ARTICLES

Punishing Involuntary Resistance

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Prosecutors should have to prove voluntariness in cases arising out of resistance to arrest. During an arrest, police violence—such as the use of pepper spray or police canines—may induce involuntary resistance. Such resistance may give rise to criminal charges. The actus reus *element of criminal responsibility, however, provides that a person may only be held criminally responsible for voluntary conduct.*

And yet, prosecutors are often not forced to prove voluntariness in resisting cases. Instead, as the case studies in this Article show, trial courts reject requests for voluntariness jury instructions, shift the burden to resisters to prove involuntariness, and—in some cases—disregard the voluntariness requirement altogether. This subversion matters because it wrongfully enables the criminalization of involuntary resisters.

Psychological and other scientific literature suggest that stressful events—like arrests—may evoke great fear. Such fear may be inborn, conditioned by violent and racially subordinating policing, or both. The more imminent a fearsome threat, the more likely one is to lose control over their response thereto. This loss of control significantly impairs one's ability to refrain from resisting. Thus, during some arrests, the state may induce the resistance it punishes.

This Article contributes to the voluntariness-requirement scholarship by offering a normative theory for how the requirement should be applied in resisting cases. This Article calls for making voluntariness an explicit, essential element of resisting offenses. In doing so, this Article reveals a means by which fact finders may disrupt cycles of harm perpetuated by police violence and criminal punishment.

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TABLE OF CONTENTS

[W]hether or not the judge and prisoner share the same philosophy of punishment, they arrive at the particular act of punishment having dominated and having been dominated with violence, respectively.

—Robert M. Cover[1]

Where there is predation, there is by evolutionary necessity its complement, predatory defense.

—Arne Öhman and Susan Mineka[2]

INTRODUCTION

On a spring night in Oregon, Pariss Lomchanthala, an indigent Pacific Islander man, was confronted by a white police officer who intended to arrest him for an outstanding parole violation warrant.[3] Pariss refused to obey the officer's order to

1. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609 (1986).

2. Arne Öhman & Susan Mineka, *Fears, Phobias, and Preparedness: Toward an Evolved Module of Fear and Fear Learning*, 108 PSYCH. REV. 483, 486 (2001).

3. *See* STEPHEN SMITH, SALEM POLICE DEP'T, INCIDENT # SMP12017712 - SUPPLEMENT REPORT 1, 4 (May 13, 2012); SALEM POLICE DEP'T, PERSON PROFILE: PARISS LOMCHANTHALA 1 (Mar. 21, 2023) (listing Pariss as "Native Hawaiian or Other Pacific Islander"); *Salem Police Officer Injured in Crash with Semi Truck*, SALEM-NEWS.COM (Mar. 26, 2009, 3:36 PM), http://www.salem-news.com/articles/march262009/smith_injury_3-26-09.php [https://perma.cc/N8SR-UQMX] (picture of Salem Police Officer "Steve Smith").

lie prostrate on the ground.[4] Pariss was unarmed,[5] had not threatened or assaulted the officer, and had not attempted to run away.[6]

Still, the officer ordered a police canine to attack Pariss.[7] As the canine attacked, Pariss fought against both the officer and the canine.[8] Soon, more officers arrived on the scene and captured Pariss, who was later charged with resisting arrest and assaulting a public safety officer.[9]

Before his trial, Pariss requested the court to inform the jury that Oregon law only permits criminal liability for performing a voluntary act or omission.[10] He intended to argue that his actions against the officer were involuntary under the circumstances.[11] But the court denied his request for a voluntariness instruction, finding that such an instruction would be confusing and unnecessary.[12] The jury later found Pariss guilty of the felony of assaulting a public safety officer.[13]

Pariss's story illustrates how credible contestations of voluntariness in resisting cases are disregarded. People who resist arrest—and survive—may be prosecuted for various resisting crimes, such as fleeing arrest, resisting arrest, and assaulting an officer. Resisting offenses generally proscribe fleeing or physically struggling against an arresting officer, provided the officer is not engaged in an unlawfully excessive use of force and the resister knows they are fleeing or resisting a law enforcement officer.[14] Some resisters, like Pariss, argue at trial that the voluntariness requirement for criminal responsibility entitles them to an acquittal.[15]

Every first-year law student learns that the voluntariness requirement is a foundational component of criminal responsibility.[16] It provides that a person may

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4. SMITH, *supra* note 3, at 2.

5. MICHAEL SOMMER, SALEM POLICE DEP'T, INCIDENT # SMP12017712 - ARREST REPORT 1 (May 12, 2012).

6. *See* State v. Lomchanthala, 341 P.3d 128, 129 (Or. Ct. App. 2014). The officer claimed Pariss walked away, *see* SMITH, *supra* note 3, at 2, while Pariss stated he did not walk away, but instead stood still, STUART GAMBLE, SALEM POLICE DEP'T, INCIDENT # SMP12017712 - SUPPLEMENT REPORT 2 (May 14, 2012).

7. *Lomchanthala*, 341 P.3d at 129.

8. *See id.*

9. *See* GAMBLE, *supra* note 6, at 1; *Case Information, 12C43321: State of Oregon vs. Pariss PV Lomchanthala*, OR. JUD. DEP'T, https://webportal.courts.oregon.gov/portal/Home/WorkspaceMode?p=0#ChargeInformation [https://perma.cc/L8FY-X7YL] (last visited Aug. 30, 2024).

10. *Lomchanthala*, 341 P.3d at 130.

11. *Id.*

12. *Id.*

13. *Id.*

14. "All fifty states and the District of Columbia criminalize [fleeing from and resisting] an arrest supported by probable cause or an arrest warrant, provided the [fleer or] resister . . . knew . . . that they were resisting a law enforcement officer." Omavi Shukur, *The Criminalization of Black Resistance to Capture and Policing*, 103 B.U. L. REV. 1, 7 & n.19 (2023) (listing statutes and ordinances criminalizing resisting arrest). In most states, a person may even be convicted for resisting an unlawful arrest. *Id.* at 36–37 & nn. 250–53 (listing the thirty-three state statutes and judicial decisions that criminalize resisting unlawful arrest).

15. *See, e.g.*, *Lomchanthala*, 341 P.3d at 131; State v. Riojas, No. 31386–7, 2014 WL 5362042, at *9 (Wash. Ct. App. Oct. 21, 2014).

16. *See, e.g.*, CYNTHIA LEE & ANGELA P. HARRIS, CRIMINAL LAW: CASES AND MATERIALS 155 (3d ed. 2014) ("In general, a person cannot be convicted of a crime unless he or she commits a voluntary

only be held criminally responsible for conduct that was voluntary.[17] Most states have either codified the voluntariness requirement in their general criminal-culpability statutes or explicitly recognized the requirement in their case law.[18]

At first blush, this requirement may appear to adequately protect involuntary resisters from criminalization and punishment. One problem, however, is that courts do not treat voluntariness as an essential element of resisting offenses.[19] Consequently, the requirement is easily subverted in resisting cases. This subversion takes multiple forms: trial courts reject requests for voluntariness jury instructions, shift the burden to resisters to prove involuntariness, and—in some cases—disregard the requirement altogether.[20] As a result of this subversion, resisters are criminally punished without any determination of whether their resistance was voluntary.

How can the voluntariness requirement be invigorated to better protect involuntary resisters from the harms of criminalization and punishment? This Article explores this question. In doing so, it contributes to the scholarship on the voluntariness requirement[21] by offering a normative theory for how the requirement

(i.e. volitional) act that causes social harm."); *see also* BENNETT CAPERS, ROGER A. FAIRFAX, JR. & ERIC J. MILLER, CRIMINAL LAW: A CRITICAL APPROACH 195 (2023); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 83 (Carolina Acad. Press 9th ed. 2022).

17. *See* LEE & HARRIS, *supra* note 16, at 155; *see also infra* Part I.

18. *See* ARIZ. REV. STAT. ANN. § 13-201 ("The minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform a duty imposed by law which the person is physically capable of performing."); HAW. REV. STAT. § 702-200(1) ("In any prosecution it is a defense that the conduct alleged does not include a voluntary act or the voluntary omission to perform an act of which the defendant is physically capable."); KY. REV. STAT. ANN. § 501.030 ("A person is not guilty of a criminal offense unless: (1) He has engaged in conduct which includes a voluntary act or the omission to perform a duty which the law imposes upon him and which he is physically capable of performing. . . ."); ALA. CODE § 13A-2-3; ALASKA STAT. § 11.81.600 (a); ARK. CODE ANN. § 5-2-204(a); COLO. REV. STAT. § 18-1-502; DEL. CODE ANN. tit. 11, § 242; 720 ILL. COMP. STAT. 5/4-1; IND. CODE § 35-41-2-1(a); KAN. STAT. ANN. § 21-5201(a); MICH. COMP. LAWS § 8.9(1)(a); MO. REV. STAT. § 562.011(1); MONT. CODE ANN. § 45-2-202; N.H. REV. STAT. ANN. § 626:1(I); N.J. STAT. ANN. § 2C:2-1(a); N.Y. PENAL LAW § 15.10; OHIO REV. CODE ANN. § 2901.21(A)(1); OR. REV. STAT. § 161.095(1); 18 PA. CONS. STAT. § 301(a); TEX. PENAL CODE ANN. § 6.01(a); Herd v. State, 724 A.2d 693, 700 (Md. Ct. Spec. App. 1999) ("Even a crime *malum prohibitum* requires a voluntary act."); State v. Engle, 743 N.W.2d 592, 595 (Minn. 2008) ("Any crime, including reckless crimes, requires some voluntary act."); State v. Caddell, 215 S.E.2d 348, 366 (N.C. 1975) (noting that without "a voluntary act . . . there can be no criminal liability"); State v. Turner, 953 S.W.2d 213, 216 (Tenn. Crim. App. 1996) ("[I]n general, a minimum requirement for criminal liability is the performance of a voluntary act."); Childers v. State, 493 P.3d 168, 172 (Wyo. 2021) (noting that "a voluntary act is an absolute requirement for criminal liability" (quoting Hopkins v. State, 445 P.3d 582, 586 (Wyo. 2019))).

19. *See infra* Part III.

20. *See infra* Part III.

21. *See, e.g.*, Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1547 (2013); Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 272 (2002); Melissa Hamilton, *Reinvigorating* Actus Reus*: The Case for Involuntary Actions by Veterans with Post-Traumatic Stress Disorder*, 16 BERKELEY J. CRIM. L. 340, 341 (2011); Rebecca Hollander-Blumoff, *Crime, Punishment, and the Psychology of Self-Control*, 61 EMORY L.J. 501, 503 (2012); MICHAEL S. PARDO & DENNIS PATTERSON, MINDS, BRAINS, AND LAW: THE CONCEPTUAL FOUNDATIONS OF LAW AND NEUROSCIENCE 122–30 (2013); Michael Corrado, *Is There an Act Requirement in the Criminal Law?*, 142 U. PA. L. REV. 1529, 1533 (1994); Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437, 2437–38 (2007); Gideon Yaffe, *The*

should be applied in resisting cases. Namely, voluntariness should be an explicit, essential element of resisting offenses. This would force prosecutors to affirmatively prove voluntariness in resisting cases.

Resisting cases, as referred to herein, encompass criminal prosecutions that stem from a person's flight from or struggle against arresting officers. A key premise of this Article is that some people may resist gun-wielding arresting officers involuntarily, that is, reflexively or otherwise nonconsciously. This involuntary resistance may take various forms, such as reflexively jerking away from an arresting officer's grasp or striking an officer with a closed fist.

Unlike cases involving civilian-on-civilian violence, resisting cases arise out of state agents attempting to capture and shackle civilians' bodies. These cases are unique because they may arise out of reflexive flight-or-fight responses elicited by law enforcement. In such cases, criminal punishment is tantamount to inflicting harm on civilians for involuntary reactions induced by the state.

Psychological and other scientific literature suggest that fearsome, violent events—like violent arrests—may evoke fearful, reflexive involuntary resistance.[22] Such fear may be inborn, conditioned by life experiences, or

Voluntary Act Requirement, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 174, 175 (Andrei Marmor ed., 2012).

22. *See* Vincenzo J. Olivett & David S. March, *The Civilian's Dilemma: Civilians Exhibit Automatic Defensive Responses to the Police*, J. PERSONALITY & SOC. PSYCH., Oct. 5, 2023, at 1, 7 (finding that "police-threat associations may evoke defensive behaviors that are difficult to control or inhibit during an initial split-second expression"); RAFAEL YUSTE, LECTURES IN NEUROSCIENCE 261, 270–71 (2023) (detailing how painful stimuli may activate "motor neurons," causing a person to reflexively extend some muscles and contract others, and defining a *reflex* as an "involuntary response to a sensory stimulus"); Öhman & Mineka, *supra* note 2, at 484 (describing the *fear module* as "a relatively independent behavioral, mental, and neural system that is specifically tailored to help solve adaptive problems prompted by potentially life-threatening situations in the ecology of our distant forefathers"); Nico H. Frijda, K. Richard Ridderinkhof & Erik Rietveld, *Impulsive Action: Emotional Impulses and Their Control*, FRONTIERS PSYCH., June 2014, at 1, 1–3 (positing a theory of impulsive action in which an appraisal of harm may automatically elicit a response); *id.* at 4 (explaining that a hostile state of action readiness may cause one to throw a bicycle stand at a police van during a "street row"); Nico H. Frijda, *Impulsive Action and Impulse Control*, *in* THE EMOTIONAL BRAIN REVISITED 199, 206–07 (Jacek Dębiec et al. eds., 2014) (explaining that intense events may elicit intense emotions that induce impulsive actions); Quyen Epstein-Ngo, Laura K. Maurizi, Allyson Bregman & Rosario Ceballo, *In Response to Community Violence: Coping Strategies and Involuntary Stress Responses Among Latino Adolescents*, 19 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 38, 39, 46 (2013); Teresa Bertram, Daniel Hoffmann Ayala, Maria Huber, Felix Brandl, Georg Starke, Christian Sorg & Satja Mulej Bratec, *Human Threat Circuits: Threats of Pain, Aggressive Conspecific, and Predator Elicit Distinct BOLD Activations in the Amygdala and Hypothalamus*, FRONTIERS PSYCHIATRY, Jan. 9, 2023, at 1, 2; Michael S. Fanselow & Laurie S. Lester, *A Functional Behavioristic Approach to Aversively Motivated Behavior: Predatory Imminence as a Determinant of the Topography of Defensive Behavior*, *in* EVOLUTION AND LEARNING 185, 186 (Robert C. Bolles & Michael D. Beecher eds., 1988); Aline F. Bastos, Andre S. Vieira, Jose M. Oliveira, Leticia Oliveira, Mirtes G. Pereira, Ivan Figueira, Fatima S. Erthal & Eliane Volchan, *Stop or Move: Defensive Strategies in Humans*, 302 BEHAV. BRAIN RSCH. 252, 261 (2016); Jennifer N. Perusini & Michael S. Fanselow, *Neurobehavioral Perspectives on the Distinction Between Fear and Anxiety*, 22 LEARNING & MEMORY 417, 422–23 (2015); Dean Mobbs, Predrag Petrovic, Jennifer L. Marchant, Demis Hassabis, Nikolaus Weiskopf, Ben Seymour, Raymond J. Dolan & Christopher D. Frith, *When Fear Is Near: Threat Imminence Elicits Prefrontal-Periaqueductal Gray Shifts in Humans*, 317 SCIENCE 1079, 1080 (2007) [hereinafter Mobbs et al., *When Fear Is Near*]; Dean Mobbs, Jennifer L. Marchant, Demis Hassabis, Ben Seymour, Geoffrey Tan,

both.[23] This fear is capable of automatically triggering defensive physiological and behavioral responses, such as flight or fight.[24] The more imminent the threat, the less control one may have over their response thereto and the more likely they are to reflexively resist.[25] These findings suggest that, in some resisting

Marcus Gray, Predrag Petrovic, Raymond J. Dolan & Christopher D. Frith, *From Threat to Fear: The Neural Organization of Defensive Fear Systems in Humans*, 29 J. NEUROSCIENCE 12236, 12242 (2009) [hereinafter Mobbs et al., *From Threat to Fear*]; L. Michael Romero, *Fight or Flight Responses*, *in* 2 ENCYCLOPEDIA OF ANIMAL BEHAVIOR 547, 547 (Jae Chun Choe ed., 2d ed. 2019); S. MARC BREEDLOVE & NEIL V. WATSON, BEHAVIORAL NEUROSCIENCE 38–40, 149, 156–57, 480–81 (8th ed. 2017) (detailing how the nervous system and endocrine system play key roles in generating stress responses); Kasia Kozlowska, Peter Walker, Loyola McLean & Pascal Carrive, *Fear and the Defense Cascade: Clinical Implications and Management*, 23 HARV. REV. PSYCHIATRY 263, 264, 267–75 (2015) (describing adaptive fear-induced physiological stress responses); R.M. Nesse, S. Bhatnagar & B. Ellis, *Evolutionary Origins and Functions of the Stress Response System*, *in* 1 STRESS: CONCEPTS, COGNITION, EMOTION, AND BEHAVIOR 95, 95–100 (George Fink ed., 2016) (detailing the dimensions of physiological stress responses); GEORG NORTHOFF, THE SPONTANEOUS BRAIN: FROM THE MIND–BODY TO THE WORLD–BRAIN PROBLEM 9, 20–25, 42, 65, 133 (2018) (detailing "how the brain's neural activity can involve different degrees of resting-state activity and, still, be shaped by external stimuli"); Andreas Löw, Peter J. Lang, J. Carson Smith & Margaret M. Bradley, *Both Predator and Prey: Emotional Arousal in Threat and Reward*, 19 PSYCH. SCI. 865, 865 (2008); *see also infra* Part II.

