup>149</sup> Nearby towns such as Kinloch either had been or became nearly all black, and the main road connecting the two towns was fenced off from Ferguson by a chain and construction barriers.<sup>150</sup>

Unlike many Northern and Midwestern cities, where white flight left behind segregated and often poor black neighborhoods,<sup>151</sup> St. Louis was more an example of “black flight,” as public housing was demolished and the local public housing authority helped to relocate black families to

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145. *Id.* at 4.

146. *Id.* at 76–78.

147. RICHARD ROTHSTEIN, ECON. POL’Y INST., THE MAKING OF FERGUSON 3 (2014), <https://perma.cc/2N27-CTHB>.

148. COLIN GORDON, MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY 24 map 1.7, 27 map 1.9, 28 map 1.10, 29 map 1.11, 30 map 1.12 (2009) (illustrating the process of white flight from several St. Louis neighborhoods that led to its concentrated poverty and segregation by the 1950s).

149. JOHN A. WRIGHT SR., ST. LOUIS: DISAPPEARING BLACK COMMUNITIES 115–17 (2005), *cited in* ROTHSTEIN, *supra* note 147, at 3 n.2. Sundown towns are just that: places where blacks were not permitted after dark. They were sometimes called “sunset towns” or “gray towns.” Blacks caught by whites in those towns after dark were subject to beatings or arrests for trespassing. *See* JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM 3–4 (2005).

150. ROTHSTEIN, *supra* note 147, at 3 n.2 (citing WRIGHT SR., *supra* note 149). The barrier was open during the day to allow black housekeepers and childcare workers to get to their places of work. *See* WRIGHT SR., *supra* note 149, at 281.

151. Allison Shertzer & Randall P. Walsh, *Racial Sorting and the Emergence of Segregation in American Cities* 32–33 (Nat’l Bureau of Econ. Research, Working Paper No. 22077, 2016); *see also* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 42–57 (1993).

Ferguson and other suburbs.<sup>152</sup> Starting in the 1930s, a major reason that small municipalities northwest of St. Louis began to incorporate was to maintain racial segregation in the schools and to avoid a redistribution of tax revenues from the better-off white areas, such as Berkeley, to the poorer black towns.<sup>153</sup> Several areas of St. Louis became more white during this time as blacks left the city in response to gentrification and increasing rents.<sup>154</sup> This process increased the racial disparity among these communities.<sup>155</sup>

The rapid movement of black families from St. Louis to the nearby suburbs after the demolition of public housing, supported in part by subsidies in the form of “Section 8 vouchers,” created a backlash among white working-class families currently living in those suburbs.<sup>156</sup> They adopted exclusionary zoning ordinances in response. These ordinances went beyond the restrictive covenants that had promoted segregation in cities throughout the mid-twentieth century.<sup>157</sup> In particular, they prevented the construction of lower-cost multi-family buildings that would have been accessible to the largely black voucher holders. Case law in the 1970s further reified those social and economic norms in constitutional law.<sup>158</sup>

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152. GORDON, *supra* note 148, at 205 (“The St. Louis Chamber of Commerce agreed that the elimination of slums . . . would merely hasten the ‘natural’ movement of people to the suburbs.”); ROTHSTEIN, *supra* note 147, at 3.

153. LOEWEN, *supra* note 149, at 370; ROTHSTEIN, *supra* note 147, at 3.

154. Rothstein’s analysis of census data shows that the downtown areas of St. Louis and neighborhoods west of it toward the city border became increasingly white over the past few decades. An analysis of several St. Louis zip codes show that these areas went from 36% white in 2000 to 44% white in 2010, and some are now a majority white. ROTHSTEIN, *supra* note 147, at 3.

155. See Otis Dudley Duncan & Beverly Duncan, *Residential Distribution and Occupational Stratification*, 60 AM. J. SOC. 493, 500 (1955) (using an index of racial dissimilarity to show how segregation increases socio-economic disadvantage).

156. Section 8 of the Housing Act of 1937, 42 U.S.C. § 1437f (2012), authorizes the payment of rental housing assistance to private landlords on behalf of low-income households. See *About the Housing Choice Vouchers Program*, U.S. DEP’T OF HOUS. & URBAN DEV., <https://perma.cc/5H65-AT48>.

157. Richard R.W. Brooks, *Covenants Without Courts: Enforcing Residential Segregation with Legally Unenforceable Agreements*, 101 AM. ECON. REV. 360, 361, 364 (2011) (presenting a theory of racial residential segregation through enforcement of racial restrictive covenants and social conventions); see also RICHARD R.W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* 47–113 (2013) (showing the use of racially restrictive covenants in America to legitimate the push in white neighborhoods to exclude minorities).

158. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270–71 (1977) (failing to find racially discriminatory intent by the village in denying the corporation approval for its application to construct low- and moderate-income housing). For a review, see Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1977).

These processes, coupled with race-conscious housing segregation practices (including racial steering and government loan practices), served to push African-American families into newly segregated suburbs in the inner ring surrounding St. Louis. Even when families could afford better housing, local real estate agents adopted “ethical” codes.<sup>159</sup> Even when federal antidiscrimination laws disallow house sellers the right to choose their neighbors,<sup>160</sup> the Federal Housing Act of 1969 created exceptions for “Mrs. Murphy” landlords that exempted some landlords from anti-discrimination provisions.<sup>161</sup> This exception practically allowed landlords to refuse to sell to black families and for real estate agents to do the same. The popular name for this exception reflects the political and racial dynamics driving the specter of an elderly widow having to take in boarders in order to make ends meet.<sup>162</sup> In effect, Mrs. Murphy can discriminate against non-white prospective renters “without fearing liability under the FHA as long as she does not tell the rejected tenant why she is rejecting him, but she can be liable if she is honest.”<sup>163</sup>

The housing discrimination processes were also structured into local regulations in and around St. Louis that escaped federal scrutiny and were designed to manage home-seeking heuristics. For example, local real estate agents in the area claimed they could lose their license from county officials if they sold homes to black families in neighborhoods not “zoned” for those families.<sup>164</sup> Ferguson’s current demography and housing landscape is the product of those historical forces of persistent racial discrimination in housing policy and practice. The lower economic status of the black residents of Ferguson and several of its surrounding municipalities reflect the economic fallout of those policies.

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159. ROTHSTEIN, *supra* note 147, at 25–28 (showing that Federal Housing Authority policies, such as permitting whites-only developments in the 1950s, defeated the efforts of middle-class blacks to buy homes in the nearby suburbs).

160. *See, e.g.,* *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that racially restrictive covenants cannot be constitutionally enforced); *Bloch v. Frischholz*, 587 F.3d 771, 779 (7th Cir. 2009) (en banc) (observing that if a condo association were to post “a sign outside saying, ‘No observant Jews allowed’ . . . [it] would undoubtedly violate [42 U.S.C.] § 3604(a) . . .”).

161. 42 U.S.C. § 3603(b)(2) (2012) (exempting from certain provisions of the Fair Housing Act “rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.”). A similarly-structured exception exempts owners of single-family residences who meet certain criteria in selling or renting out their homes. 42 U.S.C. § 3603(b)(1) (2012).

162. Lee Anne Fennell, *Searching for Fair Housing*, 97 B.U. L. REV. 349, 382 (2017). The exception is part of a larger discrimination dialogue on discrimination in public accommodations. *See* Rigel C. Oliveri, *Discriminatory Housing Advertisements On-line: Lessors from Craigslist*, 43 IND. L. REV. 1125, 1135–38 (2010).

163. Fennell, *supra* note 162, at 383.

164. GORDON, *supra* note 148, at 84–87.

## 2. The Neighborhood Ecologies of Ferguson

Table 1 shows social and economic characteristics of Ferguson in 2013. Its population shift from a largely white to a majority black municipality took place about a decade after the demolition of St. Louis public housing in the 1970s. Ferguson's black population grew from 13.8% in 1980 to 25.1% in 1990, 52.4% in 2000, and 67.4% in 2010.<sup>165</sup> Like the adjoining municipalities, it is a small city with a population of approximately 21,200 people spread over 6.2 square miles and five census tracts. More than two residents in three were black—more than twice the percentage of whites (29.3%). A small number of Hispanic and other race or ethnicity persons live in Ferguson. The density of 3,419.8 persons per square mile reflects a modest level of population concentration. Its housing stock, mostly single-family homes and low-income multi-family apartment blocks, keeps the population relatively low.

**Table 1. Demographic and Socio-Economic Conditions in Ferguson, Missouri (2009–2013)**<sup>166</sup>

Total Population	21,203
Land Area (sq. mi.)	6.2
Population Density	3419.84
Non-Hispanic White	29.30%
Non-Hispanic Black	67.40%
Hispanic White	1.20%
Hispanic Black	<1%
Foreign Born	1.10%
Age 0-14	23.46%
Age 15-24	15.57%
Age 25-34	13.14%
Age 35+	47.82%
Home Ownership	56.30%
Public Housing	<1%
Median Household Income	\$38,685
Poverty Rate	22.70%

165. American FactFinder, U.S. CENSUS BUREAU, <https://perma.cc/93HZ-5FQE> (search “Community Facts” field for “Ferguson, MO”; select “Race and Hispanic Origin”; select “Race and Hispanic or Latino Origin” under “2010 Census”); *id.* (same under “Census 2000”); *Census 1990*, SOCIAL EXPLORER, <https://perma.cc/78QR-W877>; *Census 1980*, SOCIAL EXPLORER, <https://perma.cc/PPC5-MHE5>.

166. Author calculations from the U.S. CENSUS BUREAU, 2009–2013 AMERICAN COMMUNITY SURVEY 5-YEAR (2014), <https://perma.cc/8FZ2-V5NJ>.

The population could well be characterized as poor though not particularly young. About half the population is thirty-five years of age or older. Although more than half the population in Ferguson owns their home, more than one person in five lives below the federal poverty line and the average household survives on an annual income of \$38,685. This suggests differences in the economic status of black and white residents of Ferguson, which is illustrated by the rates of poverty and black population concentration in Figure 1.

**Figure 1. Ferguson Census Tracts, Population and Poverty, 2013<sup>167</sup>**

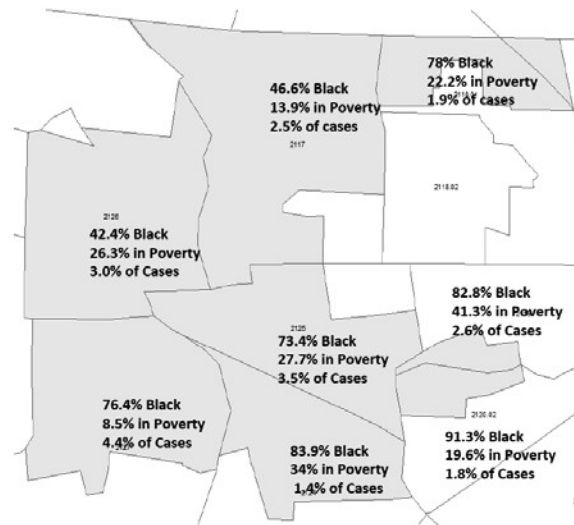


Figure 1 shows the distribution of race and poverty in Ferguson's census tracts. Some tracts have high rates of poverty but low concentrations of black residents. One tract has high concentrations of black population (less than 50%) but above-average poverty rates (26.3%). Another tract has high concentrations of black populations (76.4%) but below-average poverty rates (8.5%). The diverse patterns suggest that unlike urban areas, race and poverty are more weakly linked. Policing, in turn, seems to be less concentrated spatially. The Ferguson Report shows that policing is concentrated along major thoroughfares, rather than in residential areas or places with high pedestrian activity.<sup>168</sup>

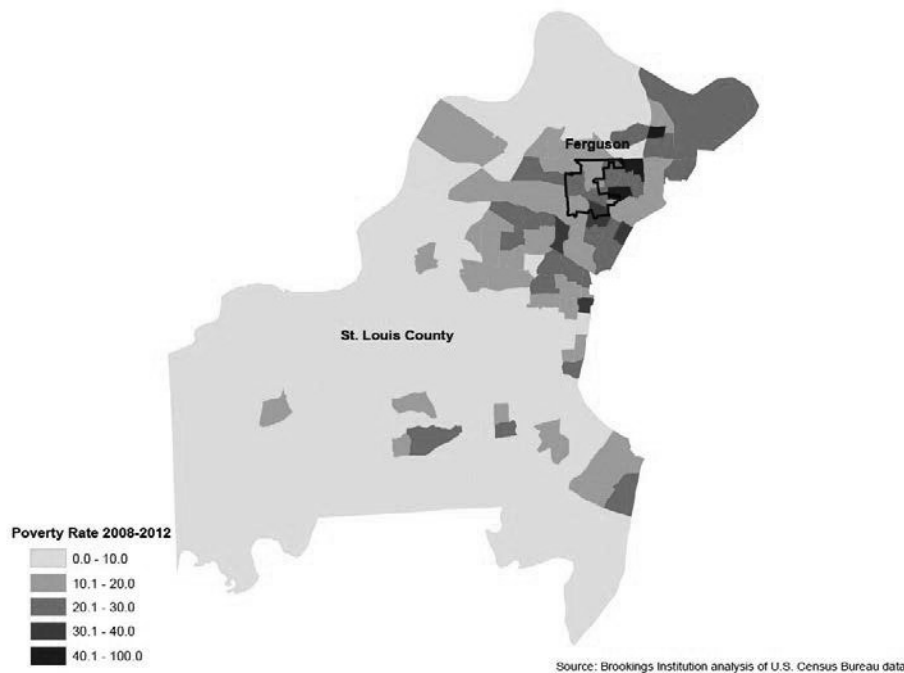
While Ferguson itself presents a mixed picture of the nexus of race and poverty, the municipality is situated in a region characterized by concentrated poverty. Figure 2 shows that Ferguson sits in the middle of a

167. Author calculations from U.S. CENSUS BUREAU, *supra* note 166, and Ferguson Municipal Court data (on file with authors).

168. FERGUSON REPORT, *supra* note 11, at 13–14.

region of small towns and vicinages that all have elevated poverty rates. Due to its location, persons traveling in and out of Ferguson who fall under police gaze are more likely to be poor and non-white. Accordingly, this wider lens on poverty suggests Ferguson is part of a larger ecology of poverty, and that policing which touches broadly on the area population may be targeted, intentionally or not, in ways similar to the racialized face of the New Policing models elsewhere.

**Figure 2. Concentrated Poverty, St. Louis County, 2008-2013<sup>169</sup>**



Crime in Ferguson over the past few years presents a mixed picture. Violent crime declined from 619.9 crimes per 100,000 population in 2006 to 376.7 in 2012—a precipitous drop in a relatively short time.<sup>170</sup> To put that rate in context, New York City’s violent crime rate over the same period remained almost flat and far higher than in Ferguson—the violent crime rate in New York City in 2012 was 639.3 crimes per 100,000

169. Elizabeth Kneebone, *Ferguson, Mo. Emblematic of Growing Suburban Poverty*, BROOKINGS (Aug. 15, 2014), <https://perma.cc/U49A-HFLT>.

170. UNIFORM CRIME REPORTING STATISTICS, FED. BUREAU OF INVESTIGATION, <https://perma.cc/BXB8-7Z2R> (select “Missouri” from “Choose a state” dropdown; select “All” from “Choose one or more groups” list; follow the “Next” link; select “Ferguson Police Dept” from “Choose one or more agencies” list; select “Violent crime rate” from “Choose one variable” dropdown; select “2006” and “2012” in the “Choose years to include” dropdown; follow the “Get Table” link).

population.<sup>171</sup> The difference is notable for two reasons. First, the New Policing was organized and designed to combat mainly violent crime.<sup>172</sup> The Ferguson rate suggests that there was less urgency there to adopt New Policing than there was in New York City, where the rates had climbed as high as 2383.6 crimes per 100,000 population in 1990.<sup>173</sup> Second, New York City's crime decline was widely celebrated,<sup>174</sup> though the claim that it was uniquely steep was contested in several empirical analyses.<sup>175</sup> Though Ferguson has only a fraction of the population of the New York City, its violent crime rate is far lower. The conditions that gave rise to the New Policing were not present in Ferguson. The reasons for its adoption could not be justified in the same terms as in urban areas. Other motives for intensive policy were present, but its operational features were quite different.

### 3. Estimating the Racial Component of Policing for Profit in Ferguson

We traced the production of LFOs and criminal liabilities from arrests and summonses in Ferguson to understand this critical step in the production of cases that generate profits from policing. We use data from both the police and the courts to show that activities at all levels have discriminatory outcomes. We rely on two sources of data. First, we obtained data on nearly all Ferguson Municipal Court cases for the years 1997–2014. Second, we obtained case processing data from Ferguson Police Department records for October 2012–July 2014.

In addition to showing the volume of violations and their outcomes, we show the racial imbalance in enforcement and adjudication of these cases. We estimate disparate racial treatment of drivers using methods that are standard both in law and in the econometrics literature.<sup>176</sup> The baseline

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171. *Id.* (select “New York” from “Choose a state” dropdown; select “All” from “Choose one or more groups” list; follow the “Next” link; select “New York City Police Dept” from “Choose one or more agencies” list; select “Violent crime rate” from “Choose one variable” dropdown; select “2006” and “2012” in the “Choose years to include” dropdown; follow the “Get Table” link).

172. Heymann, *supra* note 1, at 413–19; Livingston, *supra* note 19, at 568–69.

173. UNIFORM CRIME REPORTING STATISTICS, *supra* note 170 (select “New York” from “Choose a state” dropdown; select “All” from “Choose one or more groups” list; follow the “Next” link; select “New York City Police Dept” from “Choose one or more agencies” list; select “Violent crime rate” from “Choose one variable” dropdown; select “1990” and “1990” in the “Choose years to include” dropdown; follow the “Get Table” link).

174. ZIMRING, *supra* note 1, at 3; BRATTON WITH KNOBLER, *supra* note 2, at 287–88, 295–96.

175. KARMEN, *supra* note 27, at 23–27; Harcourt & Ludwig, *New Evidence*, *supra* note 27, at 299–300.

176. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (“If an employment practice which operates to exclude Negroes cannot be shown to be related to job

regression model features an outcome  $Y$ , representing, for example, the probability of receiving a citation conditional on a traffic stop, controlling for the race of the person. The regression takes the form of:

$$Y = \alpha + \beta R + \delta X + \varepsilon.$$

In this equation,  $\alpha$  is an intercept,  $R$  is an indicator variable for a black driver,  $X$  includes other covariates describing the driver and the traffic stop, and  $\varepsilon$  is an error term. The coefficient of interest,  $\beta$ , gives the average effect of being black on the outcome  $Y$ , after the effects of the covariates in  $X$  have been partialled out.<sup>177</sup>

Some factors that may bear on the decision to issue a citation or make an arrest may not be available in our data. The statistical problem for measuring  $\beta$  is that  $X$  likely does not include some non-race factors that are correlated with both race  $R$  and the outcome  $Y$ . For example, drivers may have a driving manner that is not directly observed in the administrative data but that impacts the probability of getting a ticket or being arrested. Different races may observe different norms while driving, some of which may attract the attention of an officer or influence the officer's decision to issue a citation or make an arrest. In that case, there is some bias in estimating the coefficient  $\beta$ , and one would not be able to draw any conclusions about discrimination.

Our regression analysis is designed to mitigate these types of statistical problems. First, we include several covariates in the regressions, conditioning for example on the category of the offense, with seriousness ranging from violations to felony charges. By conditioning on the category of the offense, we control for any racial bias that is due only to some races engaging in more serious crimes than others.

Second, we undertake targeted analyses that may be less biased by these types of factors. For example, we compare the racial breakdown of speeding tickets justified by radar, an objective measure of driver velocity,

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performance, the practice is prohibited. On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.”). The goal of these models is to identify the effects of race on outcomes after simultaneously considering factors that may be relevant to race. Failure to do so raises the risk of “omitted variable bias,” which could lead to erroneous conclusions about the effects of variables that do appear in a regression test. *See, e.g.,* Ian Ayres, *Three Tests for Measuring Unjustified Disparate Impacts in Organ Transplantation: The Problem of “Included Variable” Bias*, 48 PERSP. BIOLOGY & MED. S68, S69–70 (2005).

177. For a basic description of the regression procedure and the model form, see JOSHUA D. ANGRIST & JÖRN-STEFFEN PISHKE, *MOSTLY HARMLESS ECONOMETRICS* 25–50 (2009); *see also* DAVID W. HOSMER & STANLEY LEMESHOW, *APPLIED LOGISTIC REGRESSION* 35–37 (3d ed. 2000).



to those with an unspecified justification or those justified by vision or pacing, which are more subjective. These more subjective measures of speeding give greater discretion to the police officer, so if there are systematic differences between laser and non-laser stops, it is likely to reflect police racial preferences, rather than statistical discrimination or selection.

#### 4. Race, Policing, and LFOs in Ferguson

In Ferguson, police can charge a motorist under any of several chapters that span local municipal codes or ordinances, traffic and other vehicle code violations, state criminal code violations, or procedural criminal violations such as “failure to appear” or “failure to comply.” The state criminal code violations are predominantly misdemeanors. Jurisdiction in Missouri over misdemeanors can overlap between local (municipal) courts and county courts of general jurisdiction.<sup>178</sup> Local code violations are all heard in the municipal court.<sup>179</sup>

Table 2 reports the breakdown of offenses charged by the FPD separately by defendant race. In all instances, race notwithstanding, the emphasis on enforcement is for traffic violations, which results in court dispositions that generate revenue. For all four categories, blacks have more violations than whites. The disparity is smallest for state code violations—the most serious crimes—and largest for traffic violations—the least serious crimes. The smallest disparity is about a 3:1 ratio, compared to the 17:2 ratio for the largest disparity. This table provides statistical evidence of a theme discussed at length in Section I.C.1: racially disparate policing is focused on less serious crimes for which fines would be imposed rather than jail time.

The population distribution in Ferguson—about two-thirds black—makes it unlikely that 17:2 disparities simply reflect differences by race in illegal behavior. One would struggle to identify plausible racial differences in driving behaviors large enough to produce these racial differences in traffic enforcement.

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178. T. E. Lauer, *Prolegomenon to Municipal Court Reform in Missouri*, 31 MO. L. REV. 69, 75–76 (1966) (“There is no doubt that Missouri municipalities may lawfully adopt ordinances which duplicate state criminal statutes. . . . [T]he existence of a general statute does not defeat the power of the municipality to enact a similar ordinance.” (citing *Ex Parte Hollwedell*, 74 Mo. 395 (1881))). “This doctrine is bolstered, perhaps, by the fact that where conduct constitutes an offense under both a statute and an ordinance, prosecution under one will not bar a subsequent prosecution under the other.” *Id.* at 76.

179. FERGUSON MUN. CODE § 13-2 (2016) (granting the municipal court primary jurisdiction over code violations).

**Table 2. Type of Violation by Defendant Race, Ferguson Municipal Court, October 2012 – July 2014<sup>180</sup>**

Type of Violation	Defendant		
	Race	Number	Percent
Traffic Citations	Black	17,475	90.22
Traffic Citations	White	1,895	9.78
Local Code Violations	Black	6,149	81.76
Local Code Violations	White	1,372	18.24
State Code Violations	Black	6,901	76.85
State Code Violations	White	2,079	23.15
Failure to Appear or Comply	Black	580	88.69
Failure to Appear or Comply	White	74	11.31

Note. Racial breakdown of violation events by type of violation.

To examine more closely the role of race in traffic enforcement, we looked next at a measure of discretionary police behavior in enforcing traffic codes. Table 3 shows the racial breakdown for speeding tickets separately by the method of detection and location of detection. Although most detection is done by radar or laser, which requires an objective metric of speed, some tickets have an unspecified detection, or specify something more discretionary such as pacing or even just “vision.”

On local roads in Ferguson, the black/white disparity is quite large: over 80% of the total stops on local roads are of black drivers. For radar stops, the disparity closely approximates the overall rate because most violations result from radar stops. For non-radar detection methods, a small subset of local road stops, the disparity is even larger: 85% of non-radar stops are black drivers. On state highways, the disparities for non-radar stops are even more pronounced. Black drivers account for more than half the radar-based violations (57.3%) on state roads, but black drivers account for a larger share of the non-radar based stops on state roads (73.1%).

180. Ferguson Police Dep’t, Content Management System Data (on file with authors).

**Table 3. Speeding Violations by Driver Race, Road Type, & Method of Speed Detection, Ferguson (2012–2014)<sup>181</sup>**

Driver Race	<u>Local Roads</u>		Total
	Radar	Non-Radar	
Black	1367 (79.75%)	196 (85.22%)	1563 (80.4%)
White	347 (20.25%)	34 (14.78%)	381 (19.6%)
Total	1714	230	1944
	<u>State Roads</u>		
	Radar	Non-Radar	Total
Black	564 (57.32%)	152 (73.1%)	716 (60.07%)
White	420 (42.68%)	56 (26.92%)	476 (39.93%)
Total	984	208	1192

Note. Includes violations on state highways.  
Column percentages in parentheses.

□

Although race seems to influence the enforcement of traffic violations, namely, speeding, on both state and local roads, the racial disparities are greater on local roads, where officers can select the locations for detecting violations. Once positioned, FPD officers seem far more likely to use “other,” more subjective detection methods to issue traffic tickets to black drivers. Perhaps police are more likely to “see” violations among black drivers that go beyond what the objective radar metrics show.<sup>182</sup> Overall, Table 3 shows two different forms of racial disparity in play, both to the disadvantage of black drivers who face greater risks of citation and fines. Again, the patterns of enforcement ensure that the flow of revenue to the Ferguson Municipal Court—in effect, a tax producing a revenue transfer—is skewed toward black and poorer citizens or passersby.

181. *Id.*

182. See, e.g., Geoffrey P. Alpert, John M. MacDonald & Roger G. Dunham, *Police Suspicion and Discretionary Decision Making During Citizen Stops*, 43 CRIMINOLOGY 407, 413–14 (2005); Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows”*, 67 SOC. PSYCHOL. Q. 319, 320–21 (2004).

**Table 4. Logistic Regression of Race Effects on Stop Outcomes, Ferguson, 2010–2013**

	Stop Outcome				
	(1) Ticketed	(2) Arrest Made	(3) Searched	(4) Contraband Hit	(5) Warrant Arrest
Black-White Odds Ratio	1.354+	1.928**	1.670**	0.744	3.241**
(Standard error)	(0.236)	(0.297)	(0.235)	(0.171)	(0.921)
[p-value]	[.083]	[.000]	[.001]	[.198]	[.000]
Sample Restriction	-	-	-	If Searched	If Arrested
N	11592	11592	11592	1203	951
Pseudo R-sq.	0.359	0.063	0.101	0.041	0.083

Notes. Standard errors in parentheses, p-values in brackets. +  $p < 0.10$ , \*  $p < 0.05$ , \*\*  $p < 0.01$ . Robust standard errors clustered by arresting officer. Models include controls for driver age and gender, assignment (patrol vs. traffic), two officers with a high level of stop activity, and the reason for the stop. Column 4 estimated conditional on a search occurring. Column 5 estimated conditional on an arrest being made.

Next, we look at the outcomes of traffic stops using rich data collected from databases maintained by the Missouri State Attorney General. The implications of stops, tickets, arrests, and seizures are evident not only in the generation of revenue, but also in the creation of criminal liability. We calculated the probability of these outcomes occurring for each race by analyzing the rate of each outcome as a percentage of the number of stops, and then comparing the rates for each racial group. To this end, Table 4 shows results from logit regressions for racial differences in police decisions during these stops.<sup>183</sup> We also condition two further outcomes on a predicate event: whether contraband is seized depends on whether the driver or vehicle is searched, and whether a warrant arrest is the reason for the arrest compared to other reasons. These regressions, like those in previous tables, provide controls for several non-race factors—in particular, the stated reason for the stop—that may be correlated both with race and policing choices.

Controlling for the reason for the stop, the regression results in Model 1 of Table 4 show that blacks are 1.35 times more likely than whites to be ticketed. Model 2 shows that blacks are 1.93 times more likely to be arrested. It is possible that drivers exhibit unreported behaviors that might

183. Logit regression is a form of regression that is well suited to test for combinations of predictors of binary outcomes: arrested or not, ticketed or not, searched or not. WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* 697–99 (7th ed. 2012); *see also* ALAN AGRESTI, *CATEGORICAL DATA ANALYSIS* 121–23 (2d ed. 2002); HOSMER & LEMESHOW, *supra* note 177, at 1–10.

lead to a decision to sanction them. If there are such differences in suspect behavior leading to tickets or arrests, those behaviors are not described by the officers in official reports. These results are statistically significant, suggesting that these patterns are unlikely to occur by chance alone.

Model 3 in Table 4 shows that blacks are 1.67 times more likely than whites to have their vehicle searched once stopped. These results are significant. But seizures of contraband are *less* likely for vehicles operated by blacks, conditional on being searched (Column 4). A lower “hit” rate for blacks (26% lower, though not statistically significant) suggests that stops and searches are a form of preference-based rather than statistical discrimination.<sup>184</sup> Why bother to continue stopping and searching black motorists if there is no greater likelihood that those searches will pay off, other than a preference to stop blacks?

This is the essence of preference-based discrimination. Statistical discrimination would reflect a tendency to stop one group at a higher rate than another group based on observable characteristics such as known crime rates. But preference-based discrimination would reflect a tendency to prefer one group for stops over others based on factors unrelated to observable differences in the targeted behavior, such as race. Preference-based discrimination suggests that the purpose of stops is to select a particular group for criminal justice attention, independent of the likelihood of a positive result. If they are stopping blacks more often without finding more drugs, it is indicative of the use of punitive searches, and evidence of disparate racial treatment before the law.

Model 5 shows the reason for arrests of black defendants is 3.24 times more likely to be an outstanding warrant. Enforcement in Ferguson produced an astonishing volume of warrants: the municipal court in Ferguson issued 32,975 warrants in 2013,<sup>185</sup> more than one per resident and most likely, more than one for every motorist passing through Ferguson,<sup>186</sup> and nearly all for non-violent offenses.<sup>187</sup> Recall that the median per capita income in Ferguson in 2013 was \$38,685, and that nearly one in four persons lived below the poverty line.<sup>188</sup> That this is

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184. Jeff Dominitz & John Knowles, *Crime Minimisation and Racial Bias: What Can We Learn from Police Search Data?*, 116 *ECON. J.* F368, F379 (2006). See generally Kate Antonovics & Brian G. Knight, *A New Look at Racial Profiling: Evidence from the Boston Police Department*, 91 *REV. ECON. & STAT.* 163 (2009); Sarath Sanga, *Reconsidering Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 117 *J. POL. ECON.* 1155 (2009).

185. MO. SUPREME COURT, MISSOURI JUDICIAL REPORT SUPPLEMENT: FISCAL YEAR 2013, at 303, <https://perma.cc/YRN2-Q6YU>.

186. See FERGUSON REPORT, *supra* note 11, at 6.

187. MO. SUPREME COURT, *supra* note 185, at 173–93.

188. American FactFinder, U.S. CENSUS BUREAU, <https://perma.cc/93HZ-5FQE> (search Community Facts field for “Ferguson, MO”; then select “Show All”).

racially skewed suggests again a racial tax against those who can least afford it.

This pattern of warrant arrests is consistent with the emphasis that FPD officers and municipal executives place on enforcement of warrants, and the motivating role of outstanding warrants in determining the outcomes of stops. Warrant arrests lead to criminal punishment, in turn leading to LFOs that add monetary costs to the liberty costs of warrant arrests. Here, if the goal of policing is to detect persons with outstanding warrants and continue the economic drain on those defendants, then the police are in fact maximizing on that goal—a form of statistical discrimination. But it is the predicate processes of stops, citations, and searches that lead to the issuance of a warrant that is infected with race-based and preferential discrimination. In other words, if police are stopping black motorists with the hope of getting a warrant arrest, the ocean of outstanding warrants among black drivers makes this a good bet by the FPD.

## 5. Court Processing

An important mechanism for the proliferation of warrants and subsequent warrant arrests is the operation of the municipal court system in Ferguson and elsewhere in the northeastern corner of St. Louis County.<sup>189</sup> A sense of this process can be observed in Table 5, which reports the racial breakdown for a set of activities in the Ferguson Municipal Court over a seventeen-year period.

Over this time, concluding in 2014—the year of the Michael Brown shooting—blacks were disproportionately present at each stage of municipal court processing. Although blacks are 67% of the Ferguson population, they are 74% of municipal court defendants. Within that court population, they are 81% of the population receiving summonses, 91% of those with warrants issued for their arrest, and 95% of the persons arrested. Black defendants in the municipal court average 3.5 citations per appearance, about 50% more than the rate of 2.3 summonses per white defendants. Black defendants average 4.7 warrants per person, compared to 1.4 warrants per white defendant. They have 2.25 arrests each (relative to just 0.3 for whites). Finally, blacks have more warrants and arrests when controlling for the number of summonses.

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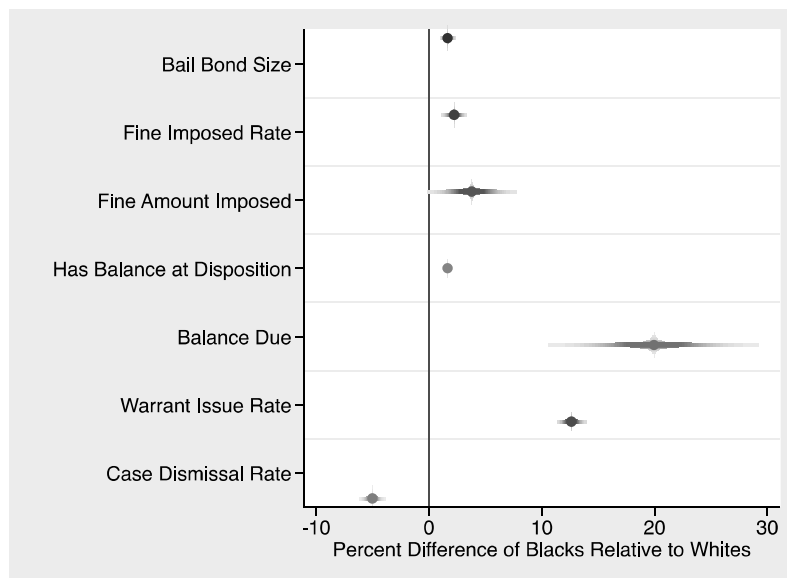
189. See THOMAS HARVEY ET AL., ARCH CITY DEFENDERS: MUNICIPAL COURTS WHITE PAPER 27–37 (2014), <https://perma.cc/4PM6-JAUK>.

**Table 5. Descriptive Statistics for Ferguson Municipal Court Activity, 1997–2014<sup>190</sup>**

	Defendant		Rate Per Defendant	Rate Per Summons
	Race	N (%)		
No. of Defendants	Black	48,980 (73.73)		
	White	17,452 (26.27)		
Summonses	Black	169,788 (80.82)	3.47	
	White	40,298 (19.18)	2.31	
Warrants	Black	233,760 (90.71)	4.77	1.38
	White	23,945 (9.29)	1.37	0.59
Arrests	Black	110,031 (94.95)	2.25	0.65
	White	5,854 (5.05)	0.34	0.15

Notes. Descriptive statistics for Ferguson Municipal Court, 1997–2014.

By itself, it is not too striking that 74% of defendants are black in a small municipality where two residents in three are black. But beyond this base rate, the disparate treatment of blacks at each stage of criminal adjudication is startling. And the much stronger per-defendant and per-summons intensive margin treatments, when taken together, are indicative of racially discriminatory treatment in this judicial system.

**Figure 3. Effect Sizes of Black-White Differences in Case Outcomes, Ferguson Municipal Court (Mean, 95% CI)**

190. Dep't of Justice, Ferguson Municipal Court Data (on file with authors).

To illustrate further the role of race in the policing-for-profit regime in Ferguson, we look at more granular outcomes at the case level for each defendant. Table 6 and Figure 3 provide regression estimates of the racial effect on several case outcomes in the Ferguson Municipal Court. As with the traffic stops, the regressions include several covariates that measure non-race factors, both legal and demographic. We also include fixed effects for the range of offenses that bring people into the municipal court and that one would expect to affect penalties and other outcomes. The standard errors in the regressions are clustered by the defendant's resident zip code, to adjust the significance estimates for local crime and social conditions. The coefficients reported in Table 6 and Figure 3 give the average difference in the stated outcome between black and white defendants in Ferguson, providing clean measures of racial disparities in misdemeanor justice. The coefficients in Figure 3 are all in percentage terms, in order that all outcomes are comparable on the same scale.

Race has a substantial impact on each outcome after controlling for potential non-racial influences on court outcomes. Conditional on the same offense, bail bond amounts imposed on black defendants are more than \$400 higher, creating barriers for those defendants to make bail. As noted earlier, a spell of pretrial detention adversely affects the disposition and sentence in criminal cases, and creates personal hardships for defendants with work or school commitments or childcare duties.<sup>191</sup> These hardships are skewed heavily toward blacks. Once adjudicated, usually via plea agreement, blacks are 2.5% more likely to have a fine imposed than whites for the same offense. In contrast, black defendants are 5.8% less likely to have their cases dismissed than white defendants, suggesting more formal adjudication and the likelihood of a LFO or a criminal record, or both.

Conditional on receiving a fine, the fine for the same offense is 4% larger on average for blacks. These stricter penalties are further reflected in worse outcomes following the fine levy. Blacks are 2% more likely to have a positive financial obligation at the end of the case, meaning they have been unable—compared to whites—to pay the full fine amount by the time the court case nears its conclusion. Conditional on having any balance at all, that balance is 22% larger. These impacts are statistically significant. And remember once again that the Ferguson population is often poor and otherwise earns a median household income of less than \$40,000.<sup>192</sup>

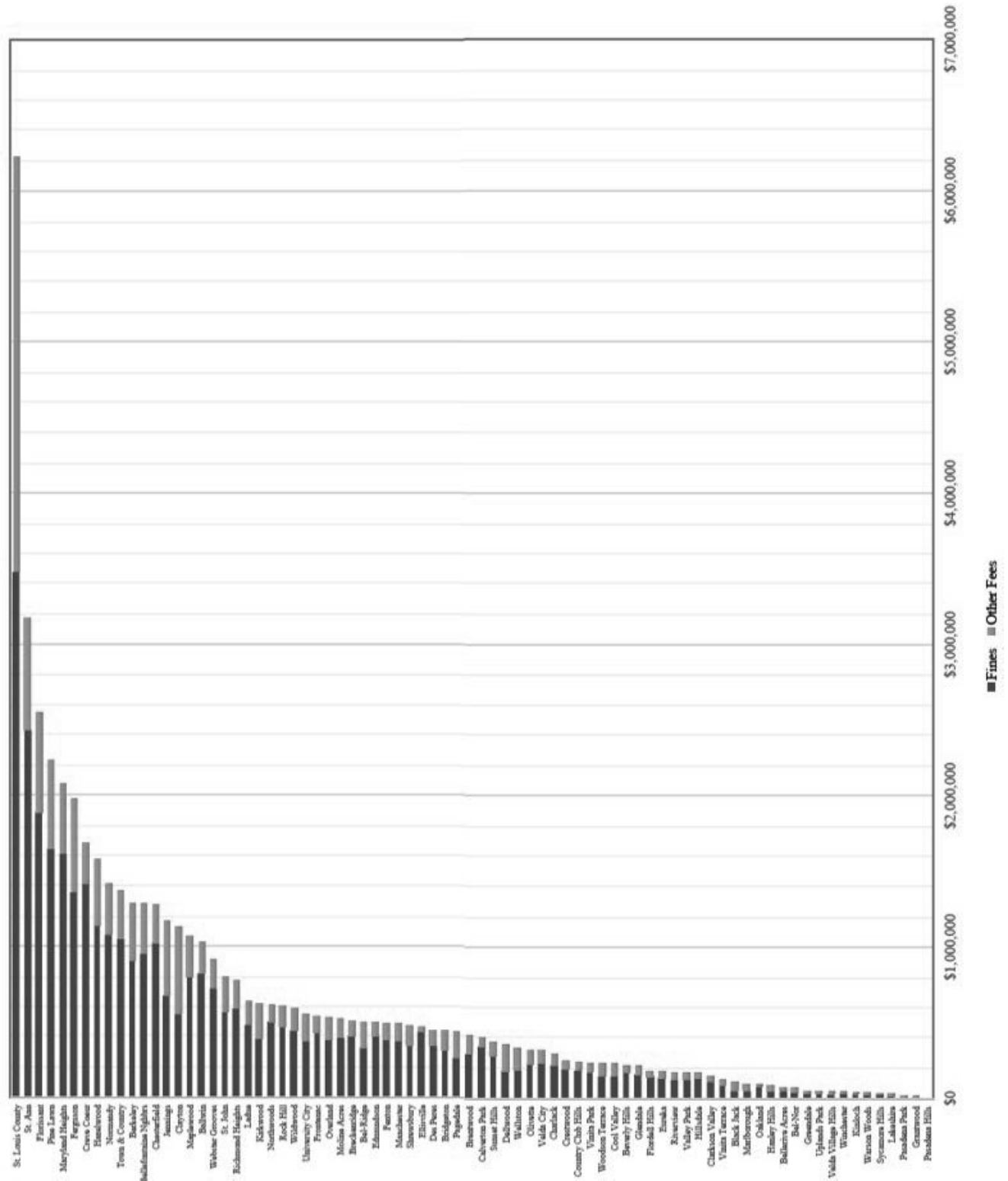
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191. *See supra* Section I.C.2.

192. *See supra* Table 1.



Figure 4. St. Louis County Municipal Courts, Collections of Fines and Fees, 2014<sup>193</sup>



193. STATE OF MO., *supra* note 196, at tbl.94.

**Table 6. Racial Disparities in Case Outcomes, Ferguson Municipal Court, 1997–2014**

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
	Bond Amount	Fine was Imposed	Log Fine Amount	Positive Balance at Disposition	Log Balance Due	Warrant was Issued	Arrest was Made	Case Dismissed
Black-White Difference	411.7*** (109.9000)	0.0258*** (.0044)	0.0432** (.0160)	0.0191*** (.0013)	0.228*** (.0404)	0.146*** (.0038)	0.0151*** (.0011)	-0.0580*** (.0060)
N	17,061	218,107	131,433	218,107	9,566	218,107	220,168	218,107
Adj. R-sq	0.400	0.402	0.441	0.090	0.092	0.102	0.187	0.100

Finally, blacks are significantly more likely to have a warrant issued and more likely to be arrested. Strikingly, blacks are 15% more likely to have a warrant issued than whites. This may reflect the stricter monetary penalties resulting in more delinquency, or it may again reflect an independent source of racially based treatment.

#### B. THE POLITICAL ECOLOGY OF POLICING AND MONEY IN ST. LOUIS COUNTY

The municipal court in Ferguson, and courts like it throughout the racially segregated municipalities of St. Louis County, serve as an important institution for generating warrants and revenue, which incentivizes police to enforce a wide range of municipal ordinances, low-level misdemeanor enforcement, and most prevalent, traffic enforcement.<sup>194</sup> This is an efficient revenue-generating machine on which the city of Ferguson grew to rely, not only to provide municipal services, but also to sustain its own police force.<sup>195</sup> It seems that the municipality of Ferguson was cloaking its taxing power in the exercise of police power by functionally equating the power of taxation with the power to punish. Court fines and fees were Ferguson's third-largest source of income in 2014, generating over \$1.964 million in revenue that sustained the court and also the police force.<sup>196</sup> Indeed, the FPD grew to depend on these revenue streams to sustain its size and to pay salaries and annual increments.<sup>197</sup> The cynicism and indifference of Ferguson leadership is breathtaking: they presided over a regime where black citizens were disproportionately taxed through the criminal justice system to generate revenue to pay for the policing that discriminated against them. All this took place in a context that was not driven by crime or public safety

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194. HARVEY ET AL., *supra* note 189, at 27–37.

195. FERGUSON REPORT, *supra* note 11, at 9–10; *see also* Memorandum from Mayor John Gwaltney to the Sergeants and Patrolmen of the Edmundson Police Dep't (Apr. 18, 2014) (on file with authors) (encouraging sergeants and patrolmen to write “good tickets” and informing them that “the tickets that you write do add to the revenue on which the [Police Department] budget is established and will directly affect pay adjustments at budget time”).

Edmundson is a small town with a population of 836 persons in 2014. It is located approximately ten miles from Ferguson and sits along one of the major regional thoroughfares that connect the small town in the northeastern quadrant of the county near the border of the city of St. Louis. *Edmundson, Missouri*, CITY-DATA, <https://perma.cc/N7FW-L8GT>.

196. CITY OF FERGUSON, ANNUAL OPERATING BUDGET: FISCAL YEAR 2016–2017, at 11–12 (2016), <https://perma.cc/2FCT-QKW7>. Only sales tax and utility gross receipts tax generated more revenue than court fines and fees. *Id.*

197. FERGUSON REPORT, *supra* note 11, at 9–10.

concerns, but instead for the concerns of maintenance of a biased legal regime.

Ferguson was not alone among St. Louis municipalities in imposing this type of revenue-generating legal process, nor in depending on these revenues for a share of the municipal budget. Figure 4 shows that Ferguson ranked sixth in St. Louis County municipalities in the collection of revenue from traffic fines and other court fees in 2014, but it hardly generated the highest revenue in 2014. The St. Louis County Municipal Court generated the largest revenue from fees and fines. That court serves the unincorporated areas of St. Louis County (outside the City of St. Louis), with a large population and land area in its jurisdiction.

Among the municipalities, Ferguson ranks fifth, behind nearby Florissant and other small areas. St. Ann, a small town near Ferguson, had a population of 12,971 (slightly more than half of Ferguson's) in 2013 with a median household income of \$35,852.<sup>198</sup> It had approximately the same per capita income as Ferguson.<sup>199</sup> Yet St. Ann's policing brought in nearly 50% more revenue than did the policing regime in Ferguson. The revenue from fines and fees in other municipalities drops gradually thereafter. Those towns are increasingly distant from the band of municipalities that border the city of St. Louis, an area in which Ferguson sits at the heart. As the population thins in those areas, and the percentage of the black population in those areas becomes smaller, the dependency on fines and fees diminishes in turn.

It is not unreasonable to consider, as we see in Ferguson, that policing in that sub-region has racial contours linked to the kinds of racial tax that led to the strife in Ferguson. The connection from race to revenue generation may run through the practice of racially selective enforcement: police may stop more black motorists not from any animus toward those drivers, but simply as a reliable means to identify unlicensed drivers or drivers with some other vehicular violation that is unrepaired due to poverty. This is simply preference-based discrimination, driven by an indifference among police to the economic consequences of piling up legal financial obligations that can put a poor motorist into poverty.

This regime of fines and fees revealed in Ferguson and in the surrounding municipalities shows the depth of the integration of these processes in the political, legal, and social ecologies of the region. This form of revenue-driven policing may be common,<sup>200</sup> "but it always is

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198. *St. Ann, Missouri*, CITY-DATA, <https://perma.cc/CE35-6F2W>.

199. *Races in St. Ann, Missouri (MO) Detailed Stats*, CITY-DATA, <https://perma.cc/J3LN-ULYE>.

200. *See Developments in the Law—Policing and Profit*, *supra* note 83, at 1726.

troubling.”<sup>201</sup> The social and historical trajectory from the creation of racially segregated communities to the enforcement of traffic laws disproportionately on blacks in Ferguson and its neighbors, displays, in turn, the synergy and integration of the New Policing and the regimes of policing for profit that are deeply implicated in these ecologies.

### III. NEW YORK, NEW POLICING

In both popular and political culture, New York City epitomizes the New Policing. Professor Philip Heymann focused his 2000 essay on the policing model in New York City,<sup>202</sup> as did Judge Debra Livingston in her widely read 1997 essay.<sup>203</sup> Professor Franklin Zimring credited the post-1994 policing regime in New York for the sharp decline in homicides and other violent crime through the 1990s and into the next decade.<sup>204</sup> The city’s policing regime in fact sustained much of the policy and empirical literature on the nationwide crime decline throughout the second half of the 1990s and for years after. This literature was sharply divided on the merits of the claims that the strategic and tactical shifts in policing in the New York model produced deep and sustained crime declines over time.