23. *See* Öhman & Mineka, *supra* note 2, at 486 ("[F]ears and social phobia originated from a second evolved behavioral system related to conspecific attack and self-defense." (citation omitted)); *id.* at 505 (disussing how humans "can learn to associate fear . . . with a stimulus they do not consciously perceive" and describing angry faces as "biologically fear-relevant stimuli"); Bertram et al., *supra* note 22, at 2 (including "the threat of being attacked by an aggressive conspecific" and "the threat of pain, such as the threat of injuring one's body" as "threatening stimuli that are relevant for most species"); Malcolm D. Holmes & Brad W. Smith, *Social-Psychological Dynamics of Police-Minority Relations: An Evolutionary Interpretation*, 59 J. CRIM. JUST. 58, 63 (2018) ("While residents of disadvantaged minority neighborhoods expect the police to deal with these problems, they lack confidence in the ability of police to do so. . . . Unpleasant interactions with the police condition citizens to fear them. . . ."). For police interactions that condition fear, see C.R. DIV., U.S. DOJ & CIV. DIV., U.S. ATT'Y'S OFF. DIST. OF MINN., INVESTIGATION OF THE CITY OF MINNEAPOLIS AND THE MINNEAPOLIS POLICE DEPARTMENT 9–47 (2023), https://www.justice.gov/d9/2023-06/minneapolis_findings_report.pdf [https://perma.cc/T7QF-KFRN] [hereinafter C.R. DIV., INVESTIGATION OF MPD] (detailing the violent, racially subordinating dimensions of policing in Minneapolis); C.R. DIV., U.S. DOJ & CIV. DIV., U.S. ATT'Y'S OFF. W. DIST. OF KY., INVESTIGATION OF THE LOUISVILLE METRO POLICE DEPARTMENT AND LOUISVILLE METRO GOVERNMENT 11–53 (2023), https://www.justice.gov/opa/pr/justice-department-finds-civil-rights-violations-louisville-metro-police-department-and [https://perma.cc/7684-H5QN] [hereinafter C.R. DIV., INVESTIGATION OF LMPD] (same for Louisville); C.R. DIV., U.S. DOJ & U.S. ATT'Y'S OFF. N. DIST. OF ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 22–46, 139–50 (2017), https://www.justice.gov/d9/chicago_police_department_findings.pdf [https://perma.cc/42BG-A54D] [hereinafter C.R. DIV., INVESTIGATION OF CPD] (same for Chicago); C.R. DIV., U.S. DOJ, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 47–115 (2016), https://www.justice.gov/d9/bpd_findings_8-10-16.pdf [https://perma.cc/9S38-87XD] [hereinafter C.R. DIV., INVESTIGATION OF BPD] (same for Baltimore); C.R. DIV., U.S. DOJ, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 28–41, 62–78 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/3BGR-R6AQ] [hereinafter C.R. DIV., INVESTIGATION OF FPD] (same for Ferguson).

24. *See* Frijda, *supra* note 22, at 207 ("[E]motions of some intensity tend to induce impulsive actions that are not preceded by deliberation, nor are they intentional in the strict sense."); Epstein-Ngo et al., *supra* note 22, at 43 (finding that both personal victimization and witnessing violence were positively associated with involuntary stress responses).

25. *See* Mobbs et al., *From Threat to Fear*, *supra* note 22, at 12241 ("Thus, when the subjects thought there was a low probability of shock, they had more controlled locomotor behaviors, yet the knowledge they were likely to be caught increased locomotor errors."); Bastos et al., *supra* note 22, at 260 (discussing observation that "as contact between predator and prey is about to take place, the

cases, the state elicits the resistance it punishes. But, without an explicit, essential voluntariness requirement, fact finders are able to disregard the potential involuntariness of the resistance in question.

This Article analyzes three resisting cases that exemplify the need for an explicit, essential voluntariness requirement. The accused person in each case is a person of color—one Pacific Islander, one Latina, one black.[26] During their jury trials, these resisters contested the voluntariness of their resistance.[27] In each case, there was evidence of involuntariness: resistance during a police canine attack,[28] resistance after being painfully grabbed from behind without warning,[29] and resistance after multiple deployments of pepper spray while being held at gunpoint.[30] The resisters' claims of involuntariness were credible: they may not have been able to consciously control their reactions to the violence preceding and co-occurring with their resistance.

And yet, none of the prosecutors in these cases were put to a burden of affirmatively proving voluntariness beyond a reasonable doubt.[31] This, despite one jurisdiction having a statutory voluntariness requirement for criminal responsibility and a pattern voluntariness instruction that was specifically requested by the accused.[32] Instead, the trial courts in these cases denied a request for a voluntariness jury instruction,[33] placed the burden on the accused to prove involuntariness,[34] and—in one case—ignored the requirement altogether.[35] The resisters in these cases were all ultimately convicted of violent felony offenses arising out of their resistance.[36]

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probability of prey jump-attack is maximal"); Perusini & Fanselow, *supra* note 22, at 421 (describing the "Predatory Imminence Theory" of defensive behaviors); Löw et al., *supra* note 22, at 870 ("[A]s with animals . . . the reflex was potentiated when viewers were confronted with an aversive cue. . . .").

26. *See* SALEM POLICE DEP'T, *supra* note 3, at 1 (listing Pariss as "Native Hawaiian or Other Pacific Islander"); State v. Riojas, No. 31386–7, 2014 WL 5362042, at *1–2 (Wash. Ct. App. Oct. 21, 2014) (noting that a witness on the scene referred to Mersadeze as Mexican and that Mersadeze testified to feeling antagonized because both this witness and the arresting officer were white); GA., FRANKLIN CNTY., WARRANT NO. 03-328FW, at 2 (May 8, 2003) [hereinafter MAYFIELD WARRANT], https://ecert.gsccca.org/api/document/QVBTX-DU6Y4-53EM [https://perma.cc/C8T4-K4K2] (listing Jerome as a "Black Male").

27. *See* State v. Lomchanthala, 341 P.3d 128, 130 (Or. Ct. App. 2014); *Riojas*, 2014 WL 5362042, at *9; Mayfield v. State, 623 S.E.2d 725, 726 (Ga. Ct. App. 2005).

28. *Lomchanthala*, 341 P.3d at 129–30.

29. *Riojas*, 2014 WL 5362042, at *2, *10.

30. *Mayfield*, 623 S.E.2d at 726.

31. *See Lomchanthala*, 341 P.3d at 130–31; *Riojas*, 2014 WL 5362042, at *9–10; *Mayfield*, 623 S.E.2d at 726–27.

32. *See* OR. REV. STAT. § 161.095(1); *Lomchanthala*, 341 P.3d at 130 ("Before trial, defendant requested that the court issue Uniform Criminal Jury Instruction 1065, which reads as follows: 'For criminal liability, Oregon law requires the performance of a voluntary act or ommission.'").

33. *Lomchanthala*, 341 P.3d at 130.

34. *Id.* at 131; *Riojas*, 2014 WL 5362042, at *9; *Mayfield*, 623 S.E.2d at 726.

35. *Mayfield*, 623 S.E.2d at 726–27 (discussing voluntariness in the context of criminal intent, rather than *actus reus*).

36. *Lomchanthala*, 341 P.3d at 130; *Riojas*, 2014 WL 5362042, at *1; *Mayfield*, 623 S.E.2d at 725–26.

I argue that resisting statutes should be amended to explicitly include voluntariness as an essential element. Since prosecutors are constitutionally required to prove all essential elements of an offense in order to secure a conviction,[37] an explicit voluntariness element would force prosecutors to affirmatively prove voluntariness. And since judges are constitutionally required to issue jury instructions on all essential elements,[38] this change would also force judges to issue voluntariness instructions in all resisting jury trials.

An essential voluntariness element would also reduce criminalization and incarceration: it would discourage prosecutors from pursuing criminal charges stemming from involuntary resistance, improve involuntary resisters' leverage in plea bargain negotiations, and increase involuntary resisters' chances of securing acquittals at trial.

Failure to make voluntariness an explicit, essential element of resisting offenses would relegate involuntary resisters to indirectly contesting voluntariness. They would have to either argue that the prosecution has not proved they resisted with the requisite *mens rea*—that is, culpable mental state[39]—or raise affirmative defenses like self-defense or duress.[40] But *mens rea* defenses elide the voluntariness requirement's focus on whether the act was a *manifestation* of a culpable mental state. And affirmative defenses unduly shift the burden to the resister to prove their resistance was excusable or justified when the burden should remain with the prosecutor to prove that the resistance was voluntary.

Affirmative defenses do not compensate for the lack of an explicit, essential voluntariness element.[41] While prosecutors have to prove essential elements, accused persons may be forced to prove affirmative defenses.[42] Moreover, judges

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37. *See* Patterson v. New York, 432 U.S. 197, 210 (1977); Leland v. Oregon, 343 U.S. 790, 794–95 (1952).

38. *See In re* Winship, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); Cole v. Young, 817 F.2d 412, 424 (7th Cir. 1987) (noting that "since the Court decided *In Re Winship*," multiple federal courts have "agreed that a conviction procured without any jury instruction on an essential element of the offense is constitutionally invalid").

39. *See, e.g.*, *Mayfield*, 623 S.E.2d at 726.

40. *See, e.g.*, *Riojas*, 2014 WL 5362042, at *9, *12.

41. *See* Michael S. Moore, *The Neuroscience of Volitional Excuse*, *in* PHILOSOPHICAL FOUNDATIONS OF LAW AND NEUROSCIENCE 179, 181 (Dennis Patterson & Michael S. Pardo eds., 2016) ("[E]xcuses are to be distinguished from those conditions that rule out there being an *act* for which one is prima facie responsible. If one's body causes harm while one . . . performs a reflex movement or a movement during an epileptic seizure, one does not excuse the 'actor' in such conditions. Rather, these cases instance ways in which the bodily motions of a person can cause harm to another without those bodily motions constituting an *act* of that person. In such cases there is nothing to be excused because one has done no wrongful *action*." (footnote omitted)).

42. *See Patterson*, 432 U.S. at 211; Dixon v. United States, 548 U.S. 1, 17 (2006) ("[W]e presume that Congress intended the petitioner to bear the burden of proving the defense of duress by a preponderance of the evidence."); *see also* Stanley v. Mabry, 596 F.2d 332, 333 (8th Cir. 1979) ("[W]e find no constitutional violation occurred by placing the burden of proof on petitioner to prove his insanity by a preponderance of the evidence.").

can determine that there is insufficient evidence to support issuing a jury instruction on an affirmative defense.[43] Affirmative defenses, then, provide less protection to involuntary resisters than essential elements.

The *mens rea* element is also not a faithful substitute for an explicit, essential voluntariness element.[44] Standing alone, certain *mens rea* requirements—such as *knowing* and *reckless*—would permit the criminalization of even involuntary and unintentional conduct.[45] For example, even if Pariss knew he was struggling against an arresting officer, he may have been unable to refrain from doing so as the canine attacked him.

Also, despite finding that a prosecutor proved a *mens rea* of *intent*, a fact finder may have doubts as to whether the actual conduct in question was under the accused's conscious control.[46] Even if Pariss initially intended to resist, he may not have been able to refrain from doing so as the canine attacked.[47] By centering the objective circumstances of the conduct at issue, the voluntariness requirement is better than the *mens rea* element at accounting for state violence that induces involuntary resistance.[48]

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43. *See, e.g.*, People v. Cornille, 484 N.E.2d 301, 306 (Ill. App. Ct. 1985) ("The trial court refused these instructions on the basis that they attempted to introduce the affirmative defense of ignorance or mistake and there was insufficient evidence presented by defendant to warrant giving such instructions. We agree."); United States v. Diaz, 916 F.2d 655, 658 (11th Cir. 1990) ("[W]e find that this action, occurring after the conclusion of all the acts which gave rise to the conspiracy charge, is insufficient evidence of withdrawal to merit an instruction on this affirmative defense.").

44. *See* Brown v. State, 955 S.W.2d 276, 280 (Tex. Crim. App. 1997) ("[T]he issue of the voluntariness of one's conduct, or bodily movements, is separate from the issue of one's mental state." (quoting Adanandus v. State, 866 S.W.2d 210, 230 (Tex. Crim. App. 1993))).

45. *See, e.g.*, OR. REV. STAT. § 161.085(8) (defining *mens rea* of *knowingly* as "with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists").

46. Several legislatures and commentators gauge voluntariness by the consciousness of the conduct. *See, e.g.*, N.Y. PENAL LAW § 15.00(2) (defining a "voluntary act" as "a bodily movement performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it"); DEL. CODE ANN. tit. 11, § 243 ("'Voluntary act' means a bodily movement performed consciously or habitually as a result of effort or determination, and includes possession if the defendant knowingly procured or received the thing possessed or was aware of the defendant's control thereof for a sufficient period to have been able to terminate possession."); COLO. REV. STAT. § 18-1-501(9) ("'Voluntary act' means an act performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it."); Stephen J. Morse, *Criminal Law and Common Sense: An Essay on the Perils and Promise of Neuroscience*, 99 MARQ. L. REV. 39, 52–53 (2015) ("The 'voluntary' act requirement is defined, roughly, as an *intentional* bodily movement—or omission in cases in which the person has a duty to act—done in a reasonably integrated state of consciousness."); Denno, *supra* note 21, at 314 ("[C]onsciousness is the foundation for voluntary conduct."); Yaffe, *supra* note 21, at 175 ("If the mental state that guides the bodily movement is not 'conscious' . . . then . . . the bodily movements it guides are therefore not voluntary actions.").