#### A. FROM *SAFE STREETS* TO *BROKEN WINDOWS*

Although many accounts look to the 1994 reforms as the onset of the New Policing, (in particular with the appointment of William J. Bratton as Police Commissioner), the strategy in fact had precursors beginning more than a decade earlier. As far back as 1980, the New York City police had revised their strategies to target open-air drug markets and other locations of recurring crime.<sup>205</sup> By the late 1980s, as crack cocaine markets developed in the city’s poorer neighborhoods, intensive street-level drug enforcement by elite police units such as the Tactical Narcotics Teams (TNT) produced tens of thousands of felony drug arrests using undercover

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201. Henry Ordower, Onésimo Sandoval & Kenneth Warren, *Out of Ferguson: Misdemeanors, Municipal Courts, Tax Distribution and Constitutional Limitations* 11 (St. Louis Univ. Sch. of Law, Legal Studies Research Paper No. 2016-14, 2016), <https://perma.cc/CEN6-TKQT>.

202. Heymann, *supra* note 1.

203. Livingston, *supra* note 19.

204. ZIMRING, *supra* note 1, at 131–32; *see also* Fagan et al., *supra* note 24, at 1289–90 (showing that the decline in violent crime from 1994–1996 was almost totally attributable to a decline in gun crimes with little corresponding decline in non-gun violent crimes).

205. ZIMRING, *supra* note 1, at 131–32; *see also* Fagan et al., *Declining Homicide*, *supra* note 24, at 1289–90 (showing that the decline in violent crime from 1994–1996 was almost totally attributable to a decline in gun crimes with little corresponding decline in non-gun violent crimes).

stings.<sup>206</sup> Several scholars had argued for similar strategies of policing “hot spots,” scaling policing strategy to places using allocation principles that matched police resources to the small areas that seemed to have recurring crime problems.<sup>207</sup> Others relied on research showing that aggressive enforcement of relatively minor crimes—usually through arrest—deterred crime by signaling the risks of detection and punishment to criminal offenders.<sup>208</sup>

In 1992–1993, New York City Police Commissioner Raymond Kelly used a “surge” model to increase street presence of officers in high crime neighborhoods.<sup>209</sup> Almost immediately, crime began to decline. The homicide rate fell by about 10% over these two years.<sup>210</sup> Robbery and assault rates fell during the same time, at similar rates.<sup>211</sup> The focus under Kelly shifted from drug crimes to major violent crimes. Drug enforcement through mass felony arrests had done little to reduce murder and other violent crimes; those rates remained unchanged through the TNT years, with homicide rates peaking in New York in 1990.<sup>212</sup> The 1992 surge refocused policing on violence, with police deployment in the highest crime areas in the city.

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206. MICHAEL E. SMITH ET AL., VERA INST. OF JUSTICE, *THE NEIGHBORHOOD EFFECTS OF STREET-LEVEL DRUG ENFORCEMENT 1–2* (1992); Jeffrey Fagan, Valerie West & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 *FORDHAM URB. L.J.* 1551, 1561 (2003); Michael Z. Letwin, *Report from The Front Line: The Bennett Plan, Street-Level Drug Enforcement In New York City and the Legalization Debate*, 18 *HOFSTRA L. REV.* 795, 798–809 (1990) (showing the failure of arrest-based drug control policy to disrupt street drug markets and homicides in New York City during the crack cocaine epidemic of 1986–1992).

207. Anthony A. Braga et al., *Problem-Oriented Policing in Violent Crime Places: A Randomized Controlled Experiment*, 37 *CRIMINOLOGY* 541, 571 (1999); Lawrence W. Sherman et al., *Hot Spots of Predatory Crime: Routine Activities and the Criminology of Place*, 27 *CRIMINOLOGY* 27, 49 (1989). *See generally* ANTHONY A. BRAGA & DAVID L. WEISBURD, *POLICING PROBLEM PLACES: CRIME HOT SPOTS AND EFFECTIVE PREVENTION* (2010).

208. Cohen & Ludwig, *supra* note 18, at 217, 218, 238–39; Sampson & Cohen, *supra* note 18, at 175–77. *See generally* BRAGA & WEISBURD, *supra* note 207.

209. The surge in police officers was the product of the Safe Streets, Safe City Act passed by the New York State Legislature in February 1991. The Act was sponsored by Mayor David Dinkins, who expended considerable political capital for a \$1.8 billion tax increase over five years to pay for additional police officers that would raise patrol strength to over 19,500 officers in a 38,310-person police force. The Act also reduced the minimum hiring age to twenty. The first Police Academy class under this expansion was deployed on the street by summer 1991, although full implementation up to the mandated personnel levels took over five years. *See* Vincent E. Henry, *CompStat: The Emerging Model of Police Management*, in *CRITICAL ISSUES IN CRIME AND JUSTICE* 117, 121 (Albert R. Roberts ed., 2d ed. 2003).

210. KARMEN, *supra* note 27, at 26; Fagan et al., *Declining Homicide*, *supra* note 24, at 1290, 1316; Ken Auletta, *Fixing Broken Windows*, *NEW YORKER* (Sept. 7, 2015), <https://perma.cc/X64W-JQRR>.

211. Fagan et al., *Declining Homicide*, *supra* note 24, at 1298, 1302.

212. *Murders in New York City, 1990–2014*, NYPD, <https://perma.cc/N5SL-9JZ8>.

When Bratton began his term in 1994, he was quick to change policing models. His reforms, described in detail by Professor Heymann, had three essential components: (1) the use of crime metrics to allocate police and deploy them where needed, (2) management reforms that held police supervisors accountable for crime control, and (3) proactive (or assertive, or aggressive) policing.<sup>213</sup> According to Professor Heymann, proactivity was the animating theory of the New Policing, whether in the context of data-driven management metrics such as CompStat, a computerized crime accounting system, or in the aggressive use of arrests for minor crimes, or the conduct of street stops at the first signs of suspicious behavior.<sup>214</sup>

Strategically, there were two faces of action that animated these principles. The first focused on social and physical disorder: prostitution, graffiti, “squeegee men,” loud music (boom boxes) and other noise, illegal alcohol distribution, and nuisance abatement. The strategy was articulated in a blueprint for “order maintenance policing.” The strategy featured arrest authority to clean up disorderly places and reduction of discretion for officers to use other tactics to nudge social norms. These methods were articulated in a policy memo titled *Police Strategy No. 5: Reclaiming the Public Spaces of New York*, issued by the NYPD in July 1994.<sup>215</sup>

The strategy was rooted in Broken Windows theory, articulated by James Q. Wilson and George Kelling, in a 1982 essay in the *Atlantic Monthly*.<sup>216</sup> The theory, in its simplest form, said that signs of physical and social disorder were signals to criminals that there was no guardianship in the local area which in turn would lead to an invasion by criminals.<sup>217</sup> Policing took the form of aggressive enforcement of these violations and increased use of custody arrests in lieu of summonses or

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213. Heymann, *supra* note 1, at 429–31.

214. *Id.*; see also Henry, *supra* note 209, at 119–20. See generally David Weisburd et al., *Reforming to Preserve: Compstat and Strategic Problem Solving in American Policing*, 2 *CRIMINOLOGY & PUB. POL’Y* 421 (2003) (showing that many police departments adopted elements of the New Policing without incorporating the metrics-driven management algorithms for targeting and assessment of police actions. In fact, the authors critique management metrics as a retarding organization reform and reinforcing the paramilitary model of police innovation).

215. N.Y. CITY POLICE DEP’T, *POLICE STRATEGY NO. 5: RECLAIMING THE PUBLIC SPACES OF NEW YORK* 4, 6–7 (July 1994) [hereinafter *POLICE STRATEGY NO. 5*]. The memo cites Senator Daniel Patrick Moynihan’s claim that high rates of crime and disorder had led to desensitization toward crime and tolerance of “conduct previously stigmatized.” *Id.* at 5.

216. See *supra* note 15 and accompanying text. Wilson and Kelling urged that police use alternatives to arrest in restoring social order and removing visible signs of physical disorder. Kelling & Wilson, *supra* note 15. The prioritizing of confrontation through investigative stops and arrests for “quality of life” and order maintenance offenses was part of the new policing strategy adopted following the strategies articulated in *Police Strategy No. 5*.

217. Kelling & Wilson, *supra* note 15.

“desk appearance tickets” that allowed offenders to avoid custody and detention.<sup>218</sup> These measures produced higher numbers of misdemeanor arrests for non-violent crimes, the origins of the order maintenance practices that dominate policing in New York today.

The second, though, was closer to the heart of the New Policing. *Policing Strategy No. 1, Getting Guns Off the Streets of New York*, explicated the Department’s plan to reduce, if not eliminate, gun violence by intensifying policing tactics to find and seize illegal guns.<sup>219</sup> The policy memo presented several reforms in training, analysis, and investigation that were designed to increase the success rate in prosecution of gun crimes. The low success rate—just 43–55% from 1981 through 1993—in gun crime prosecutions was an explicit point of attack in the memo on prior policing regimes, despite the 10% decline in homicides in the prior two years.<sup>220</sup>

Although the policy memo avoided explicit mention of using *Terry* stops to search for guns, the expansion and strengthening of specialized units to conduct investigative stops was the tactical realization of the strategy.<sup>221</sup> The police department’s patrol bureaus had relied on “Street Crime Units” to conduct investigations, including gun crimes. The new strategy relied on expanded and intensified Street Crimes Units “to attack specific high gun-violence areas.”<sup>222</sup> The details of the expansion were, for the time, quite specific:

The 86 police officers and 12 supervisors of the elite, citywide Street Crime Unit will be increased by 25% and deployed in a concentrated approach in one high-crime area at a time, on a 7-day, 24-hour a day basis, to determine to what extent they can increase firearms-related arrests, reduce violent crime in those communities, and address crime displacement into neighboring areas. Precinct resources will then be used to maintain areas taken by the Street Crime Unit.<sup>223</sup>

Although there was little mention of *Terry* stops in either of these memoranda, the policy envisioned an intensified search for weapons

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218. POLICE STRATEGY NO. 5, *supra* note 215, at 9.

219. N.Y. CITY POLICE DEP’T, POLICE STRATEGY NO. 1: GETTING GUNS OFF THE STREETS OF NEW YORK (Mar. 1994) (on file with authors) [hereinafter POLICE STRATEGY No. 1].

220. *Id.* at 9.

221. *Id.* at 10–11.

222. *Id.* at 10.

223. *Id.* at 14.



beginning with the “initial encounter” on the street.<sup>224</sup> The acoustic separation of street stops and Broken Windows in the two policy memos was just that.<sup>225</sup> In practice, it became clear that these two strategies were inextricably and formally linked.<sup>226</sup> The aggressive use of stop and frisk drove proactive police interventions with criminal suspects, coupled with an aggressive approach to low-level disorder. The big gamble was that some of those disorderly persons were carrying guns.<sup>227</sup>

The inherent racial conflict in the New Policing in New York was evident in the first statistical analyses of the practice. A 1999 investigation by the New York State Attorney General presented evidence of racial disparities in the conduct of street stops, especially stops conducted by the Street Crime Units.<sup>228</sup> Stops were made at a far higher rate for black and Hispanic persons relative to crime rates for those populations in the areas where those stops were concentrated.<sup>229</sup> These stops often violated Fourth Amendment requirements that stops be based on individualized, articulable, and reasonable suspicion.<sup>230</sup> Those same claims were litigated fourteen years later in *Floyd v. City of New York* and two companion cases, and were the focus of a court-ordered set of reforms to reduce racial disparities and return stops to constitutional standards.<sup>231</sup> When Eric Garner died, one year after the *Floyd* verdict, the frustration and anger with the new policing had already refocused from stops to misdemeanor arrests.<sup>232</sup> But the underlying racial story remained.

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224. *Id.* at 15 (“Uniformed and plainclothes members of the Patrol Services Bureau will receive precinct-based training . . . from the initial street encounter to courtroom testimony. This will enable police officers to find concealed weapons more effectively, safely effect arrests, and help obtain higher rates of conviction by making better presentations to prosecutors, grand juries, and judges.”).

225. POLICE STRATEGY NO. 5, *supra* note 215, at 7 (“By working systematically and assertively to reduce the level of disorder in the city, the NYPD will act to undercut the ground on which more serious crimes seem possible and even permissible.”).

226. See ROBERT C. DAVIS & PEDRO MATEU-GELABERT, RESPECTFUL AND EFFECTIVE POLICING: TWO EXAMPLES IN THE SOUTH BRONX 1 (1999) (“Stopping people on minor infractions also made it riskier for criminals to carry guns in public.”). If criminals, fearful of arrest for minor violations, stopped carrying guns (the argument went), fewer violent crimes, and fewer violent deaths, would occur.

227. Harcourt, *supra* note 17, at 341.

228. OAG REPORT, *supra* note 127.

229. *Id.* at 117–19; see also Fagan & Davies, *supra* note 35, at 477–78; Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department’s “Stop-and-Frisk” Policy in the Context of Claims of Racial Bias*, 479 J. AM. STAT. ASS’N 813, 821 (2007).

230. OAG REPORT, *supra* note 127, at 160–62.

231. *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

232. See *infra* note 351.

## B. STREET STOPS, BROKEN WINDOWS, AND RACE

As in Ferguson, the policing story in New York is tied to race and place. Colonial New Yorkers formed militias in the 1700s to enforce criminal codes against slaves, fearing slave insurrections during a time of conflict with the French to the north.<sup>233</sup> Civil War era draft riots in New York exposed the depth of the animus between white and black New Yorkers, with the police siding with the largely white rioters who feared a Negro “invasion” following a Northern Union victory in the Civil War.<sup>234</sup> Riots in Harlem in 1935, 1943, and 1964 followed incidents sparked by harsh police repression.<sup>235</sup> These instances of open racial conflict in New York are not unsurprising in light of deep racial segregation in the city’s residential neighborhoods<sup>236</sup> and schools.<sup>237</sup>

These historical patterns were exacerbated starting in the years after World War II as black populations began migrating to New York City as part of a larger migration from the rural South beginning in the 1940s.<sup>238</sup> Puerto Rican families soon followed, as did Dominican and other Latino groups through the 1970s.<sup>239</sup> The creation of New York City’s vast network of public housing developments may have improved access to housing for the city’s minorities, but it also contributed to residential segregation and their isolation from housing equity, and invited intensive

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233. EDGAR MCMANUS, A HISTORY OF NEGRO SLAVERY IN NEW YORK 90–91 (2001) (showing the tensions between whites and negro slaves in New York that resulted in militia patrols and a bifurcated penal code that created harsher punishments for slaves).

234. See, e.g., IVER BERNSTEIN, THE NEW YORK CITY DRAFT RIOTS: THEIR SIGNIFICANCE FOR AMERICAN SOCIETY AND POLITICS IN THE AGE OF THE CIVIL WAR 17–42 (1990); ERIC H. MONKKONEN, POLICE IN URBAN AMERICA 1860–1920 64, 78–80 (1981) (showing the persistent influence of racial animosity on policing in the United States).

235. JANET L. ABU-LUGHOD, RACE, SPACE, AND RIOTS IN CHICAGO, NEW YORK, AND LOS ANGELES 24–25 (2007).

236. See generally Andrew A. Beveridge et al., *Residential Diversity and Division: Separation and Segregation among Whites, Blacks, Hispanics, Asians, Affluent, and Poor*, in NEW YORK AND LOS ANGELES: THE UNCERTAIN FUTURE 310, 332–35 (David Halle & Andrew A. Beveridge, eds., 2013).

237. JOHN KUCSERA WITH GARY ORFIELD, NEW YORK STATE’S EXTREME SCHOOL SEGREGATION: INEQUALITY, INACTION AND A DAMAGED FUTURE 35–36 (2014); see also Elizabeth A. Harris, *School Segregation Persists in Gentrifying Neighborhoods, Maps Suggest*, N.Y. Times (Dec. 15, 2015), <https://perma.cc/TNJ4-34WM>. For an historical account of racial tensions in public education in New York, see Lauri Johnson, “*Making Democracy Real*”: *Teacher Union and Community Activism to Promote Diversity in the New York City Public Schools, 1935–1950*, 37 URB. EDUC. 566 (2002).

238. See, e.g., Mary C. Waters, *Ethnic and Racial Identities of Second-Generation Black Immigrants in New York City*, 28 INT’L MIGRATION REV. 795 (1994).

239. VIRGINIA E. SÁNCHEZ KORROL, FROM COLONIA TO COMMUNITY: THE HISTORY OF PUERTO RICANS IN NEW YORK CITY 11–50 (1994) (documenting the history of Puerto Ricans in New York City).

police interest.<sup>240</sup> Accordingly, the historical continuity of race, place, and policing is an important context for examining the New Policing in New York in the current era.

Table 7 shows basic socio-economic and demographic characteristics of New York in 2010. The table includes data from the 2010 decennial census, combined with more granular measures from the 2009–2013 American Community Survey data. Its 303 square miles illustrate the large land area. Population density, at 27,013 persons per square mile, may understate the extent of crowding in the city’s residential neighborhoods because there are several large land areas that include parks, airports, and commercial zones. New York is a city of immigrants, with more than one in three born outside the United States. The population is diverse, and the white population is barely a majority. The city is young, most households are renters, and the poverty rate is just above one household in five.

**Table 7. Demographics and Socio-Economic Conditions,  
New York City, 2010–2013<sup>241</sup>**

Total Population	8,175,133
Land Area (sq. mi.)	302.6
Population Density	27012.54
Non-Hispanic White	33.30%
Non-Hispanic Black	22.80%
Hispanic White	10.70%
Hispanic Black	2.80%
% Foreign Born	37.40%
Age 0-14	17.20%
Age 15-24	14.50%
Age 25-34	17.40%
Age 35+	50.50%
% Home Ownership	29.20%
% Public Housing	6.40%
Median Household Income	\$50,711
Poverty Rate	20.10%

240. FRITZ UMBACH, *THE LAST NEIGHBORHOOD COPS: THE RISE AND FALL OF COMMUNITY POLICING IN NEW YORK PUBLIC HOUSING* 1–9 (2011) (describing the challenges of policing in New York public housing contexts of extreme poverty and racial segregation); *see generally* Jeffrey Fagan, Garth Davies & Adam Carlis, *Race and Selective Enforcement in Public Housing*, 9 J. EMPIRICAL LEGAL STUD. 697 (2012) (showing the intensity of New Policing in public housing relative to similarly-situated adjacent neighborhoods).

241. U.S. CENSUS BUREAU, *supra* note 166.

Readers should view these structural indicia of social and economic life as averages across distinct communities in the city, and the extent of racial segregation in the city suggests that the social and economic contexts of the distinct racial populations of the city are quite different from these aggregates. Figure 5 shows the patterns of racial residential segregation in the city today. The concentration of racial isolation in this decade, well into a two-decade period of crime decline, mirrors the concentrations of incarcerations in jails and prisons,<sup>242</sup> street stops,<sup>243</sup> and misdemeanor arrests throughout this era.<sup>244</sup>

The areas with the greatest racial segregation overlap with the areas that have the highest poverty rates in New York. Figure 6 shows poverty rates by census tract for the years 2009–2013. When juxtaposed, Figures 5 and 6 show that poverty rates are highest in the areas where black and Hispanic population segregation rates are highest. When then juxtaposed with misdemeanor arrest rates by census tract in Figure 7, and stop rates in Figure 8, it becomes apparent that there is a spatial nexus of poverty, segregation, and the two essential prongs of the New Policing.

Accordingly, the tension in the New Policing goes beyond simply the allocation of policing to places with high violent crime rates, places that tend to be largely non-white and isolated, and also poor neighborhoods whose residents risk social isolation and economic disadvantage, and where arrests exacerbate those conditions for individuals exposed to the New Policing.<sup>245</sup>

But it is one thing to assign police to particular places, and to do so in a way that is proportionate. It is quite another to ask what police do once assigned to patrol those places. As in Ferguson, this has become the flashpoint of tensions between citizens and police in New York, going back more than two decades. Those tensions boiled over in investigations following the police killings of Amadou Diallo, an unarmed citizen killed by the newly expanded Street Crime Unit in 1999,<sup>246</sup> and Patrick Dorismond, a man killed by police in a botched drug sting in 2000.<sup>247</sup> Two eras of litigation, *Daniels v. City of New York*<sup>248</sup> and *Floyd v. City of New*

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242. Fagan, West & Holland, *supra* note 206, at 1568.

243. OAG REPORT, *supra* note 127, at 117–19; Fagan & Davies, *supra* note 35, at 477; Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 7 J. EMPIRICAL LEGAL STUD. 591, 595 (2010)

244. Kohler-Hausmann, *supra* note 5, at 635.

245. See, e.g., Tina Rosenberg, *Have You Ever Been Arrested? Check Here*, N.Y. TIMES (May 24, 2016), <https://perma.cc/TJ75-4CET>.

246. OAG REPORT, *supra* note 127, at 5–7.

247. Jeffrey Rosen, *Excessive Force: Why Patrick Dorismond Didn't Have to Die*, NEW REPUBLIC (Apr. 10, 2000), <https://perma.cc/6D3K-UT6R>.

248. *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. 2001).

**Figure 5. Racial Residential Segregation in New York, 2013<sup>249</sup>**



Note: Each map shows largest racial group in each census tract where racial fragmentation rate is less than 25%.

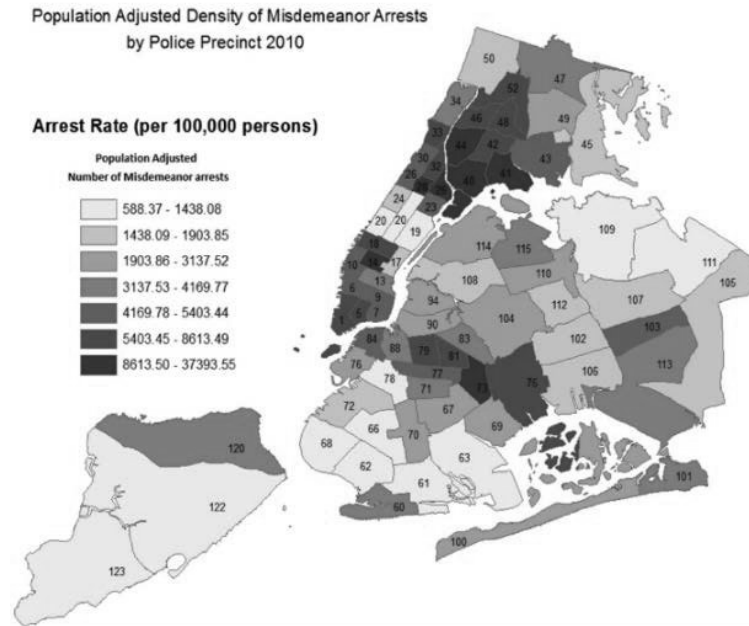
**Figure 6. New York City, Poverty Rates by Tract, 2009–2013<sup>250</sup>**



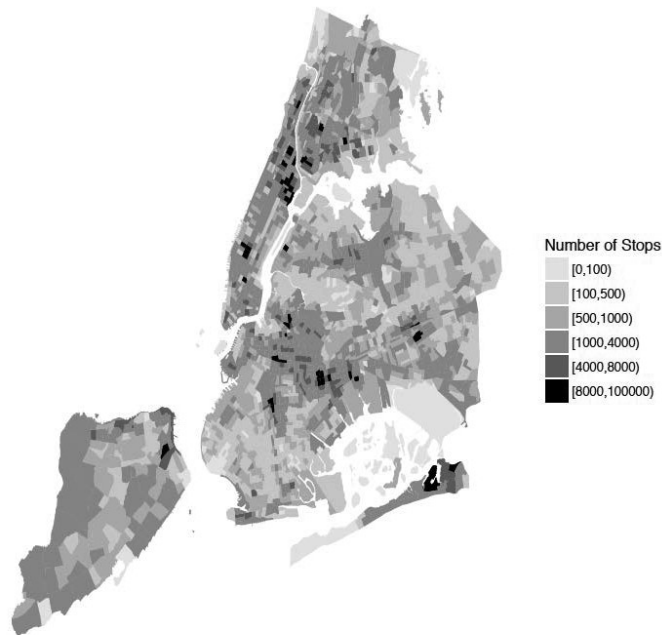
249. Mireya Navarro, *Segregation Issue Complicates de Blasio's Housing Push*, N.Y. TIMES (Apr. 14, 2016), <https://perma.cc/P9BK-CDFF>.

250. U.S. CENSUS BUREAU, *supra* note 166.

**Figure 7. Population-Adjusted Density of Misdemeanor Arrests by Police Precincts, 2010<sup>251</sup>**



**Figure 8. Stop and Frisk Activity, New York City, 2007–2012<sup>252</sup>**



251. Kohler-Hausmann, *supra* note 5, at 635 fig.5.

252. N.Y.C. POLICE DEP'T, *The Stop, Question and Frisk Report Database*, <https://perma.cc/3JYL-L5PD>.

*York*,<sup>253</sup> followed, and each revealed the depth of racial disparities in the conduct of stop and frisk, the front edge of the New Policing in New York. These disparities may not have led to riots, as in past eras, but they led to a deep divide in how citizens in New York City view the police in the era of the New Policing.<sup>254</sup> These disparities in treatment also have influenced how citizens interact with police,<sup>255</sup> with evidence of social and psychological harms among the populations most affected.<sup>256</sup>

### C. RACIAL DIFFERENTIATION IN THE NEW POLICING

This section examines the racial dynamics of the New Policing in the city over the past decade. The durable links between race and place in New York reflect that the policing experiences of black and Latino citizens are deeply woven into the social ecologies of black and Latino neighborhoods. The racial disparities in policing tend to reinforce the structural disadvantages by limiting the economic and social fortunes in these communities.

Our analysis exploits data on crime and policing made available from the *Floyd* litigation, as well as research databases used in recent empirical analyses of misdemeanor arrests, summons activity, court processing, and case outcomes. Data on stops, crimes, and arrests indicate the suspected offense, which we code into seven distinct categories that mirror the evidence in the *Floyd* litigation<sup>257</sup> and prior analyses of the New Policing in New York. Stop data are publicly available and show the age, race, and gender of the person stopped, as well as the precinct and other descriptors of the stop context.<sup>258</sup> Stop data also show the reason(s) for the stop, based on a series of categories indicated on the UF-250 form that officers complete after each stop.<sup>259</sup> The stop data also include measures of the use

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253. *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

254. Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 265 (2008).

255. Tyler, Fagan & Geller, *supra* note 6, at 751, 773–74.

256. Geller et al., *supra* note 6, at 2324.

257. Report of Jeffrey Fagan, Ph.D. at 32 tbl. 5, 42 tbl. 7, 44 tbl. 8, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034); *see also* SCHNEIDERMAN, *supra* note 39, at 8–9, app. G; Gelman, Fagan & Kiss, *supra* note 229, at 817–19 (following a strategy of using crime rates as a benchmark to estimate disparate racial treatment in street stops).

258. The data are collected by police officers on the UF-250 form. *See* Report of Jeffrey Fagan, Ph.D. at apps. B & C, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034).

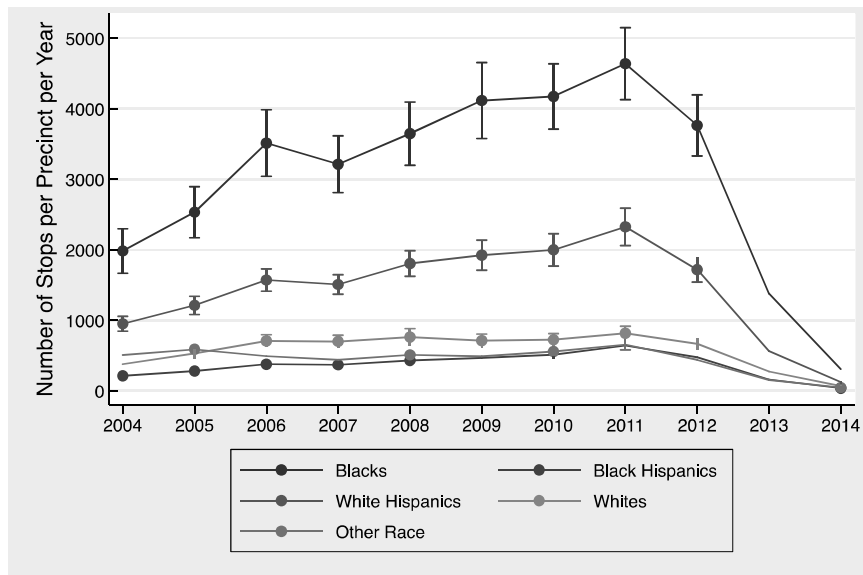
259. *See* Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 69–70, 88 (2015)

of force during the stop and the outcome of the stop: arrest, citation, frisk, search, weapons, or contraband seized. Arrest data show the arrest charge, as well as the race, age, and gender of the person stopped and the location and other descriptors of the stop event.

### 1. Terry Stops as Police-Citizen Contacts

Since the outset of the New Policing in New York, most involuntary contacts between citizens and police take place in the context of stop and frisk encounters. We use publicly available data on each stop from 2004–2014. During this time, the police recorded 4,811,769 stops.<sup>260</sup> Figure 9 shows the distribution of stops, averaged across police precincts by suspect race over that period. The race differences in the stop patterns show the elevated rate of stops, using a population benchmark, among black and Hispanic persons compared to other population groups in New York. Asians and other race persons are stopped least often, with whites stopped at a slightly higher rate over time than Asians and other race groups.

**Figure 9. Number of Terry Stops per Police Precinct by Year<sup>261</sup>**



(showing the UF-250 stop form and identifying the categories of suspicion under the Fourth Amendment that officers can indicate as the basis of the stop).

260. *The Stop, Question and Frisk Report Database*, *supra* note 252.

261. *Id.*



Stops are regulated by case law, beginning with *Terry v. Ohio* and continuing through *Adams v. Williams*, *Whren v. United States*, *Illinois v. Wardlow*, several other Fourth Amendment cases, and now *Utah v. Strieff*.<sup>262</sup> One of the principles of the New Policing as practiced in New York is the allocation of officers and stop activity to places based on their crime rates to implement the stop and frisk strategy and other investigative tactics.<sup>263</sup> The concentration of crime in neighborhoods that are more likely to be black or Hispanic would suggest that relative to local crime and population, stop rates would be consistent across places once conditioned on crime.

Table 8 shows the results of simple Ordinary Least Squares (OLS) regressions to test this theory. We compare stop rates per person within racial groups relative to the local precinct racial population composition and crime rate, as well as population density to estimate the racial component of stop patterns. We include a control for crime to reflect the policy logic of allocating officers and directing investigative activity to the places where crime rates are high and require focused attention. Similar to the estimation methods in Section II.B, the regression takes the form of:

$$Y = \alpha + \beta R + \delta X + \varepsilon.$$

where  $Y$  is the odds ratio for a given race, police precinct, and year. This odds ratio can be understood as the magnitude of the difference in the incidence of stops for that race and its proportion of the population. The vector of controls  $X$  includes fixed effects for year, a cubic polynomial in the crime rate, and the local population density.<sup>264</sup>

For each cell, the stop rate exceeds the population rate, after controlling for the local crime rate. These odds ratios would be equal to one if there were equilibrium between stops and crime for each population group. The excess above one suggests disproportionate stops. Overall, blacks and black Hispanics are stopped nearly three times more than their population would predict (4:1) after adjusting at the precinct level for local crime rates. The excess stop rate is lower for white Hispanics, but still significantly above 1.0. The results for specific crimes also show

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262. See *infra* notes 335–42; see also Fagan, *Original Sin*, *supra* note 46, at 46–66 (providing a summary of the case law).

263. BRATTON WITH KNOBLER, *supra* note 2, at 233–39; Heymann, *supra* note 1, at 424, 429; Livingston, *supra* note 19, at 650–51.

264. We use a cubic polynomial to adjust for the extreme skew in crime rates by year across the city's seventy-six police precincts. We omitted the 22nd Precinct (Central Park) because it has an extremely low population. Density is an additional measure that conveys information about the likelihood of a citizen to encounter a police officer given the territory that the officer is patrolling.

uniformly higher rates relative to population after controlling for crime with a similar racial distribution.

At first glance, then, it seems that the logic of this prong of the New Policing exposes non-white persons to police contact at a significantly higher rate than one would expect knowing the local crime rate. This exposure is independent of the type of crime, a pattern that would not be predicted by the focus on violent crime and weapons seizures suggested in the policy blueprints that animated these policies more than two decades ago.

The interaction between persons stopped and the officers, and the outcomes of those encounters, are additional dimensions of the exposure of citizens to the New Policing. Table 9 shows the results of OLS regressions that estimate the effects of suspect race on stop outcomes, controlling for the reason for the stop under Fourth Amendment jurisprudence. In this analysis, we compare the treatment of black, black Hispanic, and white Hispanic suspects to white suspects for each specific measure of stop interaction. We model five distinct outcomes of the stops. Frisks, which are permitted under *Terry* and subsequent cases as protective measures to ensure officer safety, are assessed.<sup>265</sup> We also examine “unproductive frisks”: frisks conducted where there was no indication of the presence of a weapon or violent behavior either in the suspected crime or in the suspicion bases that animated the stop.<sup>266</sup> We also examine whether any force was used, including “unnecessary force”: force used in the absence of either weapons or violent behavior in the reason for the stop.<sup>267</sup> Whether the stop resulted in an arrest, indicative of probable cause and a higher standard for the contact than the *Terry* standards of reasonable suspicion,<sup>268</sup> is the fifth measure of stop interaction.

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265. Fagan, *Original Sin*, *supra* note 46, at 56–60.

266. Whether these frisks reflect either a “hunch” that exceeds the signals of danger in the indicia of suspicion, or a measure of a taste for intrusion or punitive interaction, is a reasonable question that these data cannot answer.

267. As with unproductive frisks, unnecessary force is counted in stops where there are no clear signals of danger, or when an arrest is not affected. Use of force in those instances could suggest a “hunch” of risk or violence threat that exceeds the signals of danger in the indicia of suspicion, or a measure of a taste for using force as a form of punitive interaction. This too is a reasonable question that these data cannot answer.

268. Fagan, *Original Sin*, *supra* note 46, at 54–56.

269. *The Stop, Question and Frisk Report Database*, *supra* note 252; U.S. CENSUS BUREAU, DECENNIAL CENSUS: 2010 (2011), <https://perma.cc/BSY5-NY9H> (geocoded to NYPD Precincts at [www.infoshare.org](http://www.infoshare.org)).

**Table 8. OLS Regression for Racial Differences in Precinct-Level Odds Ratios in Stops, New York City, 2004–2014<sup>266</sup>**

Suspect Race	All Stops	Suspected Crime						
		Violence	Weapons	Property	Drugs	Trespass	Quality of Life	Other
Black	3.917*** (0.496)	4.882*** (0.591)	4.112*** (0.469)	3.436*** (0.503)	3.417*** (0.472)	3.949*** (0.452)	2.281*** (0.368)	3.874*** (0.522)
White	2.153*** (0.119)	2.116*** (0.133)	2.214*** (0.149)	2.181*** (0.110)	2.044*** (0.128)	2.273*** (0.129)	2.197*** (0.144)	2.055*** (0.113)
Black	3.996*** (0.523)	4.569*** (0.585)	4.263*** (0.592)	3.827*** (0.543)	3.252*** (0.386)	3.656*** (0.495)	3.249*** (0.554)	3.476*** (0.487)
adj. R-sq	0.358	0.360	0.341	0.270	0.278	0.239	0.129	0.303

Significance: \* =  $p < 0.05$ , \*\* =  $p < 0.01$ , \*\*\* =  $p < 0.001$ .

Note. Outcome variable is the odds ratio for the indicated race, given by the proportion of stops for that race in that precinct, divided by the proportion of the precinct population of that race. Regressions include year fixed effects, precinct crime rate, and precinct population density. Robust standard errors in parentheses, clustered by precinct.

**Table 9. OLS Regression of Racial Differences in Stop Outcomes, 2004-2014<sup>270</sup>**

	Stop Outcome				
	(1) Frisked	(2) Unproductive Frisk	(3) Use of Force	(4) Unproductive Use of Force	(5) Arrest Made
<b>Suspect Race</b>					
Black	0.047*** (.010)	0.034*** (0.006)	0.021* (0.011)	0.028*** (0.008)	-0.003 (0.003)
White					
Hispanic	0.067*** (0.012)	0.014** (0.005)	0.040*** (0.011)	0.014** (0.006)	0.002 (0.002)
Black					
Hispanic	0.072*** (0.008)	0.022*** (0.006)	0.051*** (0.010)	0.032*** (0.008)	0.006* (0.003)
<b>Sample Restriction</b>					
	-	Frisked	-	Force Used	-
N	4,811,769	2,519,934	4,811,769	1,076,575	4,811,769
Adj. R-sq	.228	.026	.052	.024	.014

Significance: \* =  $p < 0.05$ , \*\* =  $p < 0.01$ , \*\*\* =  $p < 0.001$ .

Note. Average difference in rates of stop outcomes by race, relative to the average for whites and other race. Standard errors in parentheses, clustered by precinct. Regressions include year fixed effects and controls for the reason for the stop. Robust standard errors in parentheses, clustered by precinct. Data include all stops for 2004 through 2014.

We find that blacks and black Hispanics are significantly more likely to be stopped and frisked relative to their white counterparts. Compared to their white counterparts, blacks are about 5%, white Hispanics nearly 7%, and black Hispanics are 7% more likely to be frisked. The same pattern of racial disparity is evident in the subset of frisks that we defined as unproductive frisks. The results for use of force mirror the frisk results. There are significant racial and ethnic disparities for each group for both any force and for unnecessary force.

Whatever the motive, whether a hunch of risk or danger that exceeds what the objective circumstances imply, or a taste for punitive interactions with non-white suspects, we observe a pattern of harsher treatment of minority persons by police. For non-whites, there is an increased risk of unwanted police contact, but no greater efficiency in crime detection that might benefit those same people. The harsher treatment of non-white suspects in what are common street interactions with police suggest that policing in minority neighborhoods is fraught with risks for the policed. A resident of—or visitor to—minority neighborhoods moves about in their everyday social interactions knowing that they may face a police contact

270. *The Stop, Question and Frisk Report Database*, *supra* note 252.

that is procedurally punitive even though there is weak to no evidence of criminal wrong-doing.

Whether an effort to signal risk of contact in the interest of deterrence, or simply a taste for punishment of minorities, the results show the risks of unwanted and harsh police contacts in the course of everyday movements through neighborhoods. These are costs that are borne uniquely by minorities in largely minority neighborhoods, in turn reinforcing the isolation of those places and the costs of journeying not only outside them, but often simply moving about within them.

## 2. Arrests and Summonses

Arrests and summonses are rare outcomes of street stops in New York from 2004 to the present, over this time, but, as we show below, they hardly are rare events across the city under the New Policing. Both are integral to the policing strategy that was launched in 1994 under *Policing Strategy No. 5*. And both continue to be instruments of social control and order maintenance when applied to low-seriousness misdemeanors or non-criminal violations.

### a. *Summonses.*

We first consider summonses, which at first glance are less stigmatizing and legally burdensome since they are civil actions that carry monetary penalties in lieu of jail sentences or probation. Summonses often are given in response to violations of city ordinances, traffic offenses, or low-level misdemeanors that the New York State criminal code classifies as “non-printable offenses.” These are offenses not defined by the Penal Law and for which fingerprints are not authorized. For non-fingerprintable misdemeanors, some persons are given summonses while others are subjected to summary arrest.

Our concern here is with those who are issued summonses. Summonses in New York under the New Policing are a “high-volume enforcement activity . . . [O]n average about a half million summonses were issued each year [from 2003–2013]. On a daily basis, the number of summonses issued ranged from a high of about 1,600 in 2006 to a low of about 1,200 in 2013.”<sup>271</sup> The five most frequent charges in 2013 were public consumption of alcohol, disorderly conduct, public urination, park offenses, and riding a bicycle on the sidewalk.<sup>272</sup> While these offenses

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271. PREETI CHAUHAN ET AL., THE MISDEMEANOR JUSTICE PROJECT, THE SUMMONS REPORT: TRENDS IN ISSUANCE AND DISPOSITION OF SUMMONSES IN NEW YORK CITY, 2003–2013 8 (2015), <https://perma.cc/9WH7-9YPU> [hereinafter THE SUMMONS REPORT].

272. *Id.* at 39–40, fig.20.

may fall under the capacious definition of social disorder, they hardly seem to be the precursors of criminal activity that animated the turn to order maintenance that was an essential prong of the New Policing.

Summonses, though, as we saw in Ferguson,<sup>273</sup> can metastasize into burdensome legal entanglements that not only carry weighty monetary burdens, but also criminal legal liability for those who fail to either respond to the summons or who cannot meet the legal financial obligation. The extent to which these burdens fall disproportionately on non-white persons is not easily identified. Race and ethnicity data are not uniformly recorded on summons forms,<sup>274</sup> nor are data on the distribution of summons activity by race and ethnicity reported by the state Office of Court Administration.

There are hints, though, that summons activity is racially skewed.<sup>275</sup> In 2012, Judge Noah Dear, a criminal court judge in Brooklyn, spoke publicly about the racial skew in summons cases in his courtroom. In a written opinion (itself an unusual step in a routine summons case) dismissing a summons issued to Jose Figueroa for public drinking, Judge Dear said, “As hard as I try, I cannot recall ever arraigning a White defendant for such a violation.”<sup>276</sup> Judge Dear had his staff examine a month of summons activity for public drinking issued in Brooklyn under the city’s open container law,<sup>277</sup> and found that 85% of the summonses were issued to blacks and Latinos, while only 4% were issued to whites.<sup>278</sup> According to census data, Brooklyn’s population was about 36% white.<sup>279</sup> The entire summons regime was ruled unconstitutional in 2017 on both Fourth and Fourteenth Amendment grounds in *Stinson v. City of New York*, and the city was ordered to pay \$75 million to settle claims resulting from 900,000 summonses issued from 2007–2015 that were dismissed by the court for legal insufficiency.<sup>280</sup>

To test for racial disparities in summons activity, we re-analyzed data on summons activity that were obtained from the Misdemeanor Justice

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273. See *supra* Part II.

274. THE SUMMONS REPORT, *supra* note 271, at 13, 92–93.

275. EDITORIAL BD., *New York’s Unfair Summons System*, N.Y. TIMES (Apr. 28, 2015), <https://perma.cc/U42J-686R>.

276. *People v. Figueroa*, 948 N.Y.S.2d 539, 608 (N.Y. Crim. Ct. 2012); see also Joseph Goldstein, *Sniff Test Does Not Prove Public Drinking, A Judge Rules*, N.Y. TIMES (June 14, 2012), <https://perma.cc/AAL3-GUE3>.

277. N.Y.C. Admin. Code § 10-125 (2013) (“No person shall drink or consume an alcoholic beverage, or possess, with intent to drink or consume, an open container containing an alcoholic beverage in any public place . . .”).

278. *Figueroa*, 948 N.Y.S.2d at 608.

279. *Id.*

280. 256 F. Supp. 3d 283 (2017); see also Rebecca Baker, *Judge Approves \$75M Settlement of NYPD Summonses Class Action Suit*, N.Y. L.J. (June 12, 2017), <https://perma.cc/4NG5-PD8D>.

Project in its analysis of summons activity.<sup>281</sup> We limited our analysis to 2009–2013, the most recent five-year period for which data were available. Because data were not available on the race or ethnicity of persons who received summonses, we estimated OLS regressions to show summons rates as a function of precinct population, controlling for the local precinct crime rates. As before, we used a cubic trend for crime to control for differences in precinct-level crime trajectories. We also used fixed effects for months as well as precincts, consistent with the NYPD practices under the New Policing of frequent updating of patrol and enforcement activity reflecting “real-time” crime trends.<sup>282</sup> Table 10 shows the results.

The table includes three models. In each model, the proportion white population is the reference for the regression,<sup>283</sup> and controls are included for the crime rate. Model 1 shows the relationship between racial demographics and summonses per person. The coefficient of 0.19 means that doubling the proportion black in the precinct population (for example, 20% black as compared to 10% black) is associated with 19% more summonses per person. Doubling the proportion Hispanic population also has a large effect: nearly 33%.

It is important to remember that these estimates are obtained controlling for local crime rates, suggesting a preference for summonses in black and Hispanic neighborhoods that cannot be explained by crime alone. It is possible that there is more outdoor activity in these neighborhoods, so that police can better observe law violations, or that once outdoors, young minority males are more likely to engage in disorderly behaviors including public drinking. After all, street corner socialization is an important part of city life in non-white neighborhoods, and has been for decades.<sup>284</sup> Even if some covert drinking were part of that life, it would be hard to imagine the racial disparities that are observed in these data, or that were observed in Judge Dear’s analysis of summons activity. Whether summons activity is aimed at black or Hispanic persons, or their street corner life, is hard to disentangle. But Judge Dear’s

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281. THE SUMMONS REPORT, *supra* note 271, at 18–19 (describing the data surveyed).

282. See BRATTON WITH KNOBLER, *supra* note 2, at 233–35 (discussing the logic of the use of real-time crime data to direct patrol resources and emphases to specific locations and crime problems).

283. Results for other racial and ethnic groups are not shown.

284. See, e.g., ELIJAH ANDERSON, A PLACE ON THE CORNER: AN ETHNOGRAPHY OF A SHIFTING COLLECTION OF BLACK MEN (1978); ELIJAH ANDERSON, CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY (2000) (discussing streetcorner life for young black men as a “staging area” from which their behaviors then unfold in their neighborhoods and sometimes elsewhere in the city); ELLIOT LIEBOW, TALLY’S CORNER: A STUDY OF NEGRO STREETCORNER MEN (1967); Brunson & Weitzer, *supra* note 7.

**Table 10. OLS Regressions of Summons Outcomes from Precinct Demographics and Precinct-Level Summons Outcomes, New York City, 2009-2013<sup>285</sup>**

	Model 1	Model 2	Model 3
	Summons Per Person	Acquittal and Dismissal Rate	Warrants Per Person
Proportion Black Population	0.191** (.067)	0.033* (.014)	0.189** (.068)
Proportion Hispanic Population	0.327** (.122)	-0.012 (.022)	0.344** (.125)

Significance: \* =  $p < 0.05$ , \*\* =  $p < 0.01$ , \*\*\* =  $p < 0.001$ .

Note. OLS Regression estimates show effect of the proportion of Black or Hispanic population of total precinct population on the number of summonses per person, the acquittal/dismissal rate per summons, and the number of warrants per person in that precinct. Regressions include year fixed effects, precinct crime rate, and precinct population density. Robust standard errors in parentheses, clustered by precinct. Total N = 374 precinct-year observations.

experience with open container summonses, of which only 25% seem to be sustained in court, suggests that race may in fact trump law violation in police summons activity.

The high dismissal rate that Judge Dear's analysis noted raises difficult and sensitive questions. Are police simply adhering to "productivity goals" or quotas when issuing summonses, and diluting the bases of these summonses? A high rate of dismissals is not simply a matter of police not appearing in court.<sup>286</sup> It could simply be a response to poorly composed summonses that were lacking legally sufficient bases. A similar question was raised in the *Floyd* case, where the high rate of unproductive stops that were severely racially imbalanced led the court to conclude that there was a policy of "indirect racial profiling" at work in the stop, question, and frisk (SQF) regime.<sup>287</sup> The racial imbalance after controlling for crime could also suggest that summonses were used for punitive purposes, because they seemed to be detached from sound legal analysis by police as to whether there actually was a violation that was sustainable in court.

285. Data provided by John Jay College of Criminal Justice, Misdemeanor Justice Project (on file with authors).

286. Glaberson, *supra* note 73.

287. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 590 (S.D.N.Y. 2013).



These concerns led to the analysis in Model 2 in Table 10, where we estimated the incidence of legally insufficient summonses by examining rates of acquittal and dismissal conditional on summonses.

As with summons activity, the rates of “bad” or insufficient summonses were significantly higher as the proportion of black population in the precinct increased. Relative to other precincts, doubling the proportion black population is associated with a 3.3% increase in the rate of dismissals or acquittals. The acquittal or dismissal rate does not vary with the proportion of Hispanic population in a precinct. Dismissals or acquittals can result from a legally insufficient summons that provides vague or incomplete evidence, a failure of the complaining officer to appear in court, or a factual challenge to the summons by the defendant.