47. *See also Brown*, 955 S.W.2d at 280 (rejecting argument that the issue of voluntariness "is subsumed by the 'intentionally and knowingly'" *mens rea* elements of murder); State v. Lara, 902 P.2d 1337, 1339 (Ariz. 1995) ("[I]ntent is one of our culpable mental states descriptive of *mens rea* not *actus reus*.").

48. *See* State v. Utter, 479 P.2d 946, 948 (Wash. Ct. App. 1971) ("There are two components of every crime. One is objective—the actus reus; the other subjective—the mens rea."); Farrell & Marceau, *supra* note 21, at 1590 ("[T]he concept of involuntariness applies to circumstances as well as actions.").

My goal is to reveal how courts harm survivors of police violence by discounting or disregarding the voluntariness requirement and how this harm may be reduced by requiring prosecutors to prove voluntariness in resisting cases. The aim, however, is not to perfect the criminalization of resistance.[49] Far from bolstering the criminal punishment system, shedding light on the harmful violence of arrests and malfeasance of criminal courts undermines the system's perceived legitimacy.[50]

This Article reveals how criminal courts gratuitously perpetuate cycles of harm by ignoring the structural causes of resistance to arrest. These structural causes include the sheer violence of arrest, which is especially acute in communities beset by racially subordinating policing.[51] By not requiring prosecutors to prove voluntariness, courts ease the state's path to compounding the harm of police violence with the harm of criminal punishment.

In contrast, an explicit, essential voluntariness requirement would force fact finders to confront the violent, punitive, and racially subordinating features of

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In order to satisfy the *mens rea* element, prosecutors have to prove that the accused engaged in the conduct in question with a certain state of mind, such as purpose or recklessness. *See* Counterman v. Colorado, 600 U.S. 66, 78–79 (2023); Francis Bowes Sayre, Mens Rea, 45 HARV. L. REV. 974, 1016 (1932) (describing *mens rea* as "the mental factor necessary to prove criminality").

49. In another article, I argue that the racially subordinating dimensions of resisting laws may only be remedied by abolishing the prison industrial complex ("PIC") and eradicating racial subordination. Shukur, *supra* note 14, at 51 ("As compared to reformist interventions, PIC abolition is more responsive to the tacit demands of black resisters who violently combat racially subordinating policing."); *id.* at 52 ("[B]lack resisters to the capture of arrest compel society to respond to black dissenting violence against racial subordination as it never has before in the United States: by eradicating racial subordination and all of its punitive effects."). Abolitionist attorneys may utilize the voluntariness requirement to reduce the harm of criminalization while bringing the harmful and racially subordinating dimensions of policing to the fore in resisting criminal proceedings. This litigation strategy may form part of a just transition to the abolitionist future envisioned in my other work.

50. This Article does not address the issue of voluntary, deliberate resistance to arrest, which will be the subject of future research. It also does not discuss the various reasons why people comply with arrest. Nor does it discuss cases in which people are falsely arrested for resisting; such cases are discussed elsewhere in the scholarship. *See, e.g.*, Scott Holmes, *Resisting Arrest and Racism - The Crime of "Disrespect*,*"* 85 UMKC L. REV. 625, 627 (2017); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1348 (2012) ("[B]ulk-urban policing crimes such as loitering, trespassing, disorderly conduct, and resisting arrest create the highest risk of wrongful conviction. By definition, these offenses require no physical or concrete evidence other than an officer's assertion that the defendant has engaged in relatively common types of behavior."). Instead, this Article centers cases in which people involuntarily resist arresting officers and are subsequently prosecuted for resisting. The intention, in part, is to reveal how a fundamental requirement for criminal culpability—the voluntariness requirement—is subverted in the face of credible claims of involuntary resistance.

51. *See* C.R. DIV., INVESTIGATION OF MPD, *supra* note 23, at 9–47 (detailing MPD's practice of using excessive force and engaging in racially discriminatory police practices); C.R. DIV., INVESTIGATION OF LMPD, *supra* note 23, at 11–19, 38–53 (same regarding LMPD); C.R. DIV., INVESTIGATION OF BPD, *supra* note 23, at 47–115 (same regarding BPD); C.R. DIV., INVESTIGATION OF FPD, *supra* note 23, at 28–41, 62–78 (same regarding FPD); BERNARD E. HARCOURT, COOPERATION: A POLITICAL, ECONOMIC, AND SOCIAL THEORY 152 (2023) (noting that the supposed "harms" that are the subject of criminal punishment "are themselves artifacts of the present social condition and racial hierarchies").

punitive arrests.[52] Those judges and juries would then have an obligation to acquit involuntary resisters, shielding said resisters from the harms of criminalization and incarceration. Such shifts from perpetuating to disrupting cycles of harm are crucial for mitigating the adverse effects of violence exposure.

This Article proceeds in four parts. Part I is a descriptive inquiry into the voluntariness requirement. Part II then engages with psychological and other scientific literature to illustrate how arrests can elicit involuntary resistance. Next, Part III explains how the lack of an explicit, essential voluntariness element adversely affects resisters with credible claims of involuntariness. Ultimately, Part IV calls for an essential, explicit voluntariness element and addresses some of the anticipated concerns related thereto. This Article is part of a larger project that argues that the state and society should reduce the harm of punitive arrests while shifting to nonpunitive means of ensuring safety.

I. THE VOLUNTARINESS REQUIREMENT

Generally, a person may only be held criminally responsible if they engage in voluntary conduct (*actus reus*) accompanied by a guilty mental state (*mens rea*).[53] The central focus of this Article is *actus reus*'s voluntariness requirement. This requirement is designed to limit criminal culpability to those whom proponents of criminal punishment deem "truly responsible."[54] As explained by Oliver Wendell Holmes, "The reason for requiring an act is, that an act implies a choice, and that it is felt to be impolitic and unjust to make a man answerable for harm, unless he might have chosen otherwise."[55] Roscoe Pound similarly opined that "the starting point of the criminal law . . . [is] that a criminal was a person possessed of free will who, having before him a choice between right and wrong, had freely and deliberately chosen to go wrong."[56] For these reasons and others, most commentators treat the voluntariness requirement as axiomatic.[57]

Until now, there has been no scholarly inquiry into what role, if any, the voluntariness requirement currently plays in resisting cases. This, despite the omnipresent possibility that these cases may arise out of involuntary flight-or-fight

52. This would be reminiscent of the fugitive slave trials of the Antebellum Era, during which defense attorneys brought "the militant appeal [for the abolition of slavery] in the street" into the courtroom. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 211–12 (1975).

53. *See* MODEL PENAL CODE § 2.01 cmt. 1 at 216 (AM. L. INST., Official Draft and Revised Comments 1985) ("[T]he demand that an act or omission be voluntary can be viewed as a preliminary requirement of culpability."); Sayre, *supra* note 48, at 1016 (describing *mens rea* as "the mental factor necessary to prove criminality").

54. Farrell & Marceau, *supra* note 21, at 1554.

55. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 54 (1923).

56. ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 126–27 (Transaction Publishers 1998) (1930).

57. *See, e.g.*, Farrell & Marceau, *supra* note 21, at 1545 ("As any first-year law student can explain, the 'voluntary act requirement' is a foundational component of criminal law."); Denno, *supra* note 21, at 354 ("[T]he [voluntariness] requirement, like culpability, is axiomatic and therefore one of the pillars of the criminal law."); Hollander-Blumoff, *supra* note 21, at 513 ("The actus reus requirement includes an insistence that an action be voluntary. . . ."). The intention is not to supplant the *mens rea* element, but to draw more attention to *actus reus*, which exists alongside *mens rea*.

responses to arresting officers. For instance, a person who had no conscious desire to resist may be prosecuted for having instantaneously struck an officer who grabbed them from behind.[58] The criminalization of such reflexive resistance, however, contravenes the voluntariness requirement. In order to fully explore the use, misuse, and disuse of the voluntariness requirement in resisting cases, some more background information about the requirement is needed.

Most states have explicitly recognized the voluntariness requirement.[59] For instance, Arizona state law provides: "The minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform a duty imposed by law which the person is physically capable of performing."[60] It defines a voluntary act as "a bodily movement performed consciously and as a result of effort and determination."[61] Arizona's definition—which is substantially similar to other states' definitions[62]—suffices for the purposes of this inquiry because it captures the subjective and objective dimensions of voluntariness. The subjective dimension is captured by the requirement that the conduct be performed consciously, since one's conscious is characteristic of the individual. Whereas the objective dimension is captured by the requirement that the conduct in question be performed as a result of effort and determination, as opposed to being the result of external forces beyond one's control.

These statutory voluntariness requirements are largely derived from—or reflected in—the Model Penal Code's (MPC) provisions on voluntariness. Section 2.01(1) of the MPC provides: "A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable."[63] The commentary accompanying this provision candidly concedes that the MPC's definition of "voluntary" is partial and indirect.[64] Indeed, this provision only describes what does not constitute a voluntary act: "(a) a reflex or convulsion; (b) a bodily movement during unconsciousness or sleep; (c) conduct during hypnosis or resulting from hypnotic

58. *See* State v. Riojas, No. 31386–7, 2014 WL 5362042, at *2–3, *13 (Wash. Ct. App. Oct. 21, 2014).

59. *See supra* note 18 and accompanying text.

60. ARIZ. REV. STAT. ANN. § 13-201.

61. *Id.* § 13-105(42).

62. *See, e.g.*, N.Y. PENAL LAW § 15.00(2) (defining a "voluntary act" as "a bodily movement performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it"); DEL. CODE ANN. tit. 11, § 243 ("'Voluntary act' means a bodily movement performed consciously or habitually as a result of effort or determination, and includes possession if the defendant knowingly procured or received the thing possessed or was aware of the defendant's control thereof for a sufficient period to have been able to terminate possession."); COLO. REV. STAT. § 18-1-501(9) ("'Voluntary act' means an act performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it.").

63. MODEL PENAL CODE § 2.01(1) (AM. L. INST., Official Draft and Revised Comments 1985).

64. *Id.* § 2.01 cmt. 2 at 219 (stating that "voluntary" is defined "partially and indirectly by describing movements that are excluded from the meaning of the term").

suggestion; (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual."[65]

The prominence of consciousness in the MPC's voluntariness provisions reveals the subjective dimension of the voluntariness requirement. By referencing both bodily movements during sleep and movements not produced by effort or determination, the MPC tacitly adopts a dual meaning of *conscious* as (1) "[a] wake, alert, and aware of what is happening in the immediate vicinity; not in a state of sleep, trance, or coma"; and (2) "[a]ware of and giving due weight to something."[66] For example, an act is nonconscious in the former sense if one performs the act while sleepwalking, and an act is nonconscious in the latter sense if one performs the action reflexively. In keeping with the MPC, commentators and legislatures often cast *consciousness* as central to voluntariness determinations.[67]

In addition to its subjective dimension, the voluntariness requirement has an objective dimension. While the subjective is characteristic of the individual, the objective is characteristic of the surrounding circumstances of the conduct in question. For instance, the MPC describes a case in which a French migrant was deported from England, forcibly taken back to England, and then convicted of "being 'found' in the United Kingdom without permission."[68] The MPC explains that the voluntariness requirement would have shielded this migrant from criminal responsibility because the migrant was incapable of not being forcibly taken back to England.[69]

Similarly, in some jurisdictions, people who are arrested and jailed while they happen to be in possession of a controlled substance cannot be convicted for bringing said substance into the jail.[70] This, even though these people may have been both conscious and aware of their possession of the controlled substance. In these jurisdictions, such people are not criminally culpable because they effectively had no choice but to introduce the substance into the jail as a result of their involuntary jailing.[71] Hence, they "committed no actus

65. *Id.* § 2.01(2).

66. *Conscious*, OXFORD REFERENCE, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095632962 (last visited Sept. 1, 2024).

67. *See, e.g.*, sources cited *supra* note 46.

68. MODEL PENAL CODE § 2.01 cmt. 1 at 216–17 (AM. L. INST., Official Draft and Revised Comments 1985).

69. *Id.* This reasoning squares with *People v. Grant*, in which the Supreme Court of Illinois explains that lack of control by the conscious mind defines only "[c]ertain involuntary acts." 377 N.E.2d 4, 8 (Ill. 1978). *See also* Martin v. State, 17 So. 2d 427, 427 (Ala. Ct. App. 1944) ("[A]n accusation of drunkenness in a designated public place cannot be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer.").

70. *See* State v. Eaton, 177 P.3d 157, 161 (Wash. Ct. App. 2008) (citing State v. Tippetts, 43 P.3d 455 (Or. Ct. App. 2002)), *aff'd*, 229 P.3d 704 (Wash. 2010).

71. *See id.* at 158–59, 161–62 (vacating sentence enhancement of a person whose sentence was enhanced for bringing a controlled substance into jail after a controlled substance was found on the person during a search incident to arrest at a jail); State v. Cole, 164 P.3d 1024, 1025, 1027 (N.M. Ct. App. 2007) (affirming order dismissing charge of bringing contraband into jail because defendant did not voluntarily enter jail). *But see* State v. James, 74 N.E.3d 769, 770–71, 773 (Ohio Ct. App. 2016) (affirming contraband conviction because the accused did not inform the officers that he was in

reus."[72] The objective circumstances of their capture and confinement vitiate the voluntariness of their bringing the controlled substance into the jail. It follows that more than consciousness is at play when determining voluntariness; the objective circumstances surrounding the conduct in question are also pertinent.

Though not without its critics, the notion that voluntariness entails objective circumstances that permit the actor to do otherwise has ample support in the legal academy. Michael Corrado contends that a voluntary act is one that "the actor must have been able to avoid choosing" to carry out.[73] In doing so, he argues that the voluntariness inquiry should not only consider whether the actor "had only one alternative, but [also whether] the other alternatives were so far beyond what we normally require of a person that the law will not take account of them as genuine alternatives."[74] Similarly, others contend that "an actus reus element is voluntary whenever the defendant could have done otherwise," which is "related to the ability to choose or do otherwise."[75] Likewise, H.L.A. Hart explains: "What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities."[76] At least one state appellate court has also gauged voluntariness by the ability to do otherwise.[77]

This focus on the ability or opportunity to do otherwise is unconvincing to those who argue that not having any choice but to commit an act does not necessarily make that act involuntary.[78] Indeed, it is conceivable that a person may be forced to commit an act that they intended to commit anyway.[79] But if such a person unquestionably could not have acted otherwise, then there is an obvious, significant reason to doubt that their act was voluntary. If, as several state appellate courts have held, voluntariness should be affirmatively proven

possession of a controlled substance during his arrest and jailing); State v. Gneiting, 468 P.3d 263, 265, 270–71 (Idaho 2020) (same regarding a woman who was arrested and brought to jail while in possession of a controlled substance).

72. *Eaton*, 177 P.3d at 158; *see also Cole*, 164 P.3d at 1025 ("We conclude that, under these circumstances, the actus reus element of the crime is not met because Defendant did not voluntarily enter the detention facility.").

73. Corrado, *supra* note 21, at 1557.

74. *Id.* at 1548.

75. Farrell & Marceau, *supra* note 21, at 1579.

76. H.L.A. HART, *Negligence,* Mens Rea*, and Criminal Responsibility*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 136, 152 (1968); *see also* Michael S. Moore, *Relating Neuroscience to Responsibility: Comments on Hirstein, Sifferd, and Fagan's* Responsible Brains, 16 CRIM. L. & PHIL. 283, 293 (2022) (contending that in order for a person to be held responsible for action A, they "must have *been able* to have chosen and done other than A"); FEDERICA COPPOLA, THE EMOTIONAL BRAIN AND THE GUILTY MIND: NOVEL PARADIGMS OF CULPABILITY AND PUNISHMENT 140 (2021) ("[C]ulpability hinges upon the fair opportunity to do otherwise.").