Comparing the first two columns in Table 10, the summons rate increases as the proportion of black population increases, but so too does the dismissal rate. In other words, there are more bad summonses issued, taxing black residents to respond to the summonses in court in order to dispose of it. In Hispanic neighborhoods, the summons rate is higher but the rate of “bad” summonses remains unchanged across precincts as the proportion of Hispanic population increases. While the burden of summonses is greater on Hispanic residents in terms of volume, the burden on black residents is lower by volume but higher to challenge the summonses.

Model 3 shows that the summons process more often leads to warrants issued to black and Hispanic residents. The process mirrors what we observed in Ferguson. Warrant rates rise significantly as the proportion of black and Hispanic residents increases in a precinct. Doubling the black population is predicted to increase the warrant rate by nearly 20%. For Hispanic populations, the warrant rate increases by 34% for each doubling of the Hispanic proportion in the population. As we noted earlier in the Ferguson analysis, warrants multiply the burden of a summons beyond the monetary obligation. Warrants are gateways that can transform a civil violation into a criminal matter, with the corresponding costs attached to the warrant: criminal conviction, the risk of pretrial detention and a post-conviction sentence, and further monetary costs in terms of bail, fines, and attorney costs.

*b. Misdemeanor and Felony Arrests.*

Misdemeanor arrests are a second prong of the New Policing and a central feature of the New York model of social control.<sup>288</sup> Recent scholarship on misdemeanor arrests suggest that like street stops, they have grown over time across the United States. But unlike street stops, which rarely lead to arrests, or summonses, where the liabilities are monetary and only civil, arrests are criminal and carry great weight.<sup>289</sup> We examined arrest patterns for the most recent five-year period where data were available. Unlike summonses, where data on the race of the defendant was not available, arrest data do have race and ethnicity available.

Accordingly, we examined arrests by race and ethnicity per precinct, comparing black, black Hispanic, and white Hispanic suspects to white suspects, controlling for social and crime conditions in the precinct. The data allow us to separate arrests by the most serious charge into felony, misdemeanor, and violation categories. The denominator in this model is the race-specific proportion of the population in the precinct. Using the proportions by race allows us to implicitly compare the two race and ethnicity groups to whites and others. The model form applied the same analytic strategy that we used to estimate the racial component of stops relative to crimes. Table 11 and Figure 10 show the results.

The odds ratios in Table 11 are startling. Each cell in the table is statistically significant, indicating that these are consistent patterns not attributable to chance. Relative to the local crime rates, the rate of felony arrests per population is more than two times greater for black persons, and 60% higher for white Hispanics. Similar disparities exist for misdemeanor arrests and arrests for violations. According to police data, felony crime has been declining across all NYPD precincts in New York during this period.<sup>290</sup> The concentration of arrest activity in an era of steadily declining crime suggests increasing presence and police surveillance in those neighborhoods, further sustaining their social disadvantage as arrest records and convictions pile up among those residents.

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288. Kohler-Hausmann, *supra* note 5, at 631–32.

289. *See generally* HARCOURT, *supra* note 10; Kohler-Hausmann, *supra* note 5; Howell, *supra* note 6; Natapoff, *supra* note 5.

290. Crime data for 2000–2015 for felony, misdemeanor, and violation crimes are available for public access. *Historical New York City Crime Data*, N.Y.C. POLICE DEP'T, <https://perma.cc/Z3DX-SVJ4>.

**Table 11. OLS Regression for Race and Ethnicity Difference in Precinct-Level Arrests, 2009–2014<sup>291</sup>**

Defendant Race	Top Charge Category		
	Felonies	Misdemeanors	Violations
Black	2.348*** (.329)	2.129*** (.323)	2.368*** (.317)
White Hispanic	.631*** (.046)	.644*** (.049)	.801*** (.046)
Adj. R-sq	.352	.326	.372

Significance: \* =  $p < 0.05$ , \*\* =  $p < 0.01$ , \*\*\* =  $p < 0.001$

Note. Outcome is the odds ratio for the indicated race, given by the proportion of arrests for that race in that precinct, divided by the proportion of the precinct population of that race. Black Hispanics omitted due to low population in most precincts. Coefficients above 0 suggest racial disparities compared to Whites in the share of arrests, relative to the population share of each race in that precinct. Coefficients below 0 show rates below that of Whites controlling for population share. Regressions include year-quarter fixed effects, a cubic polynomial parameter for the precinct crime rate, and a cubic polynomial in the precinct population rate. Robust standard errors in parentheses, clustered by precinct. Total N = 374 precinct-year observations.

Our particular interests here are misdemeanor arrests and arrests for violations, the essential components of the New Policing. The charges in these cases are less serious, as are the punishment tariffs. The charges often are quality of life and disorder offenses. Arrests for these lower seriousness crimes have been interpreted as a form of social control and order maintenance that is quite separate from the weightier project of public safety through felony arrests.<sup>292</sup> Table 12, from Professor Kohler-Hausmann's research, shows the distribution of misdemeanor arrests by crime type. Misdemeanor possession of marijuana is the most frequent charge category, accounting for nearly one in five misdemeanor arrests in 2012. Of the remaining charges, only misdemeanor assault (14.8%) and weapons offenses (3.6%) are crimes that threaten public safety.

The heightened risk of misdemeanor arrest of black and Latino people in New York is not confined to their own neighborhoods.<sup>293</sup> A recent analysis of misdemeanor arrests showed that fewer than half (about 40%) of misdemeanor arrests were of persons in their precinct of residence. The

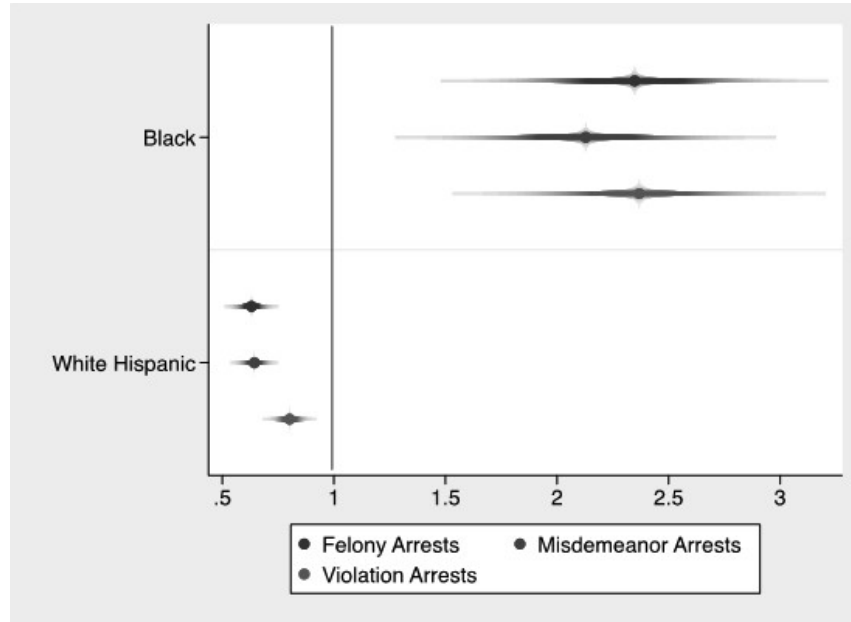
291. N.Y.C. POLICE DEP'T, *Arrest and Complaint Database Data* (on file with authors) (provided in *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013)).

292. Howell, *supra* note 6, at 273–75; Kohler-Hausmann, *supra* note 5, at 691–92; Natapoff, *supra* note 5, at 1368.

293. TODD C. WARNER ET AL., *THE MISDEMEANOR JUSTICE PROJECT, MAPPING MOBILITY OF INDIVIDUALS ARRESTED FOR MISDEMEANORS IN NEW YORK CITY, 2006–2014* 22–23 (2016).

risks of misdemeanor arrests seem to be as much associated with race as place. The implications for constrained mobility that we observed in Ferguson are mirrored here.

**Figure 10. Odds Ratios of Nonwhite-White Ratio in Per Capita Arrest Rates Controlling for Precinct Crime Rate (Mean, 95% CI)<sup>294</sup>**



Why marijuana? The relationship of marijuana use or possession to crime is a contentious debate in social science, with most analysts dismissing as spurious or narrow a hypothesized connection of marijuana use to violence.<sup>295</sup> But marijuana enforcement is targeted in New York at black and Latino young males.<sup>296</sup> Even if one were to accept the notion that there was some public safety threat associated with marijuana use that might justify intensive enforcement of marijuana arrests, there is no evidence that the marijuana-crime relationship is limited to black and Latino young males.

294. *Id.*; U.S. CENSUS BUREAU, *supra* note 269.

295. Geller & Fagan, *supra* note 243, at 623–24 (reviewing the behavioral science literature on the weak causal relationship between marijuana use and crime); *see, e.g.*, Helene Raskin White, Rolf Loeber, Magda Stouthamer-Loeber & David P. Farrington, *Developmental Associations Between Substance Use and Violence*, 11 DEV. & PSYCHOPATHOLOGY 785 (1999) (showing weak associations between marijuana use and violence that were limited to early adolescence).

296. ACLU, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 32 (2013), <https://perma.cc/CF8R-NRPN>; HARRY G. LEVINE & DEBORAH PETERSON SMALL, *MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY, 1997–2007*, at 4 (2008); Geller & Fagan, *supra* note 243, at 593; Kohler-Hausmann, *supra* note 5, at 630, 633.

**Table 12. Misdemeanor Arrests by Penal Law Chapter, New York City, 2012<sup>297</sup>**

Penal Law Chapter	Number	Percent
PL 221 Marijuana	45574	19.2%
PL 165 Other Theft*	36925	15.6%
PL 120 Assault	35068	14.8%
PL 220 Controlled Subs	25224	10.6%
PL 155 Larceny	24679	10.4%
PL 140 Trespass/Burglary-related offences	13337	5.6%
PL 265 Weapons	8477	3.6%
VTL 1192 Driving While Intoxicated	7712	3.3%
PL 145 Mischief	7444	3.1%
PL 240 Public Order	6357	2.7%
PL 205 Escape	5715	2.4%
PL 230 Prostitution	3462	1.5%
PL 130 Sex Offences	1063	0.4%
Other	15820	6.7%
<b>Total Misdemeanor Arrests</b>	<b>236857</b>	<b>100.0%</b>

Note: Other includes theft of services (such as, turnstile jumping).

Marijuana itself is also disconnected from dangerous behavior, particularly violent crime. The linkage of marijuana to crime is both contingent on contextual factors and spurious to underlying personal characteristics.<sup>298</sup> In addition, contrary to “gateway” hypotheses, few users of marijuana progress to using harder drugs, and the causal paths are complex and mediated by both observed and unobserved personal characteristics.<sup>299</sup> Nor is there a connection through marijuana markets. Several studies show that marijuana markets are segmented from cocaine and heroin markets, reducing the likelihood that disrupting marijuana buys

297. Kohler-Hausmann, *supra* note 5, at 630 tbl.2.

298. See Geller & Fagan, *supra* note 243, at 624.

299. Professors Andrew Golub and Bruce Johnson examined several waves of the National Household Survey on Drug Abuse from 1979–1997 and concluded that any “increase in youthful marijuana use [in the 1990s] has been offset by lower rates of progression to hard drug use among youths born in the 1970s.” See Andrew Golub & Bruce D. Johnson, *Variation in Youthful Risks of Progression from Alcohol and Tobacco to Marijuana and to Hard Drugs Across Generations*, 91 AM. J. PUB. HEALTH 225, 225 (2001). Connections between marijuana use and progression to other drugs is more likely to be produced through a correlation with (unobserved) personal characteristics rather than a causal path. Jan C. van Ours, *Is Cannabis a Stepping-Stone for Cocaine?*, 22 J. HEALTH ECON. 539, 551 (2003).

will have any effect on the more violence-prone heroin and cocaine markets.<sup>300</sup>

In fact, the social science evidence suggests that not only is the relationship spurious, but that marijuana use is far more frequent among white youths.<sup>301</sup> Why, then, the targeting of marijuana enforcement at non-white youths?<sup>302</sup> Perhaps this is simply a form of surveillance or control of young black males, the majority of marijuana arrestees. Perhaps it is intended to deter more serious crimes, including carrying weapons. Perhaps it is borne of a misguided notion of a stronger link between marijuana and violence or marijuana and progression to more serious drug use. Whatever the rationale, the consequences are hardly minimal and reinforce the boundaries of residential and economic segregation.<sup>303</sup>

### 3. Court Outcomes

Court processing of misdemeanor arrests shows that sanctions are rare. While there may be legal financial obligations imposed in the form of bail and other court costs, the outcomes of these cases rarely result in substantive punishment. Instead, as we show here, the life of these cases is typically marked by repeated court appearances leading to dismissal or a simple pleading that closes the case (albeit with a criminal record). The coupling of extended court processing with dismissals and rare punishment suggests that these were likely not strong cases to begin with. We are hardly the first persons to identify this process as part of the New Policing, or even policing models from past decades. Professor Malcolm Feeley's analysis of misdemeanor processing in the 1970s suggested that organizational interests among court actors contributed to a separation of processing from justice.<sup>304</sup>

Others see misdemeanor arrests as a form of management of largely poor and minority persons. Professor Eisha Jain suggested that the information generated by misdemeanor arrests serves the interests of

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300. See generally Jonathan P. Caulkins & Peter Reuter, *What Price Data Tell Us About Drug Markets*, 28 J. DRUG ISSUES 593 (1998).

301. See Geller & Fagan, *supra* note 243, at 593.

302. See Andrew Golub, Bruce D. Johnson & Eloise Dunlap, *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL'Y 131, 144–47 (2007); see also Andrew Golub, Bruce D. Johnson & Eloise Dunlap, *Smoking Marijuana in Public: The Spatial and Policy Shift in New York City Arrests, 1992–2003*, 3 HARM REDUCTION J. 22, 23 (2006); Harcourt & Ludwig, *Reefer Madness*, *supra* note 28, at 165–66.

303. Howell, *supra* note 6, at 274, 288.

304. See generally MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979) (showing how the interdependencies, adaptations, institutional maintenance, and adversarial relationships among court actors shape the process as experienced by defendants, and its separation from the interests of adjudicating guilt or innocence).

noncriminal justice actors who can then exert regulatory control over those arrested.<sup>305</sup> Professor Kohler-Hausmann suggested that misdemeanor justice is separated from the adjudication of guilt or innocence, but instead reflects interest in the management of the classes of individuals—mostly black and Latino in New York—who are brought into the court in the New Policing. She showed that during 2012, only one in five (19.6%) of misdemeanor arrests resulted in misdemeanor convictions.<sup>306</sup> About three in ten (28.7%) resulted in non-criminal convictions, which often carry financial obligations in the form of fines.<sup>307</sup> Another 7.6% were declined for prosecution, a step often taken where there is insufficient evidence to sustain a prosecution.<sup>308</sup> The total conviction rate, then, was less than 50%, well below what one might expect if the interest of misdemeanor justice was adjudication of guilt and assessment of proportionate punishment tariffs.

Yet, for those 50%, responding to their arrests, including posting bail or spending time in pretrial detention or making repeated court appearances as prosecutors and police stretched cases out over months and sometimes years, poses a different set of burdens and costs for defendants.<sup>309</sup> This is a form of unregulated punishment for which there has been little constitutional interest as prosecutors manipulated speedy trial rules to delay final case dispositions. And unless the conviction is sealed, the criminal record is available to the court and the police, a stigma burden with consequences for future work and housing.<sup>310</sup>

Four in ten overall (42.1%) were not convicted, including 29.9% who were dismissed conditionally.<sup>311</sup> Usually, these cases are adjourned after

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305. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 809 (2015). She identifies “immigration enforcement officials, public housing authorities, employers, licensing authorities, and child protective service providers, among others” as those who make use of the information generated by misdemeanor arrests to regulate the poor. *Id.* “They do so not because arrests are the best regulatory tools but because they regard arrests as proxies for information they value, and because arrests are often easy and inexpensive to access.” *Id.*

306. Kohler-Hausmann, *supra* note 5, at 647 fig.10.

307. *Id.*

308. *Id.*

309. Daniel Hamburg, *A Broken Clock: Fixing New York's Speedy Trial Statute*, 48 COLUM. J.L. & SOC. PROBS. 223, 228–31 (2014) (showing manipulation of the New York state Speedy Trial Statute, N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2015), by prosecutors with deceptive claims of trial readiness that stretches misdemeanor cases for months and sometimes years).

310. James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 207–10 (2008) (discussing how federal law both permits and mandates certain criminal background checks); *see also* Erin Murphy, *Databases, Doctrine & Constitutional Criminal Procedure*, 37 FORDHAM URB. L.J. 803, 816 (2010).

311. This is commonly known in New York as “Adjournment in Contemplation of Dismissal,” or ACD, which is authorized under N.Y. CRIM. PROC. LAW §§ 170.55,

six months and the case is closed with no lasting criminal record. For marijuana offenses and family court matters, the period of conditional dismissal is one year.<sup>312</sup> If the individual is not arrested again before the adjournment date, the case will be dismissed and sealed on the adjournment date.<sup>313</sup> But the defendant's record is open to the public—employers, landlords, and neighbors—during the ACD period, negating the de-stigmatizing purpose of an acquittal and a sealed record. Professor Kohler-Hausmann summarizes effectively the importance of these various dismissal or delay procedures in the misdemeanor court:

Defendants are *marked*—sometimes for a very short time and sometimes for a very long time—even if the eventual outcome of the case is a dismissal. That marking serves an important function even if it is not used to trigger the capacity of the state to impose a formal sanction. It allows the court to record the fact of an encounter and use it as a data point in later encounters. The next prosecutor and judge who encounter the defendant will know if there was a prior allegation of criminal conduct, without demanding that the current prosecutor and judge expend all of the time and resources needed to secure a conviction.<sup>314</sup>

Our interest is the racial skew in these processes and how that skew in processing and outcomes of misdemeanor arrests may link to the New Policing. We exploited data from the *Floyd* litigation on stops that resulted in arrests from 2009–2012,<sup>315</sup> and obtained additional data from the state Office of Court Administration on the processing of those cases from initial filing to sentencing.<sup>316</sup> Table 13 shows the percentage of cases surviving each stage of case processing. We then estimate OLS regressions to show the odds of cases reaching that stage for black, white Hispanic, and black Hispanic defendants compared to white defendants. During the four years analyzed, 142,596 cases were identified as arrests resulting from stops. This represented 5.9% of all stops recorded during

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170.56. Under an ACD, cases are adjourned by motion of either party for a specific time period (usually six months). Assuming no further contact with the police or the court, the charges are dismissed and the arrest and prosecution is voided. The case disappears from the defendant's record.

312. N.Y. CRIM. PROC. LAW §§ 170.55, 170.56.

313. Prosecutors do have the authority to move for a “do not seal” stipulation, which leaves the record open to public view. N.Y. CRIM. PROC. LAW § 160.50(1).

314. Kohler-Hausmann, *supra* note 5, at 649.

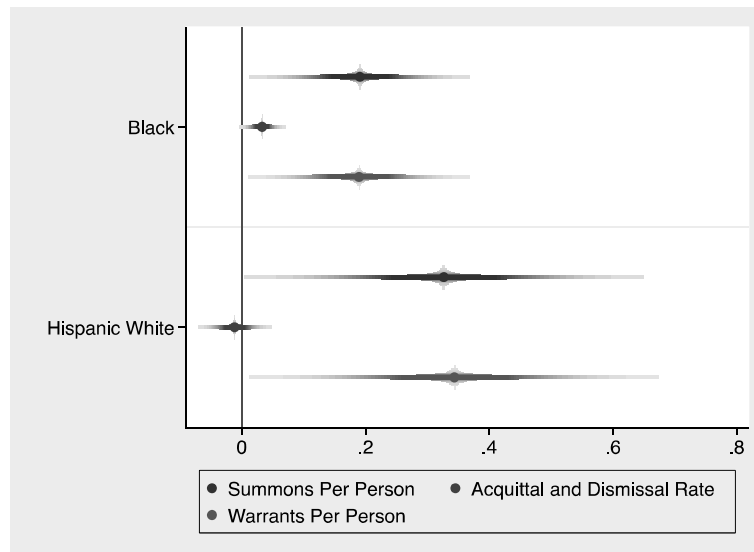
315. Summonses were excluded from this analysis because data on the race or ethnicity of persons receiving summonses were not reliably available. See THE SUMMONS REPORT, *supra* note 271, at 13.

316. For details on data sources, see SCHNEIDERMAN, *supra* note 39, at 7–8, app. A.



the four-year period. Of those, 82.3% proceeded to arraignment. Details of the reasons for the attrition of nearly 18% of the arrests were not available. Generally, cases may drop out if quashed at the precinct by police supervisors, or if they were declined for prosecution due to legal insufficiency or other evidentiary concerns.<sup>317</sup> The 18% rate is somewhat higher than rates reported by Professor Josh Bowers for New York for a four-year period from 2005–2008 immediately before the period that we observed. Bowers reported declination rates ranging from 2.25% for theft of services (generally, turnstile jumping or fare beating) to 16.5% for possession of stolen property.<sup>318</sup> For marijuana possession, an important stop and arrest charge in our data, Bowers reported a declination rate of 8.93%.<sup>319</sup>

**Figure 11. Odds Ratios of Nonwhite-White Differences in Case Outcomes, New York City (Mean, 95% CI)<sup>320</sup>**



317. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1655–56 & n.1 (2010). Bowers suggests that prosecutors inherently have the power not to charge and do so for three possible reasons: legal reasons (such as insufficient evidence), administrative reasons (such as prioritizing case assignments, inability to produce complaining witnesses), and equitable reasons (such as moral-judgment-based assessments of the seriousness of the crime, the culpability of the suspect, or the character of actors). *Id.* at 1656–57.

318. *Id.* at 1720 tbl.4.

319. *Id.*

320. N.Y.C. POLICE DEP'T, *supra* note 291; U.S. CENSUS BUREAU, *supra* note 269.

**Table 13. OLS Regressions on Progression of SQF Cases through Criminal Adjudication, New York City, Street Stops 2009–2012 (Odds Ratios, SE)**

	N, %	Black	Black Hispanic	White Hispanic
Arrested <sup>a</sup>	142,596 5.90%	1.08 *** -0.012	1.047 *** -0.011	1.014 ns -0.01
Arraigned <sup>b</sup>	117,425 82.40%	0.832 ** -0.062	0.717 *** -0.058	0.85 ** -0.064
Adjudicated or Plead Guilty <sup>c</sup>	71,795 61.10%	1.386 *** -0.079	1.389 *** -0.085	1.277 *** -0.065
Conviction Offense <sup>d</sup>	71,795	1.543 ***	1.453 ***	1.878 ***
Felony	9.30%	-0.113	-0.104	-0.072
Misdemeanor	53.50%			
Violation	37.20%			
Sentence <sup>e</sup>	71,795	1.312 **	0.98 ns	0.939 ns
Time served or no time	44.50%	-0.079	-0.064	-0.261
Fine or Probation	42.40%			
Jail or Prison	13.10%			

N=2,396,314 stops

Significance: \* p < .10, \*\* p < .05, \*\*\* p < .01

<sup>a</sup> The total arrests recorded were 148,880. Of these, 7,500 cases were eliminated because of duplicate or incomplete arrest identifiers. In addition, 146,323 cases resulted in issuance of a summons.

<sup>b</sup> Models estimated with controls for age and gender, and fixed effects for year and arrest charge. Models estimated conditional on probability of arrest or summons. Standard errors clustered by police precinct.

<sup>c</sup> Models estimated with controls for age and gender, and fixed effects for year and arraignment charge. Models estimated conditional on probability of arraignment. Standard errors clustered by precinct.

<sup>d</sup> Ordered logit regression. Models estimated conditional on probability of conviction. Estimates control for age and gender, and fixed effects for year and arraignment charge.

<sup>e</sup> Ordered logit based on sentences of time served, fine, probation, jail, prison. "No time" includes conditional discharge. Models estimated based on probability of conviction. Controls for age and gender. Fixed effects for year and conviction charge.

Convictions, whether by plea or trial, resulted in 61.1% of the total number of arrests resulting from stops. Most of those were misdemeanors (53.5%) or violations (37.2%). Perhaps these were more serious charges that were plea-bargained to a lesser offense. The Schneiderman report noted significant charge reductions from arraignment to conviction.<sup>321</sup> Convictions for crimes involving violence or weapons accounted for just one in twenty-five SQF arrests, or 0.2% of all stops, contradicting the claims of the New Policing that it is targeted at violence or removing weapons from the streets.<sup>322</sup> Sentences to jail or prison were rare with most of the 13.1% being sentenced to local jails. Again, there is little evidence in the processing of the stop-generated arrest cases to suggest that stops are having a measurable effect on crime.<sup>323</sup>

Even within these *de minimus* sanctions for crime, we observe a range of statistically significant effects suggesting racial disparities in processing and punishment. In twelve of fifteen analyses in Table 13 testing for difference in race or ethnicity, we observe significant effects that suggest harsher treatment of black, black Hispanic, and white Hispanic suspects. For example, black suspects are 8% more likely to be arrested if stopped, but less likely to be arraigned. This suggests that officers may use stops carelessly or even punitively to levy transaction costs with no basis for legal sanction.

At the same time, for the cases that do proceed, black suspects are more likely to be adjudicated guilty and receive a criminal stigma. But the charges are less serious: the regression for conviction offense shows a greater likelihood to be adjudicated guilty for a less serious charge. Specifically, compared to white suspects, black suspects are more likely to plead to lower charges. Yet they also are more likely to be sentenced to jail or prison. Again, the transaction burdens of this form of misdemeanor justice fall more heavily onto black than white defendants. There are complex factors that may result in a jail or prison sentence, such as prior record and the number of charges in the case. But controlling for charge in these regressions, we observe a significantly greater risk of incarceration for black defendants.

This duality for black suspects—arrests that lead to no charges or non-serious charges, coupled with a greater risk of a criminal sanction and

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321. SCHNEIDERMAN, *supra* note 39, at 14, 19.

322. *See* POLICE STRATEGY NO. 1, *supra* note 219, at 3–4.

323. Similar analyses using experimental designs to test for crime reduction effects of stops show a very small reduction in crime associated with increases in stops. *See* John MacDonald, Jeffrey Fagan & Amanda Geller, *The Effects of Local Police Surges on Crime and Arrests in New York City*, 11 PLoS ONE e0157223, 10–11 (2016). This research showed that stops that are based on rationales that more closely approximate probable cause, instead of the reasonable suspicion standard for investigative stops, do have statistically significant crime reduction effects. *Id.*

incarceration—seem to be present in tandem in this part of the New Policing. We observe much the same for black Hispanic suspects, although their incarceration risks at the end of the process are not significantly greater than white suspects. The results are similar for white Hispanic suspects, with the exception of arrests conditional on stops.

We see this as a grinding process of accumulating arrest records that may increase in number over time to produce at some tipping point a spell of incarceration. The consequences are severe, though. Even if there is low risk of jail time, the effect of imposing a criminal conviction becomes indelible. A criminal conviction is a permanent mark, one that is not easily removed through sealing or expunging of records.<sup>324</sup> Once a person has a criminal conviction his or her prints will be maintained by the state linked to a stable New York State Identification (NYSID) and all later arrest events will be linked to this NYSID. The arrest charges, disposition, sentence imposed, and warrants issued because of failure to appear will be listed on the rap sheet.

#### D. RACE, CRIME AND THE NEW POLICING IN NEW YORK

The New Policing took root in New York over two decades ago. Throughout this time, its tactics have been concentrated in the city's poorest and most racially segregated neighborhoods.<sup>325</sup> These also are places where serious crime rates are higher, to be sure.<sup>326</sup> Yet even after controlling for crime rates, our analyses show that these places receive more aggressive and racially skewed enforcement compared to other neighborhoods and the business districts of the city. The focus of enforcement on low-level misdemeanors and violations or public order offenses—separately from the pursuit of serious crime—is an essential feature of these tactics.

Whether there are benefits that return to people living in these areas from the New Policing is a contentious debate.<sup>327</sup> Yet any benefits are quite small, and the statistical effects have no practical significance in terms of crimes actually averted.<sup>328</sup> The evidence from court processing of

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324. Kohler-Hausmann, *supra* note 5, at 648–49; *see also* Jacobs & Crepet, *supra* note 310, at 178–79. These marks are especially weighty when seeking employment in the private sector, or when seeking a variety of housing options.

325. Fagan et al., *Broken Windows Revisited*, *supra* note 33, at 310.

326. *Id.*

327. Compare David F. Greenberg, *Studying New York City's Crime Decline: Methodological Issues*, 31 JUST. Q. 154, 182–83 (2014) (showing no empirical evidence that misdemeanor arrests reduced levels of homicide, robbery, or aggravated assaults) with Corman & Mocan, *supra* note 25, at 261–62 (finding that an increase in arrests correspond with a decrease in certain crimes).

328. MacDonald, Fagan & Geller, *supra* note 323, at 9; *see also* Greenberg, *supra*

arrests produced by the New Policing clarifies the separation of the New Policing from public safety. Stops rarely produce arrests or summonses,<sup>329</sup> and even less frequently result in seizures of weapons or contraband.<sup>330</sup> Summonses are as often dismissed as they are sustained, if not more often. Arrests, even when the charges are serious, rarely result in substantive punishment, a signal that these are not cases that can be easily linked to serious crime. Black and Latino New Yorkers are subject to these types of arrests whether moving through their own neighborhoods or moving about other neighborhoods or districts in the city.

Another way to view these cases is through the prism of the processing costs that defendants incur. Summonses must be answered. Sometimes they result in monetary costs, an example of the burdens of legal financial obligations.<sup>331</sup> However, they often are dismissed, yet the transaction costs to the defendant, usually black or Latino, are exacted through court appearances. Misdemeanor arrests are frequently declined for prosecution or dismissed in court, yet the transaction cost is again exacted. These cases require repeated court appearances over several months before they reach a conclusion. Monetary costs follow, whether in the form of processing fees for cases or for lost time and wages from the disruption of repeat court appearances. If convicted, usually for the least serious grades of misdemeanors, the stigma of a criminal conviction attaches, creating social and economic burdens and deficits.

Stops and arrests also create the risk of heightened surveillance and harsher treatment in the courts for any subsequent appearance,<sup>332</sup> and also spill over to bias in the form of exclusions from serving on juries,<sup>333</sup> or

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note 327, at 181; Richard Rosenfeld & Robert Fornango, *The Impact of Police Stops on Precinct Robbery and Burglary Rates in New York City, 2003–2010*, 31 JUST. Q. 96, 113–18 (2012).

329. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013).

330. *Id.* at 558–59; see also Sharad Goel, Justin M. Rao & Ravi Shroff, *Precinct or Prejudice? Understanding Racial Disparities in New York City's Stop-and-Frisk Policy*, 10 ANNALS APPLIED STAT. 365, 387 (2016) (showing low seizure rates and racial skew in how investigative stops are conducted in the search for weapons).

331. For an example of the burdens of pretrial bail, see Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471.

332. Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), <https://perma.cc/T9JX-UJG3> (showing a racial skew in how the accumulation of arrest records, regardless of convictions, is reproduced through predictive policing tactics that target those with prior arrests as future risks).

333. Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 YALE L. & POL'Y REV. 387, 412–14 (2016) (showing how prosecutors use prior arrests of prospective jurors as race-neutral explanations to justify peremptory strikes of blacks during *voir dire*).

college enrollment, attendance and achievement.<sup>334</sup> Even simple economic transactions, such as privately selling an iPhone, are adversely affected by the stigma of neighborhood poverty and segregation.<sup>335</sup> In other words, stops and arrests will beget stops and arrests and “spillover discrimination,” simply by stigmatizing a neighborhood or smaller area as a “high crime area.” For example, Supreme Court doctrine allows an officer to conduct investigative stops based on informant tips without making their own “personal observation[s]”,<sup>336</sup> of what you were wearing,<sup>337</sup> or how you behaved in view of the officer,<sup>338</sup> so long as the officer can state a pretextual reason *after* the stop, consistent with *Terry*.<sup>339</sup> Officers have unfettered discretion to make an investigative stop for any reason, including race or ethnicity, when an individual or vehicle is near a national border and the officer has taken into account the “characteristics of the [border] area.”<sup>340</sup> Officers in some places can conduct non-contact observations to extract the same information that they might obtain from an involuntary temporary street detention.<sup>341</sup> *Illinois v. Wardlow* goes so far as to justify a stop based on behavior within a “high crime area,” although there is no clarity on the indicia of a high crime area.<sup>342</sup> *Utah v. Strieff* now permits the prosecution of criminal offenders based on evidence obtained from an unlawful investigative (street) stop.<sup>343</sup>

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334. Alex O. Widdowson, Sonja E. Siennick & Carter Hay, *The Implications of Arrest for College Enrollment: An Analysis of Long-Term Effects and Mediating Mechanisms*, 54 CRIMINOLOGY 621, 633–34 (2016) (showing that arrested youth were 9% less likely than non-arrested youth to enroll in a four-year college within a decade after high school graduation).

335. Max Besbris, Jacob William Faber, Peter Rich & Patrick Sharkey, *Effect of Neighborhood Stigma on Economic Transactions*, PROC. NAT’L ACAD. SCI. 1, 3–4 (2017) (reporting evidence from a multi-city experiment showing that the returns from economic transactions are suppressed for persons living in poor, segregated and otherwise socio-economically disadvantaged neighborhoods).

336. *Adams v. Williams*, 407 U.S. 143, 147 (1972).

337. *United States v. Sokolow*, 490 U.S. 1, 6 (1989).

338. *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000).

339. *Whren v. United States*, 517 U.S. 806, 813 (1996). The justification has to include specific reasons that led to enough suspicion that the suspect was breaking the law. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968).

340. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884–85 (1975).

341. JEFFREY FAGAN, ANTHONY A. BRAGA, ROD K. BRUNSON & APRIL PATTAVINA, AN ANALYSIS OF RACE AND ETHNICITY PATTERNS IN BOSTON POLICE DEPARTMENT FIELD INTERROGATION, OBSERVATION, FRISK, AND/OR SEARCH REPORTS 1–3 (2015) (citing Boston Police Department Rules and Procedures, Rule 323 § 1 (May 25, 2005)); *see generally* Jeffrey Fagan, Anthony A. Braga, Rod K. Brunson & April Pattavina, *Stops and Stares: Street Stops, Surveillance and Race in the New Policing*, 43 FORDHAM URB. L.J. 539 (2016).

342. *Wardlow*, 528 U.S. at 124; *see also* Andrew Guthrie Ferguson & Damien Bernache, *The “High-Crime Area” Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1589 (2008). *But see* *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016)

At the core of this doctrine is a deep deference and respect for police expertise to exercise their professional judgment.<sup>344</sup> And because the police are permitted to rely on the cumulative information available to them that “might well elude an untrained person,”<sup>345</sup> the uncritical mass of stop data based on judgments of actuarial or collective suspicion creates an echo chamber of information that sustains if not multiplies police interventions that deepen its discriminatory effects.

So, as misdemeanor arrests and violations pile up in a neighborhood, that neighborhood becomes a high crime area and a target for yet more intensive enforcement in the style of the New Policing. With those stops and arrests come burdens. The burdens accumulate socially, economically, and psychologically.<sup>346</sup> Even if your case is dismissed in court, as often happens, you will still have an arrest record that brings on the “civil death” of discrimination by landlords, employers, and anyone choosing to conduct a background check for any reason.<sup>347</sup> Failure to return to appear in court, no matter how trivial the charge, or failing to appear after posting bail will lead to a warrant that will make you arrestable on sight.<sup>348</sup>

Under these conditions, black and Latino New Yorkers learn that routine movements can and do lead to legal entanglement and burdens.<sup>349</sup> Those movements have almost no costs or consequences in other neighborhoods. But they do have legal consequences, especially from the misdemeanor arrest prong, for black and Latino New Yorkers in those

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(holding that flight by black males in Boston may be “totally unrelated to consciousness of guilt” owing to the disproportionate and repeated targeting by police for investigative encounters. “Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity.”).

343. *Utah v. Strieff*, 136 S. Ct. 2056, 2064 (2016) (holding that evidence of a valid outstanding arrest warrant obtained in an unlawful investigative stop was not flagrant police misconduct).

344. *See Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979) (observing that a “trained, experienced police officer . . . is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer”); *United States v. Mendenhall*, 446 U.S. 544, 566 (1980) (Powell, J., concurring in part and concurring in the judgment) (“[C]ourts need not ignore the considerable expertise that law enforcement officials have gained from their special training and experience.”).

345. *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 417, 418 (1981)).

346. Geller et al., *supra* note 6, at 2324–25.

347. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1805–06 (2012); *see also* JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 33–51 (2015).

348. HARRIS, *supra* note 9, at 105.

349. Tyler, Fagan & Geller, *supra* note 6, at 775–76; *see also* Joseph Goldstein, ‘Stop-and-Frisk’ Ebbs, But Still Hangs over Brooklyn Lives, N.Y. TIMES (Sept. 19, 2014), <https://perma.cc/MZ97-VS2E> (reporting on views of neighborhood residents on the frequent negative interactions with police in the absence of any criminal activity).

neighborhoods, which can translate into social and economic burdens in housing, employment, and other social domains. The psychological toll is also salient, compromising emotional capital that is often needed to negotiate work and other everyday interactions.

Those seeking to leave their poor and segregated neighborhoods through the pathways of employment and housing face these obstacles.<sup>350</sup> Instead of gaining the means to move ahead, they are instead perhaps mired deeper in the poverty traps of their neighborhoods. The city and its police continue to engage in an aggressive form of Broken Windows policing that may lock people in place and deepen the disadvantages that keep them and their neighbors there. We explore these dynamics in more detail in the next Part.

#### IV. THE NEW POLICING AND THE REPRODUCTION OF SEGREGATION

It was only a few short weeks between the July 2014 chokehold homicide of Eric Garner by New York City police officers<sup>351</sup> and the August 2014 shooting death of Michael Brown after a confrontation with Officer Darren Wilson of the Ferguson Police Department.<sup>352</sup> Both deaths were sparked by minor legal violations—non-criminal social disorder offenses—that have become a staple of contemporary policing.<sup>353</sup> Black men died in each case at the hands of white police officers. One death—Michael Brown’s—took place in a small suburb with a population of just over 20,000. The other took place in the largest city in the country with a population 400 times greater than the first. Neither resulted in a grand jury indictment of any of the officers involved. Both killings renewed attention among journalists, researchers, and the public to the disproportionate rate of police killings of black men in the United States.<sup>354</sup>

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350. Rosenberg, *supra* note 245.

351. Eric Garner died during his arrest for selling loose cigarettes, a violation of New York City Code § 17-704, Regulation of Tobacco Products, and New York State Pub. Health Law 13-F § 1399-gg (1), Out-of-Package Sales of Tobacco Products. See Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://perma.cc/JR66-JWJL>. New York City had increased its laws and enforcement of loose cigarette sales just six months before Garner’s death. Garner’s offense was a violation punishable by a fine of up to \$2,000 for selling unlicensed cigarettes. See N.Y.C. DEP’T OF FIN., NEW LAWS AND PENALTIES FOR CIGARETTE AND OTHER TOBACCO PRODUCT VIOLATIONS IN NEW YORK CITY 6 (2014), <https://perma.cc/7H9S-VSXT>.

352. U.S. DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 5–8 (2015).

353. See Livingston, *supra* note 19, at 578–84; Kelling & Bratton, *supra* note 10.

354. Catherine Barber et al., *Homicides by Police: Comparing Counts from the National Violent Death Reporting System, Vital Statistics and Supplementary Homicide Reports*, 16 AM. J. PUB. HEALTH 922, 922 (2016); Willie F. Tolliver et al., *Police Killings*



Besides these two particular events, the respective policing regimes providing the context for these killings remain disconnected in the political, legal, and popular imagination. We argue here that these two policing models are two faces of a new culture of policing that is as common in smaller cities as it is in the larger ones. The respective policing styles share the same ideological and institutional features: managerialism, social and spatial control of the poor, revenue generation, and the distorted influence of metrics and numbers on substantive policing. Both are skewed racially, as reported in civil rights investigations and in litigation.<sup>355</sup>

Much of the discourse on policing over the past few years, when police shootings and citizen deaths took center stage in law and policy, has focused on catastrophic events such as the Garner and Brown deaths. These events do merit close attention, and there is considerable scholarship now devoted to reducing the harms inherent in contemporary policing.<sup>356</sup> But the spotlight on salient fatalities in police-citizen encounters may mask underlying trends in policing methods that tie together places such as New York and Ferguson. Aggressive policing of local ordinances and misdemeanor crimes has become the staple of policing over the past two decades, despite sustained decline in violent crime rates in most U.S. cities.<sup>357</sup>

In light of the evidence thus far presented, we take a deeper look at the consequences and implications of this model of policing for urban social ecology: the maintenance of racial boundaries, both spatial and economic, and the economic disenfranchisement of citizens under these models of socio-legal control.

#### A. CONNECTING TISSUE

What connects law enforcement across cities large and small is the underlying logic of the New Policing: the emphasis on minor social disorder as a leading indicator both of crime *rates* and *criminality* among

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of *Unarmed Black People: Centering Race and Racism in Human Behavior and the Social Environment Content*, 26 J. HUM. BEHAV. SOC. ENV'T 279, 281–82 (2016); see, e.g., Sandhya Somashekhar & Steven Rich, *Final Tally: Police Shot and Killed 986 People in 2015*, WASH. POST (Jan. 6, 2016), <https://perma.cc/XR7D-MFUU>.

355. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 603 (S.D.N.Y. 2013); FERGUSON REPORT, *supra* note 11, at 62–63.

356. See, e.g., Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 GEO. WASH. L. REV. 281 (2016); Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211 (2017).

357. Kohler-Hausmann, *supra* note 5, at 640; Natapoff, *supra* note 5, at 1348; PREETI CHAUHAN, ADAM G. FERA, MEGAN B. WELSH, ERVIN BALAZON & EVAN MISSHULA, *TRENDS IN MISDEMEANOR ARRESTS IN NEW YORK* 8–11 (2014), <https://perma.cc/4WFM-BAGX>.

individuals.<sup>358</sup> The depth of belief in this policing model is evident in both popular and academic scholarship for more than three decades.<sup>359</sup> The new era in policing instantiating these views is marked by changing definitions of the criminal, the expansion of law to accommodate new forms of social regulation, a burgeoning criminal procedure rendering moot substantive criminal law, new forms of punishment and control, a broadening social context in which law and regulation are enforced with the potential for criminal sanctions, and—most relevant for this Article—a renewed focus on social control of persons in lower social strata.<sup>360</sup> All of this adds up to what Marcus Dubber identifies as the “new police science.”<sup>361</sup>

A second connecting thread that we observed both in Ferguson and in New York is the menu of punishments and methods of social control following from this policing model. Fines and fees or other legal financial obligations are imposed on defendants. Pretrial detention for periods ranging from a few hours to a few weeks may result if bond is not posted. Even traffic violations, not punishable by jail time, can result in custody arrest.<sup>362</sup> Reporting obligations to probation officers, random drug testing, and other “treatment” conditions may be imposed, each of which carries escalating penalties if conditions are unmet. We are not alone in showing how this system of administrative rules serve as a form of punishment, with costs piling up even for those who are not found guilty of any criminal offense.<sup>363</sup>

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358. Sharon Dolovich & Alexandra Natapoff, *Mapping the New Criminal Justice Thinking*, in *THE NEW CRIMINAL JUSTICE THINKING* 1, 6 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (“These ‘order-maintenance’ and ‘zero tolerance’ policies amounted to an official decision to treat young men of color in certain neighborhoods as presumptive criminals . . .”).

359. See, e.g., BRATTON WITH KNOBLER, *supra* note 2; KELLING & COLES, *supra* note 2; SKOGAN, *supra* note 16; Corman & Mocan, *supra* note 25; Heymann, *supra* note 1; Kelling & Bratton, *supra* note 10; Livingston, *supra* note 19; Kelling & Wilson, *supra* note 15; Philip G. Zimbardo, *The Human Choice: Individuation, Reason, and Order Versus Deindividuation, Impulse, and Chaos*, 17 *NEB. SYMP. ON MOTIVATION* 237 (1969); Heather MacDonald, *‘Broken Windows’ Policing Does Work*, *NAT’L REV.* (June 8, 2015), <https://perma.cc/6VQ9-UYNH>.

360. Dolovich & Natapoff, *supra* note 358, at 14–15; see also WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 159 (2011).

361. *THE NEW POLICE SCIENCE: THE POLICE POWER IN DOMESTIC AND INTERNATIONAL GOVERNANCE* 1, 107 (Markus D. Dubber & Mariana Valverde eds., 2006) [hereinafter *NEW POLICE SCIENCE*].

362. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 324–26, 354–55 (2001) (affirming police authority to make warrantless arrests for petty offenses punishable only by fine). Gail Atwater was arrested for traffic violations including failure to wear a seatbelt and failure to carry a driver’s license and vehicle registration. *Id.* at 524. For more details on the consequences of Atwater’s arrest, see Bowers, *supra* note 7, at 989.

363. See, e.g., HARRIS, *supra* note 9, at 52–53; Logan & Wright, *supra* note 9, at 1211–12.

A third connecting thread is the expanding net of legal, social, and economic consequences of misdemeanor arrests and convictions: a criminal record; an immigration hold and detention leading perhaps to deportation; eviction from public housing or failure to meet rent obligations; suspension of driving privileges; disruptions in employment or schooling; and child custody disruption.<sup>364</sup> For those unable to post bond, a pretrial spell in jail can bias later proceedings toward harsher dispositions and sentences.<sup>365</sup> Failure to be present at any of a sequence of court dates can lead to a warrant and criminal arrest. In the wider community, harsh enforcement of minor disorder violations takes a psychological toll. Persistent “crackdowns” on the day-to-day activities of neighborhood residents in public spaces insert police into the developmental landscape of children living in those areas, leading to tensions and cynicism between citizens and police, even among neighborhood children.<sup>366</sup>

While the policing regimes in Ferguson and New York can be connected tactically, there also are connections in the ideology that animates these practices. One could argue that these policing regimes work to the benefit of local residents. Reducing fear of crime by removing signals of crime is a net benefit, regardless of actual changes in crime risks.<sup>367</sup> If the police focus on physical disorder, such as graffiti, improving those conditions could also be a net benefit by attracting and normalizing economic activity that can benefit the social and economic fortunes of local residents.<sup>368</sup>

If the theory linking social and physical disorder to crime is sound, then there should also be crime control benefits to the people and places where these tactics are concentrated.<sup>369</sup> But this is a contested claim, and so far, there is little evidence to show that this model of policing produces

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364. Howell, *supra* note 6, at 300–06; *see also* Jain, *supra* note 305, at 820–44.

365. Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 KAN. L. REV. 879, 880, 895 (2008); Marian R. Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, 28 CRIM. JUST. REV. 299, 313 (2003).

366. Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217, 229–31 (2005); *see also* PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY 150, 157 (2013) (showing that the presence of police is part of a spectrum of persistent disadvantages facing residents in black poor minority neighborhoods).

367. *See, e.g.*, TAYLOR, *supra* note 10, at 368.

368. Lorlene M. Hoyt, *Do Business Improvement District Organizations Make a Difference? Crime in and Around Commercial Areas in Philadelphia*, 25 J. PLANNING EDUC. & RES. 185, 190–91 (2005); *see also* SHARKEY, *supra* note 366, at 75.