77. *See* State v. Tippetts, 43 P.3d 455, 459 (Or. Ct. App. 2002) (explaining that Oregon's statutory voluntariness requirement was to "require more than awareness," that is, to "require[] some evidence that the defendant had the ability to choose to take a particular action").

78. *See* Yaffe, *supra* note 21, at 181 (citing HARRY G. FRANKFURT, *Alternate Possibilities and Moral Responsibility*, *in* THE IMPORTANCE OF WHAT WE CARE ABOUT: PHILOSOPHICAL ESSAYS 1 (1988)).

79. *See id.*

by the prosecution,[80] then the inquiry should not be whether the accused can disprove voluntariness beyond any doubt. Instead, the inquiry should be whether the prosecution can prove voluntariness beyond a reasonable doubt.[81]

Another critique of the focus on choice is that it would "lead to an infinite regress: a voluntary act would depend on an internal decision, and this decision would itself depend on a prior internal conscious decision to make the first decision, and so on."[82] Such a choice-centric determination would be unworkable and infinite, especially if required in every criminal case. This critique merely demonstrates the difficulty of assigning criminal responsibility based on choice, but it does not explain why an ability to do otherwise is not essential for a finding of voluntariness in criminal proceedings.[83]

Some may contend that the *mens rea* element renders the voluntariness requirement cumulative and inessential.[84] Indeed, there is significant overlap between *intentionality* and *voluntariness*.[85]

But the *mens rea* element is not coterminous with—or inclusive of—the voluntariness requirement, in part because it does not fully account for the subjective component of the requirement. Not all *mens rea* elements require intentionality. Some *mens rea* elements, for example, only require *awareness*, *knowledge,* or *recklessness*.[86] To perhaps state the obvious, a person may be aware of their

80. *See, e.g.*, People v. Register, 457 N.E.2d 704, 706 (N.Y. 1983) ("The Penal Law . . . set[s] forth what the 'elements' of an offense are and identifies them, as does the common law, as a culpable mental state (*mens rea*) and a voluntary act (*actus reus*). . . ." (citing N.Y. PENAL LAW § 15.10); People v. Fardan, 628 N.E.2d 41, 44 (N.Y. 1993) ("[T]he People remain responsible for proving the fundamental elements of *mens rea* and *actus reus* beyond a reasonable doubt." (citation omitted)); People v. Martino, 970 N.E.2d 1236, 1240 (Ill. App. Ct. 2012) (reversing conviction of aggravated domestic battery because the prosecution did not prove the voluntariness of the act at issue beyond a reasonable doubt); Valenzuela v. State, 943 S.W.2d 130, 132 (Tex. App. 1997) ("[T]he burden lies with the State to prove that the accused acted voluntarily."); State v. Sanders, No. 28304, 2008 WL 652148, at *3 (Haw. Ct. App. Mar. 12, 2008) ("The involuntary act defense presented here, like the ignorance-or-mistake-of-fact defense . . ., is a non-affirmative defense that the State must disprove beyond a reasonable doubt."); State v. Allum, 201 P.3d 776, 778 (Mont. 2009) (noting "numerous cases that establish a 'voluntary act' as an essential element of any criminal offense"); *see also* Farrell & Marceau, *supra* note 21, at 1612 ("[V]oluntariness must be treated as an essential element of every crime."). But, in other jurisdictions, prosecutors do not have an explicit burden to prove voluntariness. *See* Denno, *supra* note 21, at 396–99 (listing states with no explicit voluntariness requirement).

81. *See infra* Part IV.

82. PARDO & PATTERSON, *supra* note 21, at 128.

83. *See also* MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 115–16 (Tony Honoré & Joseph Raz eds., 1993) (further discussing the "infinite-regress objection" and responses to it).

84. *See, e.g.*, H.L.A. HART, *Acts of Will and Responsibility*, *in* PUNISHMENT AND RESPONSIBILITY, *supra* note 76, at 107 ("[I]n most cases the lack of knowledge or foresight will itself be enough to exclude liability, and it will not be necessary to bring in any doctrine concerning involuntary movement. . . .").

85. *See* MOORE, *supra* note 83, at 120 (conceiving "volition" as "a species of intention").

86. *See* OR. REV. STAT. § 163.208(1) ("A person commits the crime of assaulting a public safety officer if the person intentionally *or* knowingly causes physical injury to the other person. . . ." (emphasis added)); *id.* at § 161.085(8) (defining *mens rea* of *knowingly* as "with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists");

involuntary conduct.[87] For example, a person may be aware that they are reflexively grabbing onto somebody in front of them in response to being shoved from behind, but this awareness does not make their act of grabbing voluntary.

Even a finding that a person had an intentional mental state does not necessarily equate to a finding that their conduct was voluntarily performed. In order to satisfy the voluntariness requirement, there has to be a nexus between the accused person's mental state and the conduct in question.[88] For example, in *Brown v. State*, the accused person had argued at trial that he fired a gun as a direct result of being bumped by another person.[89] Despite record evidence corroborating this defense, the trial court denied the accused person's request for a voluntariness instruction.[90] On appeal, the prosecution argued that the issue of voluntariness was "subsumed" by the "intentionally and knowingly" *mens rea* element of murder.[91] But the appellate court rejected this argument.[92] Specifically, the court found that, *mens rea* notwithstanding, the accused person was entitled to a voluntariness instruction.[93] As explained by the court, "[t]he issue of the voluntariness of one's conduct, or bodily movements, is separate from the issue of one's mental state."[94] Regardless of whether the accused person intended to fire the gun, the fact finder would have had to acquit him if it reasonably doubted that the shooting was a conscious manifestation of this intent, as opposed to an involuntary consequence of his being bumped by another person.[95] Thus, the trial court, which issued the *mens rea* instruction,[96] should have also issued the voluntariness instruction.[97]

Courts' treatment of the voluntariness requirement in such cases has constitutional implications. If voluntariness is an essential element of criminal responsibility—as some commentators and courts maintain[98]—then the doctrinal treatment of involuntary resistance has Fifth, Sixth, and Fourteenth Amendment implications. The Due Process Clause of the Fourteenth Amendment proscribes the state from depriving a person of their liberty unless the prosecution

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CLEVELAND, OHIO, CODE OF ORDINANCES § 615.08(a) (2024) ("No person, recklessly or by force, shall resist or interfere with a lawful arrest of himself or herself or another.").

87. *See* Epstein-Ngo et al., *supra* note 22, at 38–39, 41 (using a self-reporting questionnaire to assess involuntary stress responses after the fact); *see also* State v. Tippetts, 43 P.3d 455, 458 (Or. Ct. App. 2002) ("[A] voluntary act requires something more than awareness. It requires an ability to choose which course to take—*i.e.*, an ability to choose whether to commit the act that gives rise to criminal liability.").

88. *See* Brown v. State, 955 S.W.2d 276, 280 (Tex. Crim. App. 1997).

89. *Id.* at 277.

90. *See id.*

91. *Id.* at 280.

92. *Id.*

93. *Id.*

94. *Id.* (quoting Adanandus v. State, 866 S.W.2d 210, 230 (Tex. Crim. App. 1993)); *see also* State v. Lara, 902 P.2d 1337, 1339 (Ariz. 1995) (en banc) ("[I]ntent is one of our culpable mental states descriptive of *mens rea*, not *actus reus*.").

95. *See Brown*, 955 S.W.2d at 279–80.

96. *See id.* at 278–79.

97. *See id.* at 280.

98. *See supra* note 80.

proves every essential element of the charged offense.[99] Moreover, the Due Process Clause and the Sixth Amendment place a burden on prosecutors to prove these elements beyond a reasonable doubt.[100] Finally, the Due Process Clause requires trial courts to instruct juries on each essential element of the charged offense.[101]

It follows that people accused of resisting law enforcement may be constitutionally entitled to have a fact finder determine whether the prosecutor has proved voluntariness beyond a reasonable doubt. If the charged offense is a felony, the accused may be entitled to having a jury make this determination,[102] at the trial court's instruction.

But, while courts are constitutionally mandated to treat *mens rea* as an essential element for all but strict liability criminal offenses,[103] the Supreme Court has not explicitly required courts to do the same with the voluntariness requirement. That is, it has not determined whether the criminalization of all involuntary conduct is unconstitutional. To be sure, in *Morissette v. United States*, the Supreme Court affirmed "the central thought that wrongdoing must be conscious to be criminal."[104] *Morissette* suggests that the putative moral principles embedded in the criminal law prohibit criminalizing involuntary conduct. More recently, in *City of Grants Pass v. Johnson*, the Court suggested that the Due Process Clause may require prosecutors to prove *actus reus*.[105]

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99. *See* Patterson v. New York, 432 U.S. 197, 210 (1977); Leland v. Oregon, 343 U.S. 790, 795, 799 (1952) (finding no due process violation where jury instructions "[made] it clear that the burden of proof of guilt, and of all the necessary elements of guilt, was placed squarely upon the State").

100. *See In re* Winship, 397 U.S. 358, 364 (1970); Cool v. United States, 409 U.S. 100, 104 (1972); United States v. Gaudin, 515 U.S. 506, 509–10 (1995) ("The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without 'due process of law'; and the Sixth, that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.' We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.").

101. *See Winship*, 397 U.S. at 362–64; Cole v. Young, 817 F.2d 412, 424 (7th Cir. 1987) (noting "every federal court to consider" whether failure to instruct the jury on an essential element of a crime is a constitutional error "since the Court decided *In re Winship* . . . has agreed that a conviction procured without any jury instruction on an essential element of the offense is constitutionally invalid"); Evanchyk v. Stewart, 340 F.3d 933, 939 (9th Cir. 2003) (citing *Gaudin*, 515 U.S. at 509–10; Osborne v. Ohio, 495 U.S. 103, 122–24, 122 n.17 (1990); Sandstrom v. Montana, 442 U.S. 510, 521–24 (1979)).

102. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) ("[T]he Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in federal court—would come within the Sixth Amendment's guarantee.").

103. *See* United States v. Berrios-Centeno, 250 F.3d 294, 297 (5th Cir. 2001) ("By any standards, the *mens rea* element is 'material' or 'essential.'" (citing Morissette v. United States, 342 U.S. 246, 250 (1952))).

104. 342 U.S. at 252, 273.

105. 144 S. Ct. 2202, 2217 (2024) ("Our due process jurisprudence has long taken guidance from the 'settled usage[s] . . . in England and in this country.' And, historically, crimes in England and this country have usually required proof of some act (or *actus reus*) undertaken with some measure of volition (*mens rea*). At common law, 'a complete crime' generally required 'both a will and an act.' This view 'took deep and early root in American soil' where, to this day, a crime ordinarily arises 'only from concurrence of an evil-meaning mind with an evil-doing hand.' Measured against these standards, California's law was an anomaly, as it required proof of neither of those things." (alteration in original)

The Court has previously invalidated a criminal law that was not narrowly tailored to proscribe voluntary conduct.[106] In *Robinson v. California*, the Court held that a state law that criminalized drug addiction unconstitutionally permitted cruel and unusual punishment.[107] The Court found, in part, that drug addiction is "an illness which may be contracted innocently or involuntarily" and thus should not be subject to criminal sanction.[108] Voluntariness, then, bore on the *Robinson* Court's determination that the criminal proscription at issue was in contravention of the Eighth Amendment.

Robinson, however, did not proscribe the criminalization of one's involuntary conduct. Instead, it narrowly proscribed the criminalization of one's *status*, such as the "'status' of narcotic addiction."[109] The Court has since refused to extend *Robinson*.[110] In *Powell v. Texas*, the Court held that the Eighth Amendment does not prohibit criminalizing being in public while exhibiting symptoms of the *condition* of chronic alcoholism.[111] Moreover, in *Grants Pass*, the Court held that the Eighth Amendment does not prohibit criminalizing sleeping in public with bedding or heating materials, such as a pillow or a stove, even if the accused claims to have been involuntarily houseless.[112] In both cases, the Court expressed a reticence to create "a constitutional doctrine of criminal responsibility," concluding that "doctrine[s] of criminal responsibility" must remain "the province of the States."[113] This reticence suggests the Court is unlikely to determine whether the

(citations omitted) (first quoting Hurtado v. California, 110 U.S. 516, 528 (1884); then quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 21 (The Univ. of Chi. Press 1979) (1769); and then quoting *Morissette*, 342 U.S. at 251–52)); *id.* at 2242 (Sotomayor, J., dissenting) ("The majority notes that due process arguments in *Robinson* 'may have made some sense.' On that score, I agree." (citation omitted)).

106. *See* Robinson v. California, 370 U.S. 660, 667 (1962).

107. *Id.*

108. *Id.*; *see also* Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated on other grounds*, 505 F.3d 1006 (9th Cir. 2007) (holding that the Eighth Amendment proscribes a municipality from criminally punishing "homeless individuals for involuntarily sitting, lying, and sleeping in public"); Martin v. City of Boise, 920 F.3d 584, 616 (9th Cir. 2019) (holding that the Eighth Amendment proscribes a municipality from imposing "criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter").

109. *See Robinson*, 370 U.S. at 666.

110. *See Grants Pass*, 144 S. Ct. at 2218 ("Nor, in the 62 years since *Robinson*, has this Court once invoked it as authority to decline the enforcement of any criminal law, leaving the Eighth Amendment instead to perform its traditional function of addressing the punishments that follow a criminal conviction.").

111. *See* Powell v. Texas, 392 U.S. 514, 531–33, 536 (1968).

112. *See* 144 S. Ct. at 2213, 2220, 2226; *id.* at 2233 (Sotomayor, J., dissenting).

113. *Powell*, 392 U.S. at 534, 536; *Grants Pass*, 144 S. Ct. at 2224 (Sotomayor, J., dissenting) (stating that court-issued formulas deciding what conduct a state may proscribe "have interfered with 'essential considerations of federalism,' taking from the people and their elected leaders difficult questions traditionally 'thought to be the[ir] province'" (alteration in original) (quoting *Powell*, 392 U.S. at 535–36)). The Court also expressed similar concerns in *Kahler v. Kansas*, a case in which it determined Kansas's insanity test was not in contravention of the Constitution. 589 U.S. 271, 298 (2020) ("Defining the precise relationship between criminal culpability and mental illness. . . . is a project for state governance, not constitutional law."). The *Kahler* court, however, did not address the petitioner's Eighth Amendment claim because it was not preserved for appellate review. *Id.* at 279 n.4. Still, the

Constitution requires prosecutors to affirmatively prove voluntariness beyond a reasonable doubt.

In sum, the voluntariness requirement is a widely recognized prerequisite to criminal responsibility that encompasses the subjective and objective dimensions of voluntariness. Despite this wide recognition, the Supreme Court has declined to explicitly require prosecutors to affirmatively prove voluntariness in criminal cases. The Court's failure to explicitly recognize voluntariness as an essential element of criminal responsibility is particularly glaring in resisting cases because, as discussed in Part II, the fearsome, violent dimensions of arrests may elicit involuntary resistance.

II. POLICE VIOLENCE AND INVOLUNTARY RESISTANCE

Using insights from psychology, neuroscience, and evolutionary biology, this Part uncovers how the violence of an arrest—such as the use of canines, pepper spray, or capture—may elicit involuntary resistance.[114] In doing so, this Part bolsters resisters' claims that, in some instances, resistance to law enforcement is involuntary. Accounting for the validity of these claims brings the need for an elevated voluntariness requirement in resisting cases into sharp relief.

Involuntary resistance is essentially an involuntary stress response to the violence of arrest. Researchers at the National Institute of Mental Health have cast arrest as a form of community violence.[115] People who are exposed to community violence may react by engaging in coping strategies, involuntary stress responses,

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Supreme Court has proscribed explicitly instructing juries that "the law presumes that a person intends the ordinary consequences of his voluntary acts." Sandstrom v. Montana, 442 U.S. 510, 512, 524 (1979).