369. Kelling & Bratton, *supra* note 10.

more than minor crime control benefits.<sup>370</sup> Certainly, removing both physical and social disorder might lead to improvements in neighborhood amenities, but it could also spark rounds of gentrification that result in conflict between new and incumbent residents, or otherwise disadvantage or displace local residents.<sup>371</sup> The presence of police intervening in the everyday routines of social interactions among local neighborhood residents may engender ill feelings toward police, legal cynicism, and a withdrawal from joining with the co-production of security.<sup>372</sup>

These features of the New Policing seem well suited for urban areas, where crime rates tend to be higher,<sup>373</sup> police forces larger, and policing resources deeper. Our interest in this Article is to connect the regimes in Ferguson with those in large cities such as New York. Ferguson is typical of small cities; these are places with population less than 50,000, low rates of violent crime, mostly single-family homes and low-rise block apartments, and low population density. Yet there are sub-locales in large cities that share those small-city features. The police precincts in the eastern part of New York City share similar structural characteristics with Ferguson: low rates of violent crime, low population density, a preponderance of single-family or low-rise housing, few public transportation options with correspondingly high rates of automobile ownership and usage. While the theory of social disorder underlying the New Policing may generalize to large and small cities, it has little apparent relevance to places with few indicia of social disorder or crime. Yet the strength of the ideology of policing disorder, or Broken Windows policing, has animated its spread across the country regardless of social, physical, or crime conditions, and with little attention to the thin evidence of its crime control benefits.<sup>374</sup> It is no surprise then that these policing

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370. Sophie Body-Gendrot, *Public Disorders: Theory and Practice*, 10 ANN. REV. L. & SOC. SCI. 243, 243–44 (2014) (arguing for a social constructionist view of disorder in which disorder can be viewed either as a source of democratic vitality or social pathology). For a review of the contradictory empirical evidence, see *supra* Part I. See also TAYLOR, *supra* note 10, at 22; Howell, *supra* note 6, at 276 & n.20; MacDonald, Fagan & Geller, *supra* note 323, at 10–11; Sampson & Raudenbush, *supra* note 28, at 638.

371. SHARKEY, *supra* note 366, at 152; see also Amy Schwartz et al., *Has Falling Crime Driven New York City's Real Estate Boom?*, 14 J. HOUSING RES. 101, 122–24 (2003).

372. Tyler & Fagan, *supra* note 254, at 264; Tyler, Fagan, & Geller, *supra* note 6, at 757–58.

373. See RUTH D. PETERSON & LAUREN J. KRIVO, DIVERGENT SOCIAL WORLDS: NEIGHBORHOOD CRIME AND THE RACIAL-SPATIAL DIVIDE 15 (2010); Tomislav V. Kovandzic, Lynne M. Vieraitis & Mark R. Yeisley, *The Structural Covariates of Urban Homicide: Reassessing the Impact of Income Inequality and Poverty in the Post-Reagan Era*, 36 CRIMINOLOGY 569, 572–74 (1998).

374. The Broken Windows theory was first advanced by Professor Zimbaro in his experiment in Palo Alto, California, and a New York City neighborhood in the Bronx.

tactics and logics have penetrated policing widely both in the United States and elsewhere.<sup>375</sup>

#### B. POLICING SOCIAL AND ECONOMIC BOUNDARIES

If not a prophylactic against a criminal invasion brought on by social disorder, misdemeanor arrests may be serving other purposes. The Ferguson Report, and litigation elsewhere challenging certain LFOs,<sup>376</sup> suggests that there are profit interests in the system of fines and fees in Ferguson. The private corrections litigation in Georgia and Alabama suggest that Ferguson is not an isolated case in the governmental pursuit of revenue from criminal justice actions.<sup>377</sup>

In Ferguson, it appears that black residents and black visitors are the prime targets of that enforcement.<sup>378</sup> This speaks to motives other than pure profit. There is no reason that whites living in Ferguson or passing through could not be targeted at comparable rates for enforcement of violations, ordinances, and minor misdemeanors. Targeting those offenses in a race-neutral way might increase the revenue flowing to the city: if white residents or visitors are better off economically, their ability to pay fines and fees would either replace or supplant those who cannot afford the taxing legal actions that lead to warrants and further personal monetary drains. The increase in revenue from diversifying the racial distribution of those targeted for legal-monetary sanctions might in fact benefit the FPD

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*See* Zimbardo, *supra* note 359, at 264, 287–93. Palo Alto, home to Stanford University and its surrounding community, was a small city in 1969. As described by Zimbardo, the experiment was done using a single car abandoned on a typical low-density street with a relatively low crime rate. The presence of a single disorderly vehicle in an otherwise orderly area did not inspire criminals to invade the area, nor did it launch a crime wave in Palo Alto. It was not until one of the experimenters broke a window in the abandoned car that it received any criminal attention. *Id.* at 290. The Bronx site was a high crime urban area that already had been blighted by extensive decay, including crime, abandoned and burnt out housing, and active drug markets. Rodrick Wallace, *A Synergism of Plagues: “Planned Shrinkage,” Contagious Housing Destruction, and AIDS in the Bronx*, 47 ENVTL. RES. 1, 1–2 (1988); *see also* JONATHAN MAHLER, LADIES AND GENTLEMEN, THE BRONX IS BURNING: 1977, BASEBALL, POLITICS, AND THE BATTLE FOR THE SOUL OF A CITY 29–30 (2006). An abandoned car in the Bronx was just another target for vandals looking to scavenge materials for resale in an illicit market. Zimbardo, *supra* note 359, at 287. There was no basis in either theory—given the lack of noise-free signals of disorder—nor in the case study design to make any causal inference that the vandalism of the car could be attributed to its presence in an already highly disordered neighborhood. Yet that is precisely the theory of “broken windows” that incorporated the Zimbardo results.

375. NEW POLICE SCIENCE, *supra* note 361, at 24; Forrest Stuart & Steve Herbert, *The Police and Inequality: Tales from Two Cities*, in THE SAGE HANDBOOK OF GLOBAL POLICING 193, 198 (Ben Bradford et al. eds., 2016).

376. *See supra* notes 115–116.

377. *Id.*

378. FERGUSON REPORT, *supra* note 11, at 63–69.

as well as the city generally. So why would the FPD not enforce the law more often and as aggressively with whites as it did with blacks?

One explanation is the defense of property. Raising the costs for black residents or visitors to move freely through either mixed or predominantly white social spaces would ward off encroachments that might diminish property value, or protect against property loss. Those motives, together with personal fears of, were drivers of the move toward segregation in early twentieth century St. Louis.<sup>379</sup>

A second and perhaps related explanation is the maintenance of physical space and boundaries separating black people in Ferguson from others. In other words, promoting segregation. The revenue interest of the Ferguson style of New Policing complements the interest in maintaining racial separation. Maximizing revenue by distributing enforcement proportionately by race or by allocating enforcement zones more uniformly might sacrifice the racial separation interest that the current policing model may serve.<sup>380</sup> This is more than simply a statistical form of discrimination: the profit and social control benefits of policing Ferguson-style suggests a preference or structural bias in Ferguson policing.

The pursuit of racial separation in Ferguson through policing is neither new nor surprising. Segregation runs through the history of Ferguson and the surrounding municipalities.<sup>381</sup> Ferguson is a small area where black and white homeowners live in close quarters, frequently crossing paths in their everyday movements and routines. Collective action by whites produced segregation in the form of legal instruments and social norms.<sup>382</sup> But the instruments available decades ago to manage racial separation within law and policy are no longer available. Formal legal barriers that enforced segregation, such as restrictive covenants, were banned in 1948 in *Shelley v. Kraemer*<sup>383</sup> and again later with the passage of the Fair Housing Act in 1968.<sup>384</sup>

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379. ROTHSTEIN, *supra* note 147, at 25–28.

380. *See, e.g.*, Michael W. Sances & Hye Young You, *Who Pays for Government? Descriptive Government and Exploitative Revenue Sources*, 79 J. POL. 1090, 1092–93 (2017) (showing that the use of fines and fees for local revenue disproportionately affects black voters and suppresses black representation)

381. *Id.* at 5–7.

382. MASSEY & DENTON, *supra* note 151, at 36–57; *see also* David M. Cutler, Edward L. Glaeser & Jacob L. Vigdor, *The Rise and Decline of the American Ghetto*, 107 J. POL. ECON. 455, 487 (1999) (citing the demise of legal barriers enforcing segregation after 1990).

383. *Shelley v. Kraemer*, 334 U.S. 1, 20–21 (1948) (finding that restrictive covenants barring blacks from home ownership was a “state action” that violated the rights of individuals under the equal protection clause of the Fourteenth Amendment).

384. Carol Rose & Richard R.W. Brooks, *Racial Covenants and Housing Segregation, Today and Yesterday*, in RACE AND REAL ESTATE 161, 161, 169 (Adrienne Brown & Valerie Smith eds., 2015); ROTHSTEIN, *supra* note 147, at 34 n.33.

If collective action by whites produced twentieth century segregation in Ferguson and elsewhere, there is no reason why concerted political actions by whites—with the consent and participation of black officials in Ferguson and its neighbors<sup>385</sup>—would not sustain a policing regime that enforces social and economic boundaries. Administrative and agency actions in this instance created a policing model that maintained separation socially, if not spatially, without resorting to the banned segregation instruments of the past.

The City of Ferguson, as did several of its neighbors, appears to have leveraged the regime of fines and fees, tolerated by state law and enforced by its small local police forces, to maintain racial boundaries defined by law and local economics—boundaries that reinforced the spatial segregation typical of many of these small cities. By coupling the regimes of LFOs with a brand of the New Policing that enforced minor violations and misdemeanors to generate revenue and criminal liabilities for those who failed to pay, Ferguson created alternative mechanisms to enforce segregation by building a *de facto* system of economic disenfranchisement under the color of law. Policing helps to lock people in place both spatially and economically. Systematic coupling of police actions against minority motorists and the fiscal and legal consequences of those actions for blacks maintains a form of economic and social separation that could no longer be maintained by the instruments of the past, including housing codes and other discriminatory policies.

Perhaps in cities such as New York, where there is less dependence on revenue from fines and fees, the economic prong of the New Policing is a secondary and non-essential factor contributing to this separation dynamic. The relative sizes of municipal budgets suggest that the rationales for the New Policing and the regime of LFOs differ in cities compared to smaller areas. Smaller places are more likely to use traffic tickets to generate revenue to offset shortfalls in municipal budgets and declines in municipal revenue.<sup>386</sup>

Yet what connects the policing model in a place like Ferguson with policing under Broken Windows and order maintenance in the larger cities is interest in managing minority populations.<sup>387</sup> Policing in Ferguson imposed both criminal and economic sanctions on its residents, creating strong disincentives to move and associate. Concentrated enforcement of the New Policing tactics imposes both of these sanctions as well in larger

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385. FERGUSON REPORT, *supra* note 11, at 3, 21–25.

386. Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rear View Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & ECON. 71, 86–87 (2009) (using panel data from North Carolina counties to show that police issue significantly more tickets in the year following a decline in local government revenue).

387. Kohler-Hausmann, *supra* note 5, at 691–92.

cities like New York, where routine movements can also provoke the police gaze and intrusion.<sup>388</sup> In Ferguson, pretexts for police actions exacted an economic cost through the fine regime for everyday movements, the corollary in New York and other big cities is the social and legal tax for such movements.

### C. REPRODUCING SEGREGATION

In cities, as in suburbs and exurbs, movements of citizens are affected by police tactics. When police routinely and promiscuously intervene in the everyday lives of citizens, they impose interaction costs that inevitably deter residents from moving freely. And when these police actions produce legal and economic consequences for those already in disadvantaged social positions, those consequences effectively lock them in already disadvantaged places by constraining choices of neighborhood selection.<sup>389</sup> Even when a neighborhood changes for the better, it retains its status relative to other neighborhoods that are changing simultaneously.<sup>390</sup> Because police deployments and actions are racialized and focused in poor and segregated places, police in effect reproduce inequality, racial stratification, and segregation through criminal legal enforcement actions that can constrain mobility.<sup>391</sup> Two types of police enforcement instruments can proscribe movements: the costs of legal interventions and the dignity costs of police intrusions.

#### 1. Residual Legal Costs

First, as in Ferguson, intensive enforcement of non-criminal violations and minor misdemeanors create court actions with potentially substantial economic and legal consequences for indigent persons. Review papers using meta-analysis techniques find that race enters into police decisions to arrest, rather than other discretionary dispositions in misdemeanor enforcement.<sup>392</sup> Police targeting decisions—how they are deployed and what they do once in place—define which crimes, people, and especially which places matter. Because places are conflated in most cities with

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388. See generally Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop-and-Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397 (theorizing mechanisms through which a program of stops that blankets minority communities can create and reinforce social and racial stratification).

389. Robert J. Sampson & Patrick Sharkey, *Neighborhood Selection and the Social Reproduction of Concentrated Racial Inequality*, 45 DEMOGRAPHY 1, 20–21 tbl.4 (2008) (showing intergenerational reproduction of racial inequality through constrained mobility pathways that vary by race and ethnicity).

390. Sampson & Morenoff, *supra* note 76, at 199.

391. Huq, *supra* note 388, at 2430–40.

392. Kochel, Wilson & Mastrofski, *supra* note 129, at 479, 498.



racial concentration,<sup>393</sup> enforcement by social area and social group applies legal sanctions selectively to ensure transaction costs from repetitive court appearances to clear minor legal matters such as summonses, or stigma costs of conviction.<sup>394</sup>

Once subject to arrest, defendants face court processes that now resemble administrative and bureaucratic regimes of regulation and control, and that stretch out over months.<sup>395</sup> This new model of adjudication has replaced the determination of guilt and punishment for these offenses, defaulting to actuarial determinations of dispositions, or a *going rate*.<sup>396</sup> Defendants often have to navigate this system with ill-prepared and under-resourced defense counsel.<sup>397</sup> The regimes of LFOs and the bureaucratic entanglements of processing these arrests create burdens and costs for the accused, guilt aside. We see this both in Ferguson and New York, and the diffusion of this policing model suggests that this is the reality in both urban and municipal courts elsewhere.

The adjudication process, whether resulting in a sanction or dismissal, also exacts costs and reinforces the risks of managerialism for its targets. As we saw in New York, and as others have pointed out, interactions with police under the New Policing—if they do proceed beyond stops to court involvement—lead nowhere. Adjudication of alleged crimes has defaulted to a maze of court appearances that often lead to dismissal or the most minor forms of punishment. But it is the repeated mandates to appear in court, and to pay fines and fees along the way, that creates the hazards of deeper legal entanglements through warrants and extended reporting requirements to agents who carry out the social control mandates of the court.

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393. See, e.g., MASSEY & DENTON, *supra* note 151; Shertzer & Walsh, *supra* note 151.

394. See, e.g., William Glaberson, *Courts in Slow Motion, Aided by Defense*, N.Y. TIMES (Apr. 15, 2013), <https://perma.cc/L96C-6SXS> (showing that repeated delays in resolving misdemeanor cases and summons burdens defendants with numerous court appearances stretching over months while cases remain pending).

395. *Id.*

396. Kohler-Hausmann, *supra* note 5, at 623–25.

397. Glaberson, *supra* note 394; see, e.g., Complaint at 6–12, *Yarls v. Bunton*, No. Civ. 16-31-JJB-RLB, 2017 WL 424874 (M.D. La. 2017) (alleging that criminal defendants in Orleans Parish are denied defense counsel due to budgetary shortfalls and excessive caseloads); Heather Baxter, Gideon's *Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 360–63 (2010); Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 749–50 (2016) (arguing for parity in the resources that prosecutors allocate and the methods they use to investigate crimes by police with investigation and prosecution of crimes by citizens); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 268 (2004) (arguing for parity in resources allocated to prosecutors and to defense counsel).

As a result of the new managerial posture of the misdemeanor courts, arrest now launches its own form of punishment once a case is calendared. As Malcolm Feeley once famously observed, the process indeed remains the punishment.<sup>398</sup> But the process itself has changed from the complex bureaucratic disarray described by Feeley to an administrative regime infused with scheduled fees, repetitive docket appearances, lengthening arrest records, and a host of ancillary legal consequences.<sup>399</sup> The accumulation of burdens from these stigma and complications from both arrest and non-arrest police actions complicates social mobility by disadvantaging economic enfranchisement, in effect locking already poor people in poor places.<sup>400</sup>

This is one part of the dynamic of the reproduction of segregation. The overlap of segregation and consequential policing is apparent from maps of misdemeanor arrests and maps of segregation. Comparing Figures 5–8 shows that misdemeanor arrests, street stops, poverty, and segregation are essential characteristics of impoverished neighborhoods of New York. When people already in conditions of segregation risk further pointless misdemeanor arrests for minor crimes, the legal costs of everyday movements reinforce segregation by simply deterring movements within, much less across, those neighborhood boundaries.

## 2. Social Transactional Costs

The second face of policing that deters movement is active surveillance and intrusion through the programmatic application of *Terry* stops or investigative stops.<sup>401</sup> The saturation of certain neighborhoods with stops suggested extremely tight surveillance and disruption of everyday movements primarily of young black males.<sup>402</sup> Several cities experienced this type of blanketing of entire neighborhoods with intrusive

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398. FEELEY, *supra* note 304, at 12–13. Feeley distances this process from the tempting analogy of the “assembly line,” citing complexity in the everyday decisions of prosecutors and defense counsel in negotiating pleas. *Id.*

399. JACOBS, *supra* note 347, at 303–05 (suggesting similarities between a criminal record and a job resume that signals to prospective employers, landlords, or even marital partners that one’s criminal capital may exceed that person’s social capital); *see also* Bowers, *supra* note 317, at 1699; Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 *FORDHAM URB. L.J.* 1043, 1060 (2013).

400. *See* Sampson & Morenoff, *supra* note 76, at 200 (describing the absence of social and economic mobility over time for poor people living in persistently poor places).

401. Fagan, Braga, Brunson & Pattavina, *supra* note 341, at 553–66; Meares, *supra* note 4, at 164–65.

402. Report of Jeffrey Fagan, Ph.D. at 3–4, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034); *Floyd v. City of New York*, 959 F. Supp. 2d 540, 646, 662 (S.D.N.Y. 2013).

police activity,<sup>403</sup> including and especially New York City.<sup>404</sup> In the *Floyd* trial on constitutional violations in the conduct of stop and frisk activity, one of the litigated facts was that police stops were concentrated in neighborhoods with high percentages of black and Latino residents, net of the influence of local crime rates.<sup>405</sup> The evidence also showed a pattern of stops of individuals who were out of place: people who had crossed racial boundaries and entered places where other races or ethnicities were the dominant presence.<sup>406</sup> In other words, patterns both of misdemeanor arrests and street stops described place-specific enforcement of law within racially defined boundaries.

How police behave in these contacts shows just what the costs of free movements are, both within and across neighborhoods. Proactive or aggressive policing—central features of the New Policing—can facilitate recurring and sometimes disturbing incursions on the dignity of citizens in their everyday social interactions with police.<sup>407</sup> In *Terry*, the Court recognized the risks of programmatic street stops incurring personal dignitarian harms:

[I]t is simply fantastic to urge that [a stop and frisk] performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a ‘petty indignity.’ It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.<sup>408</sup>

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403. See, e.g., AYRES & BOROWSKY, *supra* note 46, at 5–7; Rod K. Brunson & Ronald Weitzer, *Negotiating Unwelcome Police Encounters: The Intergenerational Transmission of Conduct Norms*, 40 J. CONTEMP. ETHNOGRAPHY 425, 431 (2011); Brunson & Weitzer, *supra* note 7, at 859–60; Fagan et al., *Broken Windows Revisited*, *supra* note 33, at 312–14; Craig B. Futterman, Chaclyn Hunt & Jamie Kalven, “They Have All the Power”: *Youth/Police Encounters on Chicago’s South Side* 1–3 (Chicago Public Law and Legal Theory Working Paper No. 573, 2016); MacDonald, Fagan & Geller, *supra* note 323, at 1–2; Tyler, Fagan & Geller, *supra* note 6, at 765–67.

404. See, e.g., Harris, *supra* note 45, at 853, 855–56, 871.

405. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 660 (S.D.N.Y. 2013) (finding that officers conducted a pattern of “indirect racial profiling” by concentrating stops in minority neighborhoods that routinely violated Fourth Amendment standards for investigative stops and frisks); see also Fagan et al., *Broken Windows Revisited*, *supra* note 33, at 323–25; John Cassidy, *The Statistical Debate Behind the Stop-and-Frisk Verdict*, THE NEW YORKER (Aug. 13, 2013), <https://perma.cc/RJT6-233D>.

406. Report of Jeffrey Fagan, Ph.D. at 42 tbl.7, 44 tbl.8, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034).

407. See Howell, *supra* 6, 292–315, 325–26 (showing evidence that aggressive policing of misdemeanor and other minor non-fingerprintable offenses has adverse consequences that include economic costs to citizens, dignity incursions that produce legal cynicism, and disincentives to cooperate with police); Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L & CRIMINOLOGY 15, 82 (2003).

408. *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968).

After *Terry*, the court did not return to the dignity risks of every day stops, until it did in *Atwater v. Lago Vista*, a case that highlighted a different dimension of the New Policing: the exercise of arrest discretion for the most minor of traffic violations.<sup>409</sup> If the arrest of Gail Atwater for failing to buckle her seatbelt was, as the Supreme Court noted, a “pointless indignity,”<sup>410</sup> imagine the scope of such indignities in the fruitless stops and street detentions of over four million citizens in New York since 2003, most of whom were found to have committed no crime, nor infraction of a civil ordinance.<sup>411</sup>

Recent studies analyzing the content of interactions between citizens and police in the course of *Terry* stops show the emotional and often physical freight of being stopped. Firsthand accounts of police encounters were reported by Professors Rod Brunson and Ronald Weitzer in a recent article,<sup>412</sup> by Michael Powell in a series of interviews in New York with college students,<sup>413</sup> and also by college students in focus groups conducted again in New York City.<sup>414</sup> Each study offers strong similarities in the narratives describing inconsistent and arbitrary stop rationales that bordered on the pretextual. The accounts of everyday indignities are stark and take several forms: unwarranted stops, stops alleging criminal wrongdoing, unwarranted searches of personal effects and body searches, physical aggression and property destruction, temporary detentions in police precincts, racial and homophobic invective, and threats of legal action and further violence.

Ethnographic studies show similar reactions by police. Brunson and Weitzer showed that police were particularly harsh in conducting stops of black youths who were out of place.<sup>415</sup> Police reserved special hostility for youths in mixed race groups.<sup>416</sup> Brunson and Weitzer also showed that

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409. *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2000) (O’Connor, J., dissenting) (“[A]s the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual.”). Interestingly, the respondent in this case was a white middle-class woman.

410. Bowers, *supra* note 7, at 989.

411. See *supra* Part III; *Floyd*, 959 F. Supp. 2d at 558–59; OAG REPORT, *supra* note 127, at 111–17; Bowers, *supra* note 317, at 1696 n.189; Kohler-Hausmann, *supra* note 5, at 669; *The Stop, Question and Frisk Report Database*, *supra* note 252.

412. Brunson & Weitzer, *supra* note 7.

413. Michael Powell, *Police Polish Image, but Concerns Persist*, N.Y. TIMES (Jan. 4, 2009), <https://perma.cc/P8ZZ-KMUN>.

414. Jeffrey Plaut, Dawn Hoffman & Scott Lowenstein, Global Strategy Group, *Understanding Stop & Frisk: Report of Findings from Focus Groups with African American and Latino New Yorkers* (2011) (on file with authors).

415. Brunson & Weitzer, *supra* note 7, at 865–68; see also RIOS, *supra* note 3, at 154–56.

416. Brunson & Weitzer, *supra* note 7, at 868.

police aggressively enforced racial separation with white youths, comparable to similar enforcement with their black counterparts. Whites traveling with—or simply being in the company of—young black males were subjected to the same harsh treatment as groups of black males. Spatial segregation was enforced for white youths when traveling in racially mixed or majority-black neighborhoods. Racial separation also was enforced with white youths who crossed cultural boundaries by appearing in public while dressed in hip-hop apparel. Whatever racial privilege whites may enjoy in freedom from police suspicion or action in their typical routines, it may be pierced when they violate racial covenants and codes of social organization that police enforce, whether subconsciously or as a matter of shared cultural norms and preferences.