114. I acknowledge that—aside from Olivett & March, *supra* note 22—there are not many psychological or other scientific studies that have determined that arrests may precipitate involuntary resistance. This is, in great part, due to the near impossibility of replicating the conditions of an arrest in a lab. As psychologists Arne Öhman and Susan Mineka explain: "Because of self-evident ethical constraints, the level of aversiveness that human research participants can be exposed to is rather limited. . . ." Öhman & Mineka, *supra* note 2, at 493; *see also* Bertram et al., *supra* note 22, at 15. Indeed, it is hard to imagine scientists siccing canines on, deploying pepper spray in the face of, or forcibly handcuffing research subjects. Even if this were possible, research participants in scientific studies differ from arrestees in that research participants "know that they are participating in kind of a make-believe situation that never is allowed to become dangerous." Öhman & Mineka, *supra* note 2, at 513. People who are arrested have no such assurances—au contraire, their arrest could possibly end in their death. Nevertheless, studies tracking people's responses to pictures of aggressive humans and guns—in addition to more coercive experiments on animals—shed light on the emotional, physiological, and behavioral dimensions of human involuntary stress responses. *See id.* at 498, 504; Bastos et al., *supra* note 22, at 260; Perusini & Fanselow, *supra* note 22, at 422 (referencing study that "showed that viewing unpleasant stimuli generates defensive reactions" "in humans"); Bertram et al., *supra* note 22, at 2 ("On the behavioral level, many . . . defensive responses . . . are highly consistent across mammals." (citation omitted)).

115. *See* JOHN E. RICHTERS & WILLIAM SALTZMAN, SURVEY OF EXPOSURE TO COMMUNITY VIOLENCE: SELF REPORT VERSION 9 (1990), https://www.researchgate.net/publication/317316974_Survey_of_Exposure_to_Community_Violence_Self_Report_Version; *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 120 (The Univ. of Chi. Press 1979) (1768) ("The least touching of another's person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence. . . .").

or both.[116] *Coping strategies* are conscious and volitional.[117] *Involuntary stress responses*, in contrast, "are not under one's conscious control" and "may consist of physiologically based reactivity to stress that is innate or automatic in nature."[118] *Automatic* in this context means "elicited independent of conscious cognition," before one is able to refrain.[119]

A person may reflexively and involuntarily resist police violence,[120] just as they may reflexively and involuntarily resist domestic or street violence. The findings detailed below suggest that involuntary stress responses may occur during an arrest, hence *involuntary resistance*. These findings comport with multiple state court findings that police officers may induce a person to flee just by pursuing them.[121]

Involuntary stress responses have emotional, physiological, and behavioral components.[122] The psychological and other scientific findings detailed below suggest that each of these components are capable of arising in the context of an arrest.[123]

The intention here is not to detail and adjudicate empirical debates related to stress responses—such tasks are beyond the scope of this Article and are better left to experts in psychology, neuroscience, and evolutionary biology. Rather, the following presents a prima facie case that the violence of an arrest may elicit involuntary resistance. This case reflects the claims of involuntary resisters in resisting prosecutions.[124] The plausibility of such claims militates in favor of making voluntariness an explicit, essential element of resisting offenses.

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116. *See* Epstein-Ngo et al., *supra* note 22, at 39, 46 (explaining the need to distinguish between coping strategies and involuntary stress responses).

117. *See id.* at 38.

118. *Id.* at 39; *see also* Kozlowska et al., *supra* note 22, at 264 ("For humans, the activation of defense responses—the sudden change in motor and physiological state—may be experienced as overwhelming, and beyond conscious control.").

119. Öhman & Mineka, *supra* note 2, at 504.

120. *See* Olivett & March, *supra* note 22, at 7.

121. *See, e.g.*, Commonwealth v. Thibeau, 429 N.E.2d 1009, 1010 (Mass. 1981) (finding that flight from a police officer does not per se constitute reasonable suspicion because "otherwise, the police could turn a hunch into a reasonable suspicion by inducing the conduct justifying the suspicion"); State v. Beauchesne, 868 A.2d 972, 980–81 (N.H. 2005) (same); People v. Thomas, 660 P.2d 1272, 1275 (Colo. 1983) (en banc) (same), *overruled on other grounds by* People v. Archuleta, 980 P.2d 509 (Colo. 1999) (en banc).

122. *See* Kozlowska et al., *supra* note 22, at 268 ("Flight-or-fight responses are active defense responses—coordinated patterns of emotional-behavioral-physiological response—that are activated when animals are confronted with imminent danger, such as being actively pursued or attacked by a predator.").

123. Elsewhere, psychologists have observed stress responses in relation to community violence exposure. *See* Epstein-Ngo et al., *supra* note 22, at 43.

124. *See, e.g.*, State v. Riojas, No. 31386–7, 2014 WL 5362042, at *9 (Wash. Ct. App. Oct. 21, 2014); Mayfield v. State, 623 S.E.2d 725, 726 (Ga. Ct. App. 2005); State v. Lomchanthala, 341 P.3d 128, 130 (Or. Ct. App. 2014); People v. Newton, 87 Cal. Rptr. 394, 403 (Ct. App. 1970).

A. EMOTIONAL DIMENSION

The emotion of fear plays a central role in activating an involuntary stress response.[125] Put plainly, fear motivates people to avoid and escape danger.[126] Fearsome threats are capable of eliciting a reaction that "is mostly not under direct voluntary control but rather is activated extremely rapidly and automatically, independent of intentions, and often without conscious awareness."[127]

Two subtypes of fears may activate the stress response system: *inborn fears* of evolutionarily relevant threats and *learned fears* of novel threats.[128] As explained below, an arrest involves both types of fearsome stimuli. Particular attention is paid to how a learned fear of an arresting officer may be especially pronounced among black or brown people who are subjected to racially subordinating policing. Ultimately, whether a fearsome stimulus evokes an involuntary stress response depends on one's "evolutionary preparedness" and life experiences.[129]

Inborn fears relate to survival threats that our species's evolutionary forebears encountered, such as snakes, hostile human adversaries, and bodily pain.[130] People are essentially primed to rapidly react to such fearsome stimuli because avoidance thereof was essential to our evolutionary forebears' survival.[131] Specifically, inborn fears aid in survival by motivating avoidance of and escape from primordial deadly threats.[132]

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125. *See* Öhman & Mineka, *supra* note 2, at 483; *see also* Frijda, *supra* note 22, at 207 ("[E]motions of some intensity tend to induce impulsive actions that are not preceded by deliberation, nor are they intentional in the strict sense."); COPPOLA, *supra* note 76, at 93 ("Emotions are automatic survival responses to relevant environmental challenges. . . ." (citing Joseph E. LeDoux, *Feelings: What Are They & How Does the Brain Make Them?*, DÆDALUS, J. AM. ACAD. ARTS & SCIS., Winter 2015, at 96, 100)).

126. *See* Öhman & Mineka, *supra* note 2, at 483.

127. *Id.* at 505; *see also* Kozlowska et al., *supra* note 22, at 264 ("For humans, the activation of defense responses—the sudden change in motor and physiological state—may be experienced as overwhelming, and beyond conscious control."); Epstein-Ngo et al., *supra* note 22, at 39 ("[I]nitial responses to stress may or may not be within a person's conscious awareness or under an individual's control."). Öhman & Mineka refer specifically to the *fear module*, which they define as "a relatively independent behavioral, mental, and neural system that is specifically tailored to help solve adaptive problems prompted by potentially life-threatening situations in the ecology of our distant forefathers." Öhman & Mineka, *supra* note 2, at 484. Herein, I use *stress response* to refer to fear module activation, defensive responses, the defense cascade, and flight-or-fight responses.

128. *See* Öhman & Mineka, *supra* note 2, at 487–88; YUSTE, *supra* note 22, at 360–62 (discussing the neurological underpinnings of innate and learned fears).

129. Öhman & Mineka, *supra* note 2, at 488; Fanselow & Lester, *supra* note 22, at 208 ("This perception [of the imminence of predation] is a function of the prey's phylogenetic and ontogenetic experiential history with regards to the environmental stimuli present at the time of imminence determination.").

130. *See* Öhman & Mineka, *supra* note 2, at 483–86 ("[F]ears and social phobia originated from a second evolved behavioral system related to conspecific attack and self-defense."); *id.* at 505 (describing snakes and angry faces as "biologically fear-relevant stimuli"); Bertram et al., *supra* note 22, at 2 (including "the threat of being attacked by an aggressive conspecific" and "the threat of pain, such as the threat of injuring one's body" as "threatening stimuli that are relevant for most species").

131. *See* Öhman & Mineka, *supra* note 2, at 483.

132. *See id.*

An arrest may evoke inborn fears because it involves at least two evolutionarily relevant threats: a deadly human adversary and bodily pain.[133] People, therefore, may be predisposed to fear arresting officers. This fear may, in turn, help trigger involuntary resistance to arrest.[134]

This is not to say that people are invariably fearful of arresting officers or that such fear invariably results in fearful reactions. People's perceptions differ: one person may perceive an event as threatening, while another may not. Even when two people perceive the same event as threatening, their response to the threatening event may differ.[135] While some of this variation is attributable to differences in the kind and degree of inborn fears, much of it is also attributable to differences in life experiences.[136]

Fear learning entails a form of conditioning in which stimuli of a cultural origin (as opposed to an evolutionary origin) are associated with danger, death, or trauma.[137] A person may even learn to fear an object or event vicariously—that is, without ever having encountered it.[138]

For instance, a person may fear snakes or spiders without knowing what dangers they pose, but this same person may not fear guns until they learn about the dangers thereof. They may develop a fear of guns, even if they are never shot or never come into contact with a gun. Indeed, studies have found that even pictures of guns pointed away from a viewer may elicit a stress response in the viewer.[139] That is, guns are known to be so deadly that the mere sight of one may evoke a desire to flee, even if the gun is not aimed at the viewer.[140] In sum, an object or event associated with danger, death, or trauma may be the subject of a learned fear sufficient to trigger an involuntary stress response.[141]

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133. *See supra* note 130 and accompanying text.

134. Such fearfulness may also form a part of the "expressive dimension[]" of an act of resistance. *See* Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1242 (2017) ("It [resistance to police officers] expresses a desire for self-preservation, for dignity, for liberation from intrusions perceived to be arbitrary or unjust.").

135. *See* BREEDLOVE & WATSON, *supra* note 22, at 490–91 (explaining the science behind individual differences in stress responses).

136. *See* NORTHOFF, *supra* note 22, at 133; Öhman & Mineka, *supra* note 2, at 487 (explaining that "other conditions such as the presence of other aversive stimuli or a preexisting state of fear or anxiety in the organism may enhance the likelihood of an evolutionarily primed stimulus to elicit fear").

137. *See* Öhman & Mineka, *supra* note 2, at 487, 492, 504. Conditioned fears should not be conflated with conditioned, habitual responses. The former is an emotion that is learned. *See id.* at 483. In contrast, the latter is a behavioral response that stems from a habit of engaging in—or training to specifically engage in—said behavior. *See* Frijda, *supra* note 22, at 200–01.

138. *See* Öhman & Mineka, *supra* note 2, at 494, 498 (discussing vicarious fear conditioning); Epstein-Ngo et al., *supra* note 22, at 43 (finding that both personal victimization and witnessing violence were positively associated with involuntary stress responses).

139. *See, e.g.*, Bastos et al., *supra* note 22, at 260 ("We conclude that exposure to threat [gun] directed-away pictures might have led to a predisposition to active escape, that is, resembling the 'flight' stage of defense cascade.").

140. *See id.*; Öhman & Mineka, *supra* note 2, at 492.

141. *See* Bastos et al., *supra* note 22, at 261.

Adverse experiences with law enforcement officers may condition some people to develop an acute fear of being arrested.[142] An arrest entails being captured by a gun-wielding person whose aim, in part, is often to subject the person arrested to criminal punishment.[143] Moreover, arresting officers may use potentially deadly force against those who physically resist arrest.[144] An arrest, then, involves multiple culturally-relevant fearsome stimuli, including guns, patrol vehicles, and law enforcement officers. Even people who have never encountered a law enforcement officer may learn to fear them through vicarious accounts of harmful encounters with law enforcement.[145]

This learned fear may give rise to an appraisal of arresting officers as deadly, fearsome threats.[146] Such appraisals are largely automatic—although they may or may not be subsequently interspersed with conscious, deliberative processes.[147] Put differently, a person does not have to consciously choose to fear law enforcement officers in order to experience fear upon seeing them. A person may automatically retrieve and process information regarding prior contact with law enforcement, the arresting officer, the context of the arrest, and the circumstances of the arrest.

The dimensions of such automatic appraisals may include the anticipated effects of the encounter, the ability to cope with the encounter, and whether the encounter obstructs the person's needs.[148] Pertinent needs include bodily autonomy, healthy attachments with loved ones, and self-esteem.[149] An arrest—and the incarceration it prefigures—necessarily places these needs in jeopardy.[150]

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142. *See* Holmes & Smith, *supra* note 23, at 63 ("Unpleasant interactions with the police condition citizens to fear them. . . .").

143. Law enforcement officers may arrest civilians for aggravated crimes like murder or for petty infractions like not wearing a seatbelt. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) (finding that an arrest for a seatbelt violation was constitutional).

144. *See* Tennessee v. Garner, 471 U.S. 1, 7, 11–12 (1985).

145. *See* Holmes & Smith, *supra* note 23, at 66 ("Vicarious accounts shared by citizens inculcate and reinforce pejorative stereotypes and beliefs depicting police as dangerous, and they educate others on precautions to avoid problems when dealing with police officers." (citation omitted)).

146. Frijda et al. define "appraisal" as "the information that confers personal meaning to brute perceived events, which is drawn from environmental stimuli plus their temporal and spatial context, plus that drawn from actually interacting with the event, and that which is drawn from stored, associated information." Frijda et al., *supra* note 22, at 3; *see also* COPPOLA, *supra* note 76, at 117 ("[T]he reason for and way in which people appraise and respond to salient stimuli with specific emotional and behavioural reactions depends on the socio-environmental context."). Elsewhere, Frijda defines appraisal as "the information processes that enrich incoming event information, providing it with meaning that makes the event relevant to the individual," "retrieving information on what can be expected from the event," and "what he or she may do to cope or deal with that [event]." Frijda, *supra* note 22, at 205–06 (citations omitted).

147. *See* Frijda, *supra* note 22, at 206–07.

148. *See* Frijda et al., *supra* note 22, at 3.

149. *See id.*

150. The collateral consequences of criminal conviction may include the loss of housing, social relationships, social status, employment, earning potential, and cognitive and emotional functioning. *See* M. Eve Hanan, *Incapacitating Errors: Sentencing and the Science of Change*, 97 DENV. L. REV. 151, 152, 188, 191, 200 (2019).

Such fearful appraisals may be especially common in municipalities plagued by unconstitutional and racially subordinating policing, where people are more likely to have adverse experiences with law enforcement.[151] Over the past fifteen years, the Civil Rights Division of the United States Department of Justice ("DOJ") has produced myriad reports detailing various police departments' unconstitutional patterns and practices, such as using excessive force,[152] conducting unlawful searches,[153] and engaging in racially discriminatory law enforcement practices.[154]

Tellingly, many of these investigations were precipitated by highly publicized killings of black people, such as George Floyd in Minneapolis,[155] Laquan McDonald and Rekia Boyd in Chicago,[156] Michael Brown in Ferguson,[157] Breonna Taylor in Louisville,[158] and Freddie Gray in Baltimore.[159] Amid this

151. *See* Holmes & Smith, *supra* note 23, at 63 ("[T]he police charged with protecting citizens from the wrongdoers among them are yet another symbol of danger to many citizens of such [disadvantaged minority] neighborhoods." (citations omitted)); *id.* at 61 ("[I]n some important respects the police constitute a marauding band invading the territory of an outgroup."); *id.* at 63 ("Unpleasant interactions with the police condition citizens to fear them. . . .").

152. *See* C.R. DIV., U.S. DOJ, INVESTIGATION OF THE CITY OF PHOENIX AND THE PHOENIX POLICE DEPARTMENT 13–40 (2024) [hereinafter C.R. DIV., INVESTIGATION OF PHX. PD]; C.R. DIV., INVESTIGATION OF MPD, *supra* note 23, at 9–30; C.R. DIV., INVESTIGATION OF LMPD, *supra* note 23, at 11–19; C.R. DIV., INVESTIGATION OF CPD, *supra* note 23, at 22–45; C.R. DIV., INVESTIGATION OF BPD, *supra* note 23, at 74–115; C.R. DIV., INVESTIGATION OF FPD, *supra* note 23, at 28–41.

153. *See* C.R. DIV., INVESTIGATION OF LMPD, *supra* note 23, at 22–27; C.R. DIV., U.S. DOJ, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 30–31 (2011) [hereinafter C.R. DIV., INVESTIGATION OF NOPD]; C.R. DIV., INVESTIGATION OF BPD, *supra* note 23, at 24–34.

154. *See* C.R. DIV., INVESTIGATION OF PHX. PD, *supra* note 152, at 55–71; C.R. DIV., INVESTIGATION OF MPD, *supra* note 23, at 31–47; C.R. DIV., INVESTIGATION OF LMPD, *supra* note 23, at 38–53; C.R. DIV., INVESTIGATION OF NOPD, *supra* note 153, at 31–40; C.R. DIV., INVESTIGATION OF BPD, *supra* note 23, at 47–73; C.R. DIV., INVESTIGATION OF FPD, *supra* note 23, at 62–78.

155. *See* C.R. DIV., INVESTIGATION OF MPD, *supra* note 23, at 1; *see also* Jim Salter & Mark Vancleave, *George Floyd's Killing Capped Years of Violence, Discrimination by Minneapolis Police, DOJ Says*, ASSOCIATED PRESS (June 16, 2023, 12:03 AM), https://apnews.com/article/george-floyd-minneapolis-police-investigation-19d384c2d90b186b627f9d8cf1d5be2e [https://perma.cc/8F7S-BBN3].

156. *See* C.R. DIV., INVESTIGATION OF CPD, *supra* note 23, at 1, 19; *see also* Monica Davey & Mitch Smith, *Black Leaders in Chicago Push for Investigation of Police Department*, N.Y. TIMES (Nov. 25, 2015), https://www.nytimes.com/2015/11/26/us/black-leaders-in-chicago-push-for-investigation-of-police-department.html.

157. *See* C.R. DIV., INVESTIGATION OF FPD, *supra* note 23, at 5; *see also* Matt Apuzzo & John Eligon, *Ferguson Police Tainted by Bias, Justice Department Says*, N.Y. TIMES (Mar. 4, 2015), https://www.nytimes.com/2015/03/05/us/us-calls-on-ferguson-to-overhaul-criminal-justice-system.html.

158. *See* C.R. DIV., INVESTIGATION OF LMPD, *supra* note 23, at 2; *see also* Dylan Lovan, *After Breonna Taylor Death, Feds Find Police Discrimination*, ASSOCIATED PRESS (Mar. 8, 2023, 6:14 PM), https://apnews.com/article/breonna-taylor-louisville-justice-department-investigation-070 17f9d2721e1b6f99494ea6b03f1f4 [https://perma.cc/WJR9-23Q9].

159. *See* C.R. DIV., INVESTIGATION OF BPD, *supra* note 23, at 19–20. Similarly, on July 27, 2023, the DOJ announced its investigation of the City of Memphis and the Memphis Police Department. Press Release, Office of Public Affairs, Justice Department Announces Pattern or Practice Investigation of the City of Memphis and the Memphis Police Department (July 27, 2023), https://www.justice.gov/opa/pr/justice-department-announces-pattern-or-practice-investigation-city-memphis-and-memphis [https://perma.cc/D4XY-DN83]. While announcing the investigation, United States Associate Attorney General Vanita Gupta noted that the people of Memphis were "still hurting after the tragic death of Tyre Nichols, " a black man who was beaten to death by Memphis police officers. *Id.*; *see also* Rick Rojas, *Justice*

spate of police killings of black people, the Federal Bureau of Investigation has produced multiple reports detailing white supremacists' ongoing infiltration of law enforcement agencies.[160]

Violent, invasive, and racially subordinating policing does not just exist in the pages of DOJ reports; instead, it is a part of the lived experience, collective memory,[161] and historical trauma[162] of communities menaced by law enforcement. Elsewhere, I explore the history of antiblack policing, from Antebellum slave patrols to modern racially subordinating policing.[163] Today, people who experience or witness police violence, invasive police searches, and evidently racist policing may become conditioned to appraise law enforcement to be a hostile, fearsome threat to their liberty and lives.[164]

Dept. Opens Civil Rights Investigation of Memphis Police, N.Y. TIMES (July 27, 2023), https://www.nytimes.com/2023/07/27/us/memphis-police-civil-rights-investigation.html.

160. *See, e.g.*, FED. BUREAU OF INVESTIGATION, COUNTERTERRORISM DIV., COUNTERTERRORISM POLICY DIRECTIVE AND POLICY GUIDE 89 (2015), https://archive.org/details/CounterterrorismPolicyDirectiveAndPolicyGuide/page/n35/mode/2up [https://perma.cc/W8XS-Y43B] ("Domestic terrorism investigations focused on militia extremists, white supremacist extremists, and sovereign citizen extremists often have identified active links to law enforcement officers. . . ."); FED. BUREAU OF INVESTIGATION, COUNTERTERRORISM DIV., WHITE SUPREMACIST INFILTRATION OF LAW ENFORCEMENT 3 (2006), https://web.archive.org/web/20201116013804if_/https://oversight.house.gov/sites/democrats.oversight.house.gov/files/White_Supremacist_Infiltration_of_Law_Enforcement.pdf [https://perma.cc/3KCL-LT5D] (finding that "white supremacist groups have historically engaged in strategic efforts to infiltrate and recruit from law enforcement communities'' and that "[w]hite supremacist presence among law enforcement personnel is a concern," in part, because it "can result in . . . abuses of authority").

161. *See* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2106–07 (2017) ("Collective memories are based on some combination of personal experience, observing and hearing about the experiences of others, passing accumulated wisdom from parent to child, observing interactions in public space, seeing (or not seeing) murals and other forms of public commemoration, watching television, scrolling through social media, and sharing all of these personal and vicarious experiences in the community.").

162. *See* Andie Kealohi Sato Conching & Zaneta Thayer, *Biological Pathways for Historical Trauma to Affect Health: A Conceptual Model Focusing on Epigenetic Modifications*, 230 SOC. SCI. & MED., 2019, at 74, 74 (defining "historical trauma" as "collectively experienced trauma in an ancestral generation that is associated with poor mental and physical health outcomes in descendent generations").

163. *See* Shukur, *supra* note 14, at 5–6, 10.

164. In 2022, a team of research psychologists found that "Black Americans are reportedly more distrusting of members of law enforcement, perceive higher levels of racial bias, and are more prone to report negative encounters characterized by discrimination and injustice." Leslie A. Anderson, Margaret O'Brien Caughy & Margaret T. Owen, *"The Talk" and Parenting While Black in America: Centering Race, Resistance, and Refuge*, 48 J. BLACK PSYCH. 475, 476 (2022) (citations omitted); *see also* Rod K. Brunson & Ronald Weitzer, *Police Relations with Black and White Youths in Different Urban Neighborhoods*, 44 URB. AFFS. REV. 858, 864 (2009) (finding that white youth in the researchers' study "had a less troubled relationship with and more positive views of the police than Black youth"). Myriad empirical studies have made similar findings. *See* Bell, *supra* note 161, at 2059, 2069–72 (compiling empirical evidence supporting the conclusion that black people "are more likely than whites to view the police as illegitimate and untrustworthy"). As Monica Bell explains, "objective structural conditions (including officer behaviors and the substantive criminal law)" may give birth to a "subjective orientation" in which black and brown communities view police and courts as "illegitimate, unresponsive, and ill equipped to ensure public safety." *Id.* at 2066–67 (quoting David S. Kirk & Andrew V. Papachristos, *Cultural Mechanisms and the Persistence of Neighborhood Violence*, 116 AM. J. SOCIO. 1190, 1191 (2011)).

A young black man, for example, may have such an appraisal if he has previously witnessed police officers capturing and shackling people who look like him against their will, if his parents have told him that police officers are likely to target and brutalize him because of his race and gender,[165] or if he has watched videos of police officers murdering civilians who look like him. For instance, Keenan Anderson, a young black man, repeatedly exclaimed, "They're trying to George Floyd me!" as he resisted the Los Angeles Police Department officers who repeatedly electrified him with a Taser.[166] As Keenan faced imminent capture, the highly-publicized killing of George Floyd was at the top of his mind. Hours later, Keenan tragically died after suffering cardiac arrest.[167]

In *Commonwealth v. Warren*, the Supreme Judicial Court of Massachusetts found that "where the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from . . . a pattern of racial profiling of black males in the city. . . ."[168] The court went on to note that, under the circumstances, a black male's flight "is not necessarily probative of a suspect's state of mind or consciousness of guilt."[169] The court recognized that the appraisal of police as racially subordinating may induce a black man to flee from an

165. The scourge of racially subordinating policing may compel black and brown parents to have "the Talk" with their children. *See* Tracy R. Whitaker & Cudore L. Snell, *Parenting While Powerless: Consequences of "the Talk,"* 26 J. HUM. BEHAV. SOC. ENV'T 303, 304 (2016). During the Talk, black and brown parents teach their children about "racial profiling and diffusing negative perceptions and stereotypes to avoid being hurt or killed by police during routine activities, such as driving or walking down the street." *Id.* (citation omitted). The Talk may also understandably contribute to said youth mistrusting law enforcement officers. This mistrust may partially determine resistance to law enforcement. The intention here is not to disparage parents who have the Talk, but instead to limn one means by which social conditions that necessitate the Talk may precipitate resistance. Indeed, the Talk is necessary in the wake of racial harms like the 15-year-old black boy, Bobby Moore, who in 2012 was killed by a white police officer who had previously attended a Ku Klux Klan meeting, or the McCurtain county commissioner in Oklahoma who in March 2023 waxed poetic—with the county sheriff—about when the sheriff could "take a damn Black guy and whoop their ass and throw him in the cell" and wished that he could "[t]ake them [Black citizens] down to Mud Creek and hang them up with a damn rope." *See* Radley Balko, *'If You Don't Get at That Rot, You Just Get More Officers Like Josh Hastings,'* WASH. POST (Nov. 2, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/11/02/feature/if-you-dont-get-at-that-rot-you-just-get-more-officers-like-josh-hastings/; John Lynch, *Ex-LR Officer's Case Ends in Mistrial; New Date Set*, ARK. DEMOCRAT-GAZETTE (June 24, 2013, 12:40 AM), https://www.arkansasonline.com/news/2013/jun/24/ex-lr-officers-case-ends-mistrial-new-dat-201 30624/; Richard Luscombe, *Oklahoma Officials Recorded Making Racist and Threatening Remarks*, GUARDIAN (Apr. 18, 2023, 6:42 PM), https://www.theguardian.com/us-news/2023/apr/18/oklahoma-mccurtain-county-sheriff-officials-recording-racist-threatening-remarks [https://perma.cc/B42E-TA2Y]. In this atmosphere of violent racial subordination, the Talk is necessary, even if it is fear inducing.

166. Timothy Bella, *BLM Co-Founder's Cousin Dies After Police Repeatedly Use Taser, Video Shows*, WASH. POST (Jan. 12, 2023, 1:06 PM), https://www.washingtonpost.com/nation/2023/01/12/keenan-anderson-police-taser-death-los-angeles/.

167. *See id.*

168. 58 N.E.3d 333, 342 (Mass. 2016).

169. *Id.*

officer.[170] Black women may have similar appraisals, as they are also subjected to racially subordinating policing.[171]

Such fearful appraisals are not limited to black people.[172] One recent study found that from 2013 to 2019, annual rates of police killings of Pacific Islanders and Indigenous people in the United States were roughly on par with those suffered by black people.[173] This study also noted that the spillover effects of such fatal police violence "may be even more significant in smaller ethnic groups" and may impact the mental health of "community members with the same racial/ethnic background as decedents."[174]

Police violence may also condition some Latine people to fear law enforcement. After Raul de la Cruz, a neurodivergent Latino, was shot by New York City police officers, de la Cruz's nine-year-old cousin confronted officers, exclaiming, "You're abusers. Really, you're abusers. . . . You wanted to kill him."[175] The shooting of her cousin, then, may have shaped this child's perception of police officers as abusive. Moreover, undocumented Latine people are among those impacted by anti-immigration policies and practices that breed pervasive fear of capture and deportation.[176] This fear is reinforced by exploitative employers who threaten to report undocumented workers to law enforcement if they request back pay.[177]

This is not to suggest that only black or brown people may fear law enforcement. Again, any person, regardless of race, may have an inborn fear of an aggressive adversary attempting to capture their bodies.[178] And certainly a white person may learn to fear police officers and the guns they wield. The prevalence of racially subordinating policing, however, may uniquely condition black and brown people to fear policing and arrests.

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170. *See id.* at 341 ("Were the rule otherwise, the police could turn a hunch into a reasonable suspicion by inducing the [flight] justifying the suspicion." (alteration in original) (quoting Commonwealth v. Stoute, 665 N.E.2d 93, 97–98 (Mass. 1996))).

171. *See* Chardée A. Galán, Evan E. Auguste, Naila A. Smith & Jocelyn I. Meza, *An Intersectional-Contextual Approach to Racial Trauma Exposure Risk and Coping Among Black Youth*, 32 J. RSCH. ON ADOLESCENCE 583, 588 (2022).

172. *See* Gabriel L. Schwartz & Jaquelyn L. Jahn, *Disaggregating Asian American and Pacific Islander Risk of Fatal Police Violence*, PLOS ONE, Oct. 10, 2022, at 1, 7.

173. *See id.* at 2, 5, 6 fig.1. The rates for white, Latine, and Asian people, however, were much lower. *See id.* at 6 fig.1.

174. *Id.* at 7.

175. *Family Demands Justice for Raul de la Cruz, Bronx Resident Critically Wounded by NYPD*, DEMOCRACY NOW! (Apr. 10, 2023), https://www.democracynow.org/2023/4/10/headlines/family_demands_justice_for_raul_de_la_cruz_bronx_resident_critically_wounded_by_nypd [https://perma.cc/T5B7-N5MP]; *see also* Complaint at 5, de la Cruz v. City of New York, No. 24-cv-02289 (S.D.N.Y. Mar. 26, 2024).

176. *See* Lindsay Pérez Huber, *"*Como Una Jaula de Oro*" (It's Like a Golden Cage): The Impact of DACA and the California Dream Act on Undocumented Chicanas/Latinas*, 33 CHICANA/O-LATINA/O L. REV. 91, 108 (2015) (describing state "laws [that] sought to severely restrict the lives of the undocumented by enforcing immigration stops and authorizing the detaining of those that could not provide identification, creating a climate of fear and hostility").

177. *See id.* at 116.

178. *See* Bertram et al., *supra* note 22, at 2.

In addition to fears of racial violence, fears of sexual violence at the hands of law enforcement officers may pervade subordinated communities—especially among black women, who are disproportionately affected by police sexual violence.[179] Police sexual violence has a long history in the United States.[180] Such violence may take various forms, such as sexual harassment, forcible touching, sexual extortion, child sex abuse, and rape.[181] Degrading misgendering and cross-gender strip searches of transgender people may also condition fear of arrests.[182]

Such culturally relevant learned fears may be among the drivers of involuntary resistance to arrest. As such, they should be taken into account in prosecutions arising out of acts of resistance.

B. BEHAVIORAL ACCOUNT

Inborn and learned fears may prime a person to experience an automatic defensive behavioral response during an encounter with an arresting officer.[183] The perceived imminence of the threat may play a pivotal role in precipitating such responses.[184] Imminence is measured by the "physical, temporal, and probabilistic

179. *See* Galán et al., *supra* note 171, at 588.

180. *See Database*, INVISIBLE NO MORE (Sept. 24, 2019), http://invisiblenomorebook.com/database/ [https://perma.cc/7949-HZH3] (detailing over 600 cases of police violence against women of color, including sexual violence, from the 1940s through the 2010s); Andrea J. Ritchie, *How Some Cops Use the Badge to Commit Sex Crimes*, WASH. POST (Jan. 12, 2018, 9:16 AM), https://www.washingtonpost.com/outlook/how-some-cops-use-the-badge-to-commit-sex-crimes/2018/01/11/5606fb26-eff3-11e7-b390-a36dc3fa2842_story.html.

181. *See* ANDREA J. RITCHIE, SHROUDED IN SILENCE: POLICE SEXUAL VIOLENCE: WHAT WE KNOW & WHAT WE CAN DO ABOUT IT 4–5 (2021), http://interruptingcriminalization.com/breaking-the-silence [https://perma.cc/FH5H-JA9B]; Jessica Contrera, Jenn Abelson, John D. Harden, Hayden Godfrey & Nate Jones, *Abused by the Badge*, WASH. POST (June 12, 2024, 8:00 AM), https://www.washingtonpost.com/investigations/interactive/2024/police-officers-child-sexual-abuse-in-america/ (reporting on 1,800 police officers in the United States prosecuted for crimes involving child sex abuse from 2005 through 2022). The fact that hundreds of police officers have been arrested for sexual misconduct does not erase the harm these officers have caused survivors of police sexual violence, their loved ones, or their communities. *See* Ritchie, *supra* note 180.

182. *See* First Amended Complaint at 1–2, 6, 9, 11, 18, Marquez-Martinez v. United States, No. 18-CT-3118 (E.D.N.C. Nov. 1, 2019) (claiming that the cross-gender strip searches of a Latine trans woman in federal custody constituted wrongdoing under the Federal Tort Claims Act). Prior to the filing of the aforementioned amended complaint, the *Marquez-Martinez* court denied, in part, the federal government's motion to dismiss the plaintiff's claim that the cross-gender strip searches of her while in federal custody constituted tortious assault and battery, and granted dismissal on other claims. *See* U.S.'s Memorandum in Support of Its Motion to Dismiss at 7, 27, Marquez-Martinez v. United States, No. 18-CT-3118 (E.D.N.C. Oct. 15, 2018); Order, Marquez-Martinez v. United States, No. 18-CT-3118 (E.D.N.C. July 9, 2019).

183. *See* Olivett & March, *supra* note 22, at 3–6 (detailing a series of psychological experiments in which participants more often exhibited automatic defensive responses when shown images of uniformed police officers than when shown images of civilians in street clothes and uniformed nonpolice professionals like firefighters and postal workers).

184. *See* Fanselow & Lester, *supra* note 22, at 202, 208. Fanselow and Lester's findings were based on studies of laboratory rats. *Id.* at 188. Mobbs et al. made substantially similar findings in studies of humans. *See* Mobbs et al., *When Fear Is Near*, *supra* note 22, at 1082 ("Our results show a dynamic configuration of threat responses that include the PAG and are akin to what might be predicted from animal models of defensive avoidance. . . .").

closeness to contact."[185] There are three key types of defensive responses: pre-encounter, post-encounter, and circa-strike.[186] Pre-encounter defensive responses consist of precautionary actions taken when a threat does not pose an immediate danger and is not near.[187] Post-encounter defensive responses are taken once the threat is seen or otherwise perceived to be near.[188] Circa-strike defensive responses are taken just before, during, and immediately after the threat makes contact.[189] The more imminent the threat, the more likely a target is to lose control over their defensive response thereto.[190]

Once a deadly threat is seen or otherwise determined to be near, a target may freeze, that is, become immobile.[191] This instinctive immobility helps a target avoid detection and prepare to escape the detected threat.[192] It is as if "the freezing animal is tensed up and ready to explode into action if the freezing response fails it."[193]

If an escape is available, then the dominant defensive reaction is typically to flee.[194] The probability of the target attacking the threat, however, is maximal just before and as contact is made (circa strike),[195] which is when the target is least likely to control their behavior.[196] Once such a defensive reaction is triggered, it may continue until the threat or fear subsides.[197]

An arrest necessarily involves capture at the hands of an arresting officer. And, as discussed in Part III, some arrests involve the use of acute police violence,

185. Perusini & Fanselow, *supra* note 22, at 421.

186. *See* Fanselow & Lester, *supra* note 22, at 188–203; Mobbs et al., *When Fear Is Near*, *supra* note 22, at 1080.

187. *See* Fanselow & Lester, *supra* note 22, at 188; Mobbs et al., *When Fear Is Near*, *supra* note 22, at 1080.

188. *See* Fanselow & Lester, *supra* note 22, at 191.

189. *See id*. at 202.

190. *See* Mobbs et al., *From Threat to Fear*, *supra* note 22, at 12241 ("Thus, when the subjects thought there was a low probability of shock, they had more controlled locomotor behaviors, yet the knowledge they were likely to be caught increased locomotor errors."); Bastos et al., *supra* note 22, at 260 (discussing observation that "as contact between predator and prey is about to take place, the probability of prey jump-attack is maximal"); Perusini & Fanselow, *supra* note 22, at 422 ("These findings support models suggesting that higher forebrain areas are involved in early-threat responses, including the assessment and control of fear, whereas highly imminent danger results in fast, nonassociative defensive reactions mediated by the midbrain." (citations omitted)).

191. *See* Perusini & Fanselow, *supra* note 22, at 421.

192. *See id*. at 421–22; Bastos et al., *supra* note 22, at 260–61 (discussing the theory that "immobility under attack embeds a concomitant action preparation to be released when escape opportunity is evoked").

193. Fanselow & Lester, *supra* note 22, at 202.

194. *See* Bastos et al., *supra* note 22, at 253.

195. *See id*. at 260 (discussing observation that "as contact between predator and prey is about to take place, the probability of prey jump-attack is maximal"); Perusini & Fanselow, *supra* note 22, at 421.

196. *See* Mobbs et al., *From Threat to Fear*, *supra* note 22, at 12241.

197. *See* Öhman & Mineka, *supra* note 2, at 506 ("Once activated, fear runs its course, with limited possibilities for cognitive interventions."); Frijda, *supra* note 22, at 203 ("Control precedence includes persistence over time, overcoming obstacles and interruptions, and attentional selectivity. . . . It is why impulsive actions often fail to reckon with harmful or disadvantageous consequences they might entail, but that could have been foreseen if one had taken the time and the cognitive trouble to do so.").

such as canine attacks, and the use of chemical weapons like pepper spray. This violence may cause a person to experience an automatic defensive response that continues throughout the duration of the arrest.

C. PHYSIOLOGICAL ACCOUNT

The physiological account of involuntary stress responses further illuminates how a fearful person facing the imminent or actual violence of arrest may reflexively resist an arresting officer.

People are generally equipped with defense systems, which have evolved over the course of hundreds of millions of years.[198] These systems include a "reflexively wired motor system" that moves us away from danger.[199] Our evolutionary forebears needed this reflexive wiring in the wild, where "a few milliseconds' difference in defense activation" could mean the difference between life and death.[200] The reflexivity of this system does not allow for a "complete cognitive analysis" before an automatic defensive action is carried out.[201] Further, once an automatic defense response is elicited, it is difficult to stop.[202] This is due to the primordial "need to rely on time-proven strategies rather than recently evolved cognitions to deal with rapidly emerging and potentially deadly threats."[203]

Once a person detects a threat, neural activity increases in forebrain structures, such as the amygdala.[204] The amygdala is a group of nuclei that are pivotal in regulating emotions, including the emotion of fear.[205] Forebrain structures are involved in gathering information about a threat, associating the threat with danger, predicting possible outcomes of the threatening event, considering contingencies, and accounting for uncertainty.[206] They allow a target to "choose the most effective and resourceful strateg[ic]" response to the threat.[207] But some forebrain processes are relatively slow compared to those of some other brain regions.[208] Accordingly, in the face of an extreme threat, high-level forebrain

198. *See* Nesse et al., *supra* note 22, at 97; Öhman & Mineka, *supra* note 2, at 502; Perusini & Fanselow, *supra* note 22, at 421; *see also* Clara W. Liff, Yasmine R. Ayman, Eliza C.B. Jaeger, Hudson S. Lee, Alexis Kim, Angélica Viña Albarracín & Bianca Jones Marlin, *Fear Conditioning Biases Olfactory Stem Cell Receptor Fate*, ELIFE, Dec. 15, 2023, at 1, 3 ("Olfactory conditioning in the parent may provide future generations with an adaptive advantage: enhanced sensitivity to aversive sensory features in the environment of the parent.").

199. Öhman & Mineka, *supra* note 2, at 483, 503 ("Mammalian evolution has required the successful development of defense systems to cope with dangers that threatened to disrupt the transport of genes between generations."); Löw et al., *supra* note 22, at 870 ("[A]s with animals, . . . the reflex was potentiated when viewers were confronted with an aversive cue. . . ."); Romero, *supra* note 22, at 547.

200. Öhman & Mineka, *supra* note 2, at 483, 502.

201. *Id.* at 502.

202. *See id.* at 485.

203. *Id.*

204. *See* BREEDLOVE & WATSON, *supra* note 22, at 480; Mobbs et al., *From Threat to Fear*, *supra* note 22, at 12241.

205. *See* BREEDLOVE & WATSON, *supra* note 22, at 47, 480.

206. *See id.* at 480; Mobbs et al., *From Threat to Fear*, *supra* note 22, at 12241; Bertram et al., *supra* note 22, at 10.

207. Mobbs et al., *When Fear Is Near*, *supra* note 22, at 1082.

208. *See* Mobbs et al., *From Threat to Fear*, *supra* note 22, at 12241.

processes may be inhibited as other brain regions attempt to elicit a rapid defensive response.[209]

The more imminent the fearsome threat becomes—by, for example, moving closer to its target—the more the target's midbrain structures may predominate.[210] If a person is physically harmed during a violent encounter, then they may experience a polysynaptic reflexive response.[211] A person experiencing this reflexive response to pain may involuntarily engage in complex behaviors that entail extending and contracting various muscles.[212] For example, if someone steps on a sharp pin, then they may reflexively lift their leg without having consciously chosen to do so.[213]

Midbrain structures are involved in producing rapid reflexive behaviors, such as freeze, flight, or fight.[214] One team of neuroscientists explains: "It is known that overactivity of the midbrain PAG [periaqueductal gray] results in maladaptive responses such as panic, which manifest as uncoordinated behavior and *loss of control*."[215] These physiological processes may unfold within a fraction of a second.[216]

This physiological account of involuntary stress responses remains controversial among scholars who doubt that existing neuroscience sufficiently accounts for complex human behaviors.[217] It is, therefore, important to remember that, in addition to the physiological account of involuntary stress responses, there is also a behavioral account, which is detailed in the previous Section.[218]

Given the foregoing, the voluntariness requirement is particularly salient in resisting cases. Arresting officers may evoke myriad fears, and arrests may elicit automatic defensive responses beyond the resisters' conscious control. And yet, trial courts do not treat voluntariness as an essential element of resisting offenses.[219] Part III provides paradigmatic examples of trial courts failing to put

209. *See id.* at 12242; Perusini & Fanselow, *supra* note 22, at 422.

210. *See* Mobbs et al., *When Fear Is Near*, *supra* note 22, at 1080, 1081 fig.3, 1082; Mobbs et al., *From Threat to Fear*, *supra* note 22, at 12236–37; Perusini & Fanselow, *supra* note 22, at 422.

211. *See* YUSTE, *supra* note 22, at 270–71.

212. *See id.*

213. *See id.*

214. *See* Mobbs et al., *When Fear Is Near*, *supra* note 22, at 1080.

215. Mobbs et al., *From Threat to Fear*, *supra* note 22, at 12236, 12241 (emphasis added) (citation omitted).

216. *See* Romero, *supra* note 22, at 548.

217. *See, e.g.*, Morse, *supra* note 46, at 61 ("Despite the astonishing advances in neuroimaging and other neuroscientific methods, we still do not have sophisticated causal knowledge of how the brain works generally, and we have little information that is legally relevant."). *But see* Moore, *supra* note 76, at 297 (concluding that "[n]euroscience can deepen our understanding of when persons are responsible and what enables them to be the responsible creatures that they are"). I recognize that the fact that neural activity may increase in a certain brain structure before or during an act does not mean that said structure solely causes the act. *See* Morse, *supra* note 46, at 60.

218. *See* Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397, 405 (2006) ("If the person meets the behavioral criteria for responsibility, the person should be held responsible, whatever the brain evidence may indicate, such as the presence of an abnormality.").

219. *See infra* Part III.

prosecutors to a burden of proving voluntariness in resisting cases; this happens despite meaningful evidence corroborating resisters' claims that the violence accompanying their arrest caused them to resist involuntarily.

III. SUBVERTING THE VOLUNTARINESS REQUIREMENT IN RESISTING CASES

This Part details the means by which the voluntariness requirement is subverted in resisting cases. As explained in Part I, the voluntariness requirement is widely recognized as a core prerequisite to criminal responsibility. Jurisdictions formally allocate the burden of proving or disproving voluntariness in at least three different ways: (1) prosecutors are formally tasked with proving voluntariness beyond a reasonable doubt;[220] (2) prosecutors are tasked with proving voluntariness beyond a reasonable doubt only if a court determines that evidence in the record calls into question the voluntariness of the conduct at issue;[221] or (3) prosecutors are not explicitly tasked with affirmatively proving voluntariness.[222]

It is not unheard of for a court to require a prosecutor to prove the voluntariness of resistance against an arresting officer. In *People v. Newton*, for example, a state appellate court reversed Black Panther Party co-founder Huey Newton's conviction for killing a police officer.[223] The appellate court found that the trial court

220. *See supra* note 80.

221. *See, e.g.*, Baird v. State, 604 N.E.2d 1170, 1176 (Ind. 1992) ("[O]nce evidence in the record raises the issue of voluntariness, the state must prove the defendant acted voluntarily beyond a reasonable doubt."); Alford v. State, 866 S.W.2d 619, 624 n.8 (Tex. Crim. App. 1993) (en banc) ("[T]he State need not prove voluntariness unless the evidence raises the issue of accident, in which case the State must disprove the theory of accident beyond a reasonable doubt."); State v. Almaguer, 303 P.3d 84, 91 (Ariz. Ct. App. 2013) ("An instruction that the state must prove the defendant committed a voluntary act is appropriate only if there is evidence to support a finding of bodily movement performed unconsciously and without effort and determination. . . .").

222. *See, e.g.*, State v. Deer, 287 P.3d 539, 543 (Wash. 2012) (en banc) (holding that one can be found liable for a strict liability offense, such as rape of a child, even if one was asleep when the offense occurred); State v. Jones, 527 S.E.2d 700, 707 (N.C. Ct. App. 2000) (affirming trial court placing the burden on the accused to prove unconsciousness or automatism); Denno, *supra* note 21, at 396–99 (listing states with no explicit voluntariness requirement). The state of Georgia, for example, does not list voluntariness in its general culpability statute, but recognizes voluntariness-related defenses involving claims that the accused acted "unconscious[ly]." Smith v. State, 663 S.E.2d 155, 156–57 (Ga. 2008); *see* GA. CODE ANN. § 16-2-1. There are no readily available means of discerning how often resisting cases turn on the issue of voluntariness. Published resistance-related appellate court opinions involving contestations of voluntariness are scarce. Acquittals due to findings of involuntariness may not result in appellate opinions because prosecutors generally cannot appeal acquittals. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). In addition, misdemeanor offenses may be dismissed during plea negotiations, or be less likely to be appealed because they generally carry less severe sentences than felony offenses. *See* Linda Sanabria & Melissa Bender, *Plea Bargaining: Areas of Negotiation*, FINDLAW (Sept. 13, 2023), https://www.findlaw.com/criminal/criminal-procedure/plea-bargaining-areas-of-negotiation.html [https://perma.cc/VWN4-EWN3]; Christy Bieber & Adam Ramirez, *What Is a Misdemeanor? Legal Definition and Examples*, FORBES (June 14, 2023, 3:50 AM), https://www.forbes.com/advisor/legal/criminal-defense/what-is-a-misdemeanor/. This paucity of published appellate court opinions could also evince that prosecutors are generally not tasked with proving voluntariness in resisting cases, even when the law may require them to do so.

223. *See* 87 Cal. Rptr. 394, 397, 415 (Ct. App. 1970); Earl Caldwell, *Huey Newton's Conviction Reversed by Coast Court*, N.Y. TIMES (May 30, 1970), https://www.nytimes.com/1970/05/30/archives/huey-newtons-conviction-reversed-by-coast-court-newton-verdict.html.

impermissibly refused to issue a jury instruction on unconsciousness, despite credible evidence that the officer shot Newton first, possibly causing Newton "to lose consciousness and go into [a] reflex shock condition."[224] More recently, however, resisters challenging voluntariness have not fared as well as Newton.[225]

Below, I examine three cases in which accused persons credibly claimed their resistance was involuntary. These cases involve black or brown people who actually resisted arresting officers, contested voluntariness, and brought their cases to trial. The voluntariness requirement was subverted in each of their cases. That is, the requirement was not treated as an essential element of the charges against them. Instead, one trial court rejected a resister's request for a voluntariness jury instructions,[226] another shifted the burden to a resister to prove involuntariness,[227] and yet another disregarded the requirement altogether.[228] Each resister was convicted despite meaningful evidence suggesting that their resistance was involuntary. These resisters would have been less likely to suffer the harms of criminalization and incarceration if voluntariness was an explicit, essential element of the charges against them.

These cases demonstrate how trial courts' failures to require prosecutors to affirmatively prove voluntariness prejudice resisters with credible involuntariness defenses.

A. STATE V. LOMCHANTHALA

The Introduction briefly discusses the trial of Pariss Lomchanthala, a Pacific Islander man who was convicted of felony assault on an officer.[229] Pariss's case demonstrates the inadequacies of voluntariness requirements enumerated in general culpability statutes and pattern jury instructions.[230] It is also an example of the *mens rea* element's failure to adequately protect involuntary resisters from criminalization and incarceration.[231]

By the time Pariss began resisting arrest, he was already being attacked by a police canine.[232] The arresting officer later recalled:

> The suspect [Pariss] was resisting and we fell back and to the ground, with Jett [the canine] still biting the suspect's leg. . . . I chose to allow Jett to keep biting

224. *Newton*, 87 Cal. Rptr. at 403–04, 406.

225. *See infra* Sections III.A–III.C.

226. *See infra* Section III.A.

227. *See infra* Section III.B.

228. *See infra* Section III.C.

229. *See* State v. Lomchanthala, 341 P.3d 128, 130 (Or. Ct. App. 2014); SALEM POLICE DEP'T, *supra* note 3, at 1 (listing Pariss as "Native Hawaiian or Other Pacific Islander").

230. *See Lomchanthala*, 341 P.3d at 130–31; OR. REV. STAT. § 161.095(1); OR. REV. STAT. § 161.085(2); OR. STATE BAR COMM. ON UNIF. CRIM. JURY INSTRUCTIONS, OREGON UNIFORM CRIMINAL JURY INSTRUCTIONS, at 1065 (2018).

231. *See Lomchanthala*, 341 P.3d at 130–31; OR. REV. STAT. § 161.085(8) (defining *mens rea* of "knowingly" as "with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists").

232. *See Lomchanthala*, 341 P.3d at 129.

> the suspect as a distraction while we fought. . . . [Pariss] started yelling, "Ok, Ok, he's biting me, he's biting me." However, the suspect continued to fight with me.[233]

The dog scratched and bit Pariss repeatedly, leaving his face, arms, buttocks, legs, and back riddled with scratches and bite marks.[234]

Soon, more officers arrived on the scene.[235] One officer grabbed the top of Pariss's eye sockets and forehead while another knelt on Pariss's head.[236] It was only after Pariss was captured that the canine was ordered to stop attacking.[237] Pariss was later charged with resisting arrest and assaulting a public safety officer.[238]

Under Oregon state law, "[t]he minimal requirement for criminal liability" is the performance of a voluntary act or omission,[239] with a voluntary act defined as "a bodily movement performed consciously."[240] Prior to Pariss's arrest, the Court of Appeals of Oregon explained that the legislative intent underlying Oregon's statutory voluntariness requirement was to "require more than awareness," that is, to "require[] some evidence that the defendant had the ability to choose to take a particular action."[241] For instance, a person may not be held criminally liable in Oregon's state courts for bringing contraband into a jail if they were arrested and taken to jail while they happened to have contraband on them.[242] In theory, no criminal liability can be assigned in Oregon state courts if a prosecutor does not satisfy their burden to prove voluntariness.[243] Only eight states have a voluntariness pattern jury instruction, with Oregon being one of the eight.[244] Pariss, then,

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233. SMITH, *supra* note 3, at 2.

234. *See Lomchanthala*, 341 P.3d at 130; GAMBLE, *supra* note 6, at 2; Digital Photos of the Suspect and His Injuries Taken by CPL Gamble at Salem in Room #3, *in Request Number P025460-021423*, CITY OF SALEM, OR. PUB. RECS. REQUEST PORTAL, https://salemor.govqa.us/WEBAPP/_rs/(S(q504qtsgpa3prxmgo0fbiocl))/supporthome.aspx [https://perma.cc/2E7U-JMCE] (last visited Sept. 4, 2024).

235. GAMBLE, *supra* note 6, at 1.

236. *Id.*

237. *See* SMITH, *supra* note 3, at 2.

238. OR. JUD. DEP'T, *supra* note 9.

239. OR. REV. STAT. § 161.095(1).

240. OR. REV. STAT. § 161.085(2).

241. State v. Tippetts, 43 P.3d 455, 459–60 (Or. Ct. App. 2002) (reversing a conviction for supplying contraband because the prosecutor did not present "any evidence from which a reasonable juror could find that defendant had such a choice").

242. *See id.*

243. *See id.* at 457.

244. *See* OR. STATE BAR COMM. ON UNIF. CRIM. JURY INSTRUCTIONS, *supra* note 230, at 1065; CRIM. JURY INSTRUCTIONS COMM. OF THE SUP. CT. OF THE STATE OF MONT., MONTANA CRIMINAL JURY INSTRUCTIONS, at 2-110 (2022), https://courts.mt.gov/Courts/boards/CriminalJuryInstructionsCommission [https://perma.cc/354Z-DLPY]; KAN. JUD. COUNCIL PIK-CRIM. ADVISORY COMM., PATTERN JURY INSTRUCTIONS FOR KANSAS - CRIMINAL 4TH, at 52.040–.070 (4th ed. 2021); DEL. CTS. JUD. BRANCH, PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SUPERIOR COURT OF THE STATE OF DELAWARE, at 4.25, https://courts.delaware.gov/superior/pattern/pdfs/pattern_criminal_jury_rev5_2022a.pdf [https://perma.cc/7NU8-PT85] (last visited Sept. 4, 2024); MODEL CRIM. JURY INSTRUCTIONS COMM. OF THE COLO. SUP. CT., COLORADO JURY INSTRUCTIONS CRIMINAL, at F:391 (2022), [https://perma.cc/4ZDL-GGJX]; STATE

was seemingly well-positioned to challenge voluntariness because, in Oregon, voluntariness was an explicit prerequisite for criminal liability, and he had a pattern jury instruction at the ready.

At his jury trial, Pariss sought to argue that his resistance was involuntary, given the violent circumstances of his arrest.[245] Pariss's arrest involved both evolutionarily relevant and culturally relevant fearsome threats, such as the attacking canine and arresting officer. Before releasing the police canine, the arresting officer believed Pariss was going to "flee or fight."[246] As explained in Part II, *flight* and *fight* are two predominant forms of involuntary stress responses.

Once the canine began biting him, Pariss might have lost control of his actions. Unable to escape, Pariss may have experienced an automatic defensive reaction as the canine continued attacking, the arresting officer began fighting him, and Pariss's "body became lodged against a sign post."[247] The officer in Pariss's case admitted that the police canine continuously attacked Pariss throughout the attempted arrest.[248] The inability to escape, canine attack, and officer assault formed a set of objective circumstances that likely impaired Pariss's ability to refrain from resisting. Thus, his contestation of voluntariness was credible. It would strain credulity to conclude that no reasonable jury could doubt the voluntariness of a person's reaction to being bitten and clawed by a canine.

And yet, Pariss's jury was not apprised of the prosecutor's duty to prove voluntariness; this, despite Pariss's request for a voluntariness jury instruction and evidence corroborating his contestation of voluntariness.[249] In denying his request, the trial court claimed that the instruction "'introduce[d] additional terms' that were unrelated to other instructions or to the elements of the charged offense."[250] The trial court wrongfully disregarded Oregon's general statutory voluntariness requirement. The jury then found Pariss guilty, and the court sentenced him to twenty-two months in prison.[251]

BAR OF ARIZ., REVISED ARIZONA JURY INSTRUCTIONS (CRIMINAL) 28 (6th ed. 2022), https://www.azbar.org/media/g01ktaqc/raji-criminal-6th-ed-2022.pdf [https://perma.cc/7HRK-8T6A]; COMPENDIUM OF THE HAWAI'I PATTERN JURY INSTRUCTIONS – CRIMINAL, at 7.16 (2021), https://www.courts.state.hi.us/docs/docs4/crimjuryinstruct.pdf [https://perma.cc/LPQ6-LJBS]; N.Y. UNIFIED CT. SYS. CJI COMM., CRIMINAL JURY INSTRUCTIONS (CJI): INSTRUCTIONS OF GENERAL APPLICABILITY, https://www.nycourts.gov/judges/cji/1-General/ALPHA_TOC.shtml [https://perma.cc/T2BZ-DXL3] (last visited Sept. 4, 2024).

245. *See* State v. Lomchanthala, 341 P.3d 128, 130 (Or. Ct. App. 2014).

246. Respondent's Answering Brief at 3, *Lomchanthala*, 341 P.3d 128 (No. 12C43321).

247. *Lomchanthala*, 341 P.3d at 129, 131.

248. *See* SMITH, *supra* note 3, at 2 ("The suspect was resisting and we fell back and to the ground, with Jett [the canine] still biting the suspect's leg. . . . I chose to allow Jett to keep biting the suspect as a distraction while we fought.").

249. *See Lomchanthala*, 341 P.3d at 130–31.

250. *Id.* at 130.

251. *Id.*; Appellant's Opening Brief & Excerpt of Record at 1, *Lomchanthala*, 341 P.3d 128 (No. 12C43321).

Unlike the trial court, the appellate court acknowledged that voluntariness was, in fact, an element of the offense.[252] Moreover, it did not reject the possibility "that a rational jury could . . . find that a person was 'aware' of engaging in certain conduct without *voluntarily* engaging in that conduct."[253] Nevertheless, the appellate court did not find that the trial court erred in refusing to issue the requested voluntariness instruction.[254] Rather, the appellate court effectively ignored the trial court's erroneous decision not to issue the instruction.[255]

Ultimately, the court affirmed Pariss's conviction, finding that there was no evidence controverting the arresting officer's testimony that Pariss was fighting and "not 'flailing wildly.'"[256] The appellate court, then, failed to acknowledge that the fearsome and painful circumstances of Pariss's arrest were likely to have impaired his ability to refrain from resisting. Instead, the appellate court wrongfully weighed the evidence in favor of the prosecution despite myriad evidence supporting Pariss's contention of voluntariness.[257]

Pariss's case demonstrates that a state's recognition of the voluntariness requirement does not guarantee that a court will issue a voluntariness instruction when requested.

In addition, Pariss's case is an example of the *mens rea* element's failure to account for the full breadth of involuntary conduct. In Oregon, a person needs only to knowingly cause injury to a public safety officer in order to be found guilty of felony assault on a public safety officer.[258] The state defines *knowingly* as "with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists."[259] A resister, then, may be convicted of felony assault on a police officer if the resister *knew* that they were assaulting a police officer, even if the resister did not *intentionally* assault the officer.[260] Hence, the jury in Pariss's case did not have to grapple with the possibility that Pariss was unable to refrain from resisting arrest as the canine attacked him. Instead, they only had to find that Pariss knew that he was struggling with a police officer, as if Pariss's conduct occurred in a vacuum.[261]

252. *See Lomchanthala*, 341 P.3d at 131.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. The year following the issuance of the *Lomchanthala* opinion, the Court of Appeals of Oregon further eroded the voluntariness requirement by (1) holding that "a defendant can consciously perform an act in the absence of alternatives" in *State v. Hess*, 359 P.3d 288, 293 (Or. Ct. App. 2015); and (2) holding that voluntariness instructions only need to be issued if there is evidence in the record of involuntariness in *State v. Beck*, 344 P.3d 140, 144 (Or. Ct. App. 2015).

258. OR. REV. STAT. § 163.208(1) ("A person commits the crime of assaulting a public safety officer if the person intentionally or knowingly causes physical injury to the other person, knowing the other person to be a peace officer. . . .").

259. OR. REV. STAT. § 161.085(8).

260. *See Lomchanthala*, 341 P.3d at 130.

261. *See id.*

If, however, voluntariness were treated as an essential element—like *mens rea* was—then the trial court would have been required to instruct the jury on voluntariness, and the jury would have been forced to grapple with the acute violence of Pariss's arrest.

B. STATE V. RIOJAS

Courts may also subvert the voluntariness requirement by shifting the burden to the accused, thereby requiring the accused to prove involuntariness. The following is an example of this means of subversion.

On a summer morning in southeast Washington State, Mersadeze Riojas, a young Latina, was partying at a warehouse with some friends.[262] At some point, police officers were dispatched to the warehouse to investigate a report of underage drinking, fighting, and "possibly a gun."[263] When the police officers arrived at the warehouse, they heard people yelling and glass breaking just before a young white woman, who looked intoxicated, ran out of the warehouse followed closely by Mersadeze, who also appeared to be intoxicated.[264] The white woman, Bailee Culver, told the officers: "Those Mexican girls are chasing me and . . . throwing bottles at me and I don't know why."[265]

Mersadeze calmed down after a Latino police officer approached her.[266] Mersadeze told the officer that Bailee "had been going after" her friend, which is why Mersadeze chased her.[267] Shortly thereafter, a white male police officer approached Mersadeze.[268] At this point, Mersadeze embellished her story by claiming that Bailee had chased her with a knife.[269] The Latino officer then went to investigate other partygoers, leaving Mersadeze with the white officer