Not only did the risks differ, but the course of these mixed-race encounters was distinctly different in tone and in basic respect for the dignity of the respondents. The descriptions by white respondents along these lines are vivid. For example, a white youth named Toby reported a similar experience when they journeyed into a majority-black neighborhood and were stopped by the police:

[We] was on a corner during school hours and a cop talked to us about what we were doing, and then took us back to school. We got in trouble for it at school, it sucked. . . . The cop that stopped us was being a dick at first. He kept asking us if we were going on a booty call together. You know, like we were gay. Then kept making jokes about booty calls and then ask[ed] if we left school because of the “brothers.” Then he asked if we were scared of the “brothers” and if that is why we left school or if the “brothers” booty call[ed] us and that is why we left. The cop finally quit giving us shit, took us back to school, and we got three days of in-school suspension.<sup>417</sup>

Toby evidently crossed two social boundaries, inviting a harsh police response: he was spatially out of place as a white youth in a black neighborhood, and he was traveling in a racially mixed group. Yet he was also quite sure that, although the officer’s comments were offensive, they felt that they “kinda got off easy.”<sup>418</sup> But that was not always the case. Kyle told this story:

[The police] asked me what I was doing in a Black neighborhood, ’cause I’m a White boy. They said, ‘You

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417. *Id.* (alteration in original).

418. *Id.*

ain't sellin' drugs are you?' and he tried to plant drugs on me. I didn't have weed on me 'cause I never sold it or smoked it but the [officer] put it in my pocket, put his hand in my pocket and pulled it out. I felt his thumb was folded under his hand, there's a lump. And then when he touched me I felt a bag under his thumb, he pulled it out and then said, "Aha, what's this?"<sup>419</sup>

Cultural integration was treated as harshly as was crossing spatial boundaries. White youths who dressed in "hip hop" clothing such as saggy pants or wide-brimmed baseball caps, or who had "grills," or wore new "Jordans" (tennis shoes), were all viewed suspiciously or treated harshly, in the accounts of the St. Louis youths.

The attribution of suspicion in these instances, and the pathway from suspicion to harsh treatment in the course of everyday policing, evokes Jerome Skolnick's timeless archetype of the "symbolic assailant"—an individual whose mere attire, demeanor, or language is construed by police as a cue that the person is a potential threat or involved in illegal activity.<sup>420</sup> But in the New Policing, in an era of declining crime rates, it also marks these individuals as targets for mechanisms of social control that reinforce social and economic boundaries. The symbolic assailant is deeply embedded in the social context of race and neighborhood, mixed in with attributions of disorder and criminality.<sup>421</sup> It is common to cities as far apart as St. Louis, Ferguson, and New York, as well as Chicago and Kansas City. What perhaps links the New Policing with the reproduction of segregation is the banality of its enforcement, its indifference to dignitarian concerns, and the acts of criminalization and gratuitous violence that seem to follow from policing that is endemic to poor people in poor places.

### 3. Beyond Inequality: Social, Health, & Economic Legacies of the New Policing

Residential segregation has been an enduring feature of American urban life for persons of African descent for decades.<sup>422</sup> Segregation of blacks is so severe that sociologists Douglas Massey and Nancy Denton

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419. *Id.* (alteration in original).

420. SKOLNICK & BAYLEY, *supra* note 29, at 45–48.

421. Alpert, MacDonald & Dunham, *supra* note 182, at 422–23.

422. MASSEY & DENTON, *supra* note 151, at 2 ("No group in the history of the United States has ever experienced the sustained high level of residential segregation that has been imposed on blacks in large American cities . . .").

refer to the condition as “hypersegregation.”<sup>423</sup> In cities across the United States, people tend to cluster in social and economic spaces with people who share their educational, socioeconomic, racial, and ethnic backgrounds.<sup>424</sup> Even as U.S. cities have become more racially diverse in the past two decades with rising Latino immigration, racially distinct neighborhoods persist and remain a central defining feature of the urban landscape of many cities. In other words, racial segregation today has a multigroup structure that spans artifactual neighborhood boundaries to reflect segregation patterns across communities within a wider metropolitan area.<sup>425</sup> This spatial configuration, which Chad Farrell terms “segregation amid diversity,” characterizes the segregation patterns we observed both in New York and Ferguson.<sup>426</sup>

Segregation by itself may or may not have adverse effects on social advantage, but it is related to upward mobility and income inequality.<sup>427</sup> Historically, the blocking effects of racial segregation on social mobility are most pronounced in the middle of the social stratification ladder, where white-collar socioeconomic strata are statistically adjacent to blue-strata.<sup>428</sup> The conflation of racial segregation and economic mobility means that, typically, a black adolescent or young adult male in U.S. cities lives in very different economic and social circumstances than his white counterpart: different types of schools, different social networks, different levels of access to social capital leading to crime, and different exposure to the police and to violence.<sup>429</sup> The blocking effects of segregation mean

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423. Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 DEMOGRAPHY 373, 373 (1989).

424. Bryan S. Graham, *Identifying and Estimating Neighborhood Effects 2* (Nat’l Bureau of Econ. Research, Working Paper No. 22575, 2016) (reporting his calculations of neighborhood characteristics using the *Neighborhood Change Database*,. Graham estimates that:

In 2000 the average Black individual lived in a city where over 50 percent of her immediate neighbors were Black, although just 20 percent of residents city-wide were. She was two and one half times as likely to have a Black neighbor relative to a counterfactual world without residential segregation by race.

*Id.* at 2 (footnote omitted).

425. Chad R. Farrell, *Bifurcation, Fragmentation or Integration? The Racial and Geographical Structure of US Metropolitan Segregation 1990–2000*, 45 J. URB. STUD. 467, 468–69, 472 (2008) (describing a “patchwork of different groups occupying spatial niches within large, diverse metropolitan areas” spanning boundaries of small municipalities within “an array of incorporated municipalities and their unincorporated equivalents”).

426. *Id.* at 468.

427. Duncan & Duncan, *supra* note 155, at 500; *see also* Farrell, *supra* note 425, at 469 (“Residential segregation can also block pathways to socioeconomic mobility.”).

428. Duncan & Duncan, *supra* note 155, at 502.

429. SHARKEY, *supra* note 366, at 30–33.

that people in these areas are far less likely to better their economic circumstances than whites.

We observed in two quite different locales that the cumulative and aggregate effects of New Policing placed economic burdens and social stigma on blacks and, to a slightly lesser extent, Latinos living in conditions of spatial and racial segregation. When families are given the chance to escape poor and racially segregated neighborhoods, economic disadvantage can be overcome if they can move to neighborhoods with higher income levels and less segregation than the neighborhoods they had left.<sup>430</sup> But those chances are out of reach for many families, whose escapes are blocked by segregation and criminal justice involvement. People living in neighborhoods with high levels of racial fragmentation and income inequality have less access to public goods, and lower levels of civic engagement that might alleviate those conditions.<sup>431</sup> In other words, black residents of highly segregated and economically unequal neighborhoods have limited access to the types of everyday material services (such as, libraries, supermarkets, parks, and cultural institutions) that characterize economically better-off places.<sup>432</sup> Segregation, in other words, determines access to such essentials as educational and employment opportunities for African-Americans, truncating their socioeconomic mobility and reinforcing racial inequalities.<sup>433</sup>

People in segregated neighborhoods also form weaker bonds with their neighbors, attenuating the formation of social capital—trust and ties between neighbors—that can, in conditions of high social capital, translate

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430. Micere Keels, Greg J. Duncan, Stefanie Deluca, Ruby Mendenhall & James Rosenbaum, *Fifteen Years Later: Can Residential Mobility Programs Provide a Long-Term Escape from Neighborhood Segregation, Crime and, Poverty?*, 42 DEMOGRAPHY 51, 71 (2005) (“Helping low-income minority families relocate to communities that are racially integrated, [and] economically prosperous . . . appears to be beneficial in both the short and long run.”); see also Jake Intrator, Jonathan Tannen & Douglas S. Massey, *Segregation by Race and Income in the United States, 1970–2010*, 60 SOC. SCI. RES. 45, 54–57 (2016).

431. See, e.g., Alberto Alesina, Reza Baqir & William Easterly, *Public Goods and Ethnic Divisions*, 114 Q. J. ECON. 1243, 1274 (1999) (showing evidence that ethnic fragmentation with neighborhood segregation can lead to a low supply of public goods, including public education); see also Andrea Tesei, *Racial Fragmentation, Income Inequality and Social Capital Formation: New Evidence from the U.S.* 2 (2011) (unpublished paper), <https://perma.cc/XJ6Q-W9RX>.

432. JOHN R. LOGAN, SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS, HISPANICS AND ASIANS IN METROPOLITAN AMERICA 1, 5, 9 (2011), <https://perma.cc/XM3W-KH27> (showing that black and Hispanic households live in neighborhoods with more than one and a half times the poverty rate of neighborhoods where the average non-Hispanic, white lives).

433. David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REP. 404, 407 (2001).



into better economic fortunes and social mobility.<sup>434</sup> These associations and interactions among neighborhood residents define the socioeconomic environments of their members; when locked into isolated and segregated places, these environments can create and perpetuate inequality between these associational networks and similar networks in less isolated areas.<sup>435</sup>

The blocking effects of segregation on mobility serve to consign those living in segregated neighborhoods to long-term exposure to a set of social and psychological toxins that reinforce the individual and collective disadvantages of these poverty traps.<sup>436</sup> First, and perhaps most important, is the subsequent exposure to crime and victimization. Across studies, there is a robust and persistent link between racial residential segregation and neighborhood rates of violent crime. Professors Logan and Messner show these effects for suburban communities surrounding metropolitan areas, while Professors Peterson and Krivo focus on inner-city neighborhoods, again in large cities.<sup>437</sup> Professor Douglas Massey further specifies the connection between income deprivation, concentrated poverty (via segregation), and a “high risk of physical injury, violent death, and criminal victimization.”<sup>438</sup> Professors Edward Shihadeh and Nicole Flynn showed the same, but used a definition of segregation based on spatial isolation—the social and physical distances of black residents from whites—to show the link between high degrees of “segregation” and violent crime.<sup>439</sup> Segregation also seems to multiply its effects over time

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434. For a detailed exposition of social capital theory and function, see James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. S95, S100–S105 (1988).

435. Steven N. Durlauf, *Associational Redistribution: A Defense*, 24 POL. & SOC’Y 391, 392–94 (1996) (showing that these associations and network interactions are observed at the neighborhood level, where social capital represents a collective resource for the neighborhood that shapes the economic fortunes of its residents).

436. Sampson & Morenoff, *supra* note 76, at 199 (“[N]eighborhoods remain remarkably stable in their relative economic standing . . . which means that the overall pattern of neighborhood inequality did not change much over time [and that] further change is invariably in the direction of greater racial homogeneity and more poverty.”).

437. John R. Logan & Steven F. Messner, *Racial Residential Segregation and Suburban Violent Crime*, 68 SOC. SCI. Q. 510, 510 (1987) (arguing for the consideration of “racial residential segregation as an independent variable with important consequences for metropolitan communities”); Ruth D. Peterson & Lauren J. Krivo, *Racial Segregation and Black Urban Homicide*, 71 SOC. FORCES 1001, 1001, 1006 (1993) (showing evidence from 125 central cities that “social isolation . . . is the mechanism by which segregation leads to higher levels of homicide among African Americans”).

438. Douglas S. Massey, *Getting Away with Murder: Segregation and Violent Crime in Urban America*, 143 U. PENN. L. REV. 1203, 1210 (1995) (describing the mechanisms by which segregation creates conditions leading to elevated risks of violent crime victimization).

439. Edward S. Shihadeh & Nicole Flynn, *Segregation and Crime: The Effect of Black Social Isolation on the Rates of Black Urban Violence*, 74 SOC. FORCES 1325, 1341 (1996) (showing that, in addition to residential segregation, unevenness in the spatial

as populations change in neighborhoods. Research in Chicago neighborhoods from 1970–1990 shows that increases in neighborhood homicide and concentrated social deprivation over a twenty-year period were associated with increases in black population, but decreases in white population.<sup>440</sup> Recent research shows similar evidence of elevated rates of violence in both Latino and black neighborhoods across central cities in the United States.<sup>441</sup>

Several studies report that racial segregation exacerbates the prevalence and severity of health disparities,<sup>442</sup> and is a fundamental cause of racial disparities in health.<sup>443</sup> For example, researchers have reported that black infants in hypersegregated metropolitan areas were more likely to be preterm births.<sup>444</sup> Overall, access to health care is limited in segregated neighborhoods, including higher rates of hospital closings.<sup>445</sup> One explanation is the concentration of uninsured people in the catchment areas of those hospitals, creating a fiscal strain that often leads to

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distribution of blacks and whites leads to physical and social isolation and in turn, higher rates of both black homicide victimization and black robbery victimization).

440. Jeffrey D. Morenoff & Robert J. Sampson, *Violent Crime and the Spatial Dynamics of Neighborhood Transition: Chicago, 1970–1990*, 76 SOC. FORCES 31, 56 (1996) (showing sharp racial group differences in the growth of homicide in black and white neighborhoods as segregation and poverty changed over time).

441. Ruth D. Peterson & Lauren J. Krivo, *Segregated Spatial Locations, Race-Ethnic Composition, and Neighborhood Violent Crime*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 93, 102 (2009) (showing that the spatial distribution of disadvantage and segregation accounts for higher levels of violence in both black and Latino neighborhoods compared to white neighborhoods).

442. See, e.g., Tse-Chuan Yang, Yunhan Zhao & Qian Song, *Residential Segregation and Racial Disparities in Self-Rated Health: How Do Dimensions of Residential Segregation Matter?*, 61 SOC. SCI. RES. 29 (2017) (discussing evidence that specific dimensions of residential segregation are implicated in health disparities).

443. See, e.g., Williams & Collins, *supra* note 433, at 404.

444. Theresa L. Osypuk & Dolores Acevedo-Garcia, *Are Racial Disparities in Preterm Birth Larger in Hypersegregated Areas?*, 167 AM. J. EPIDEMIOLOGY 1295, 1300 (2008) (“[T]he probability of preterm birth for Blacks was higher, and . . . the racial disparity in preterm birth was larger, for infants born in metropolitan areas characterized by hypersegregation. . . .”); Emily Walton, *Residential Segregation and Birth Weight among Racial and Ethnic Minorities in the United States*, 50 J. HEALTH & SOC. BEHAV. 427, 436–37 (2009) (showing that the incidence of low birth weight increases with the percentage of Latino and African-American population in U.S. cities); see also Anna Forte, *Segregation and Health*, OAK PARK REG’L HOUSING CTR. (June 22, 2016), <https://perma.cc/UM6Z-AZ EQ>.

445. Sara McLafferty, *Neighborhood Characteristics and Hospital Closures: A Comparison of the Public, Private and Voluntary Hospital Systems*, 16 SOC. SCI. MED. 1667, 1671 tbl.5 (1982) (showing that closings of each of three different types of hospitals were more likely in neighborhoods with higher concentrations of black residents); David G. Whiteis, *Hospital And Community Characteristics In Closures of Urban Hospitals, 1980–87*, 107 PUB. HEALTH REP. 409, 414–15 (1992) (showing that hospital closings from 1980–1987 were predicted by the percent of black population in the community).

closings.<sup>446</sup> In addition, federal funding cuts in that era in unemployment insurance, income support, food stamps, and child nutrition programs disproportionately affected poor people in predominantly minority neighborhoods, increasing their demand for health care that was increasingly scarce and inaccessible to them.<sup>447</sup> One study showed that pharmacies in predominantly minority New York City neighborhoods were less likely than pharmacies located elsewhere in the city to stock adequate amounts and types of medication.<sup>448</sup>

The cumulative effects of segregation on health, violence, and socioeconomic isolation from educational and economic opportunities suggest a process of stress proliferation that translates into “large and systematic inequalities in physical health, longevity, and emotional well-being.”<sup>449</sup> Stress experiences at the individual level, such as discriminatory treatment or poor access to health care or education, aggregate over time and are magnified into health impacts of structural or contextual factors such as concentrated poverty, racial segregation, lower educational attainment, environmental hazards, and neighborhood disorder.<sup>450</sup> The effects of neighborhood disorder, where policing is concentrated, on stressors that ultimately affect health can also be seen in psychological stress responses, such as fearful anxiety or depression.<sup>451</sup> These same stressors also produce physiological signs of autonomic arousal including nausea, troubled breathing, chest pains, upset stomach, and muscle weakness.<sup>452</sup> Although research on stressors has not looked (yet) at police treatment, some studies have shown the psychological impacts on mental health of harsh interactions with police in the context of New Policing.<sup>453</sup>

Other work shows how racial segregation and inequality impacts the economic lives of black persons in their access to capital and their ability

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446. McLafferty, *supra* note 445, at 1671.

447. Whiteis, *supra* note 445, at 414–15.

448. R. Sean Morrison et al., “*We Don’t Carry That*”—*Failure of Pharmacies in Predominantly Nonwhite Neighborhoods to Stock Opioid Analgesics*, 342 *NEW ENG. J. MED.* 1023, 1025 (2000) (showing that pharmacies in predominantly nonwhite neighborhoods in New York City were less likely to stock opioids than pharmacies in predominantly white neighborhoods).

449. Peggy A. Thoits, *Stress and Health: Major Findings and Policy Implications*, 51(S) *J. HEALTH & SOC. BEHAV.* S41, S46 (2010) (summarizing research linking segregation to physical and mental health stressors that are concentrated among disadvantaged group members).

450. *Id.*

451. Terence D. Hill, Catherine E. Ross & Ronald J. Angel, *Neighborhood Disorder, Psychophysiological Distress, and Health*, 46 *J. HEALTH & SOC. BEHAV.* 170, 176–79 (2005).

452. *Id.* at 181.

453. *See, e.g.*, Geller et al., *supra* note 6.

to multiply it. For example, attributions of class and crime combine to devalue the economic status of blacks in civil tort claims in the eyes of white jurors.<sup>454</sup> These patterns lead to biases that in turn tend to reduce the monetary value attributed to the income and property of black people, or lead jurors to see black people's money as having come from morally suspect sources, and hence devalue their loss.<sup>455</sup> Professor Regina Austin describes a case arising from a traffic accident where several jurors reported that "they did not want to award anything to [the plaintiff] because she was a fat black woman on welfare who would simply blow the money on liquor, cigarettes, jai alai, bingo or the dog track."<sup>456</sup> Austin concludes that the "[p]laintiff was . . . beholden to them and their class for any money she had, whatever form it took, and the jurors in turn felt justified in keeping a tight rein on the purse strings."<sup>457</sup>

Such attitudes go beyond the criminal stigma to reflect a plaintiff's presumed position in the labor market and the low market value of her labor. It is a form of collective suspicion, but generalized from criminal behavior to attributes associated with racial stratification and concentration. In other words, jurors' biased view of a black plaintiff's worth becomes a reproducer of her already diminished (and suspect) social and economic standing. Professor Austin concludes that the money being awarded was not simply an economic determination, but a calculation that also reflected social and cultural modifiers that owed to a black defendant's place toward the bottom rungs of social stratification. It is not too hard, in this light, to connect the deeply instantiated system of racially latent taxation in Ferguson with the devaluation of the labor and lives needed to generate the revenue that is transferred to the city to pay for its largely white police force. It is not only the money that is devalued, it is

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454. Ronen Avraham & Kimberly Yuracko, *Valuing Black Lives: Constitutional Challenges to the Use of Race-Based Tables in Calculating Tort Damages* 5 (Univ. of Tex. Sch. of Law, Public Law & Legal Theory Research Paper No. 674, 2017), <https://perma.cc/SJZ3-KM79> (critiquing the use of race-based wage, life expectancy and work-life expectancy tables in calculating tort awards that damage racial minority communities as well as individuals).

455. *Id.* at 4, n.3, 12 n.29; see also Regina Austin, "Black People's Money": *The Impact of Law, Economics, and Culture in the Context of Race on Damage Recoveries* 2 (Univ. of Pa. Inst. for Law & Econ., Research Paper No. 16-24, 2012), <https://perma.cc/W3VE-52XR> (theorizing that black people's money is worth less than whites' because their "cash is considered petty [in small amounts] and in large amounts it is considered evidence of crime"). Jurors also said that they, as taxpayers, "would be paying one way or another, by awarding money in [a] case or through welfare." *Wright v. CTL Distribution, Inc.*, 679 So. 2d 1233, 1234 (Fla. Dist. Ct. App. 1996).

456. Austin, *supra* note 455, at 3 (quoting *Wright v. CTL Distribution, Inc.*, 650 So. 2d 641, 642 (Fla. Ct. App. 1995)) (alteration in original).

457. *Id.* at 5.

the effort to produce it and the moral diminution of the uses of that money.<sup>458</sup>

Limited access to capital also attenuates the ability of black and other minority business borrowers to invest and multiply their capital. Professor Darius Palia showed that black borrowers are 30% more likely to have their business loan applications rejected compared to white borrowers, after controlling for a rich set of alternative factors including the borrower, the firm and the characteristics of the lender.<sup>459</sup> Palia found no differences between Asian and white borrowers.<sup>460</sup>

Not only were loan applications differentially accepted, but the average amount loaned to black borrowers was far lower (\$331,000) than loans to white borrowers (\$1.17 million).<sup>461</sup> As a counterfactual, Palia also considered the expected default loss, but found no evidence that black borrowers posed a larger risk for lenders.<sup>462</sup> This analysis is quite strong, owing to the use of three different methods to account for any alternative factors that might predict lending differences.<sup>463</sup> The lower access to capital for black borrowers again suggests attributions of financial risk that mirrors the risks of criminal activity that animates police decision making. Whether by blocking access to capital or access to employment, the effects of racial segregation that block the social mobility of black and other minorities again reproduce and deepen segregation.

If the New Policing is reinforcing and deepening segregation, these empirical studies suggest that it also is contributing to health disparities, higher risks of mortality and crime victimization, and attenuated access to educational, employment, and economic opportunities. These deficits compound the direct economic burdens imposed by the New Policing and the regimes of legal financial obligations that can deepen segregation. Together with poor housing conditions and limited access to basic neighborhood amenities, segregation appears to have a churning effect on the processes and structures that contribute to sustained economic disadvantage, or the perpetuation of poverty traps through downward socioeconomic mobility.<sup>464</sup> Mobility is a casualty of these processes, and

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458. As Professor Austin notes, for whites, the money that would be awarded in a tort action to a black person “would obviously be put to a better, higher use in the hands of a nonblack person. Moreover, the money is tainted by the association between blacks and crime and dishonesty and, as with a fetish subject to a taboo, is sanitized or restored to full value when it passes into the hands of others. *Id.* at 38.

459. Darius Palia, *Differential Access to Capital from Financial Institutions by Minority Entrepreneurs*, 13 J. EMP. LEG. STUDIES 756, 777–78 (2016).

460. *Id.*

461. *Id.* at 779.

462. *Id.*

463. *See id.*

464. SHARKEY, *supra* note 366, at 114–15.

so the inheritance of the ghetto, with its skewed exposure to policing, burdens successive generations. In other words, New Policing contributes to being “stuck in place,” or the cross-generational legacy of urban disadvantage.<sup>465</sup>

#### CONCLUSION

The New Policing today is ascendant in crime control theory and policy. Breaking with a past tradition of “reactive policing,” agencies now emphasize advanced statistical metrics, new forms of organizational accountability, and aggressive tactical enforcement of minor crimes as the core of the new models. The tactics of the New Policing have become institutionalized in police–citizen interactions in the everyday lives of residents of poorer, often minority, and higher crime areas of the nation’s cities.

We link the rise of the New Policing in urban areas to new trends in policing in smaller cities and municipalities. We observe surprising and troubling similarities in the conduct of the New Policing in two vastly different areas, the suburb of Ferguson and the metropolis of New York City. We show that both in large cities and small municipalities, there is a racial skew in the distribution of the burdens of the New Policing. Aggressive enforcement of low-level offenses—whether “public order” crimes such as open containers or traffic violations for vehicle defects—is the starting point for legal proceedings that over time evolve into punishments that lead to financial burdens and criminal stigma with lasting consequences. These financial burdens can metastasize from simple fines to warrants to arrests and further penalties. In turn, exposure to criminal punishment imposes social and economic burdens with both near- and long-term effects on employment, housing, and other social assets.

Beyond criminal sanctions, the New Policing systematically reinforces and reproduces racial separation and segregation, attenuating socio-economic mobility while deepening inequality. In turn, inequality and segregation are linked to externalized harms in physical and mental health, mortality and the formation of social capital, compounding the disadvantaging effects of the New Policing. Future research and policymaking in this area should be aimed at understanding and breaking the cycles of intergenerational poverty of which the New Policing is an important contributor.

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465. *Id.* at 117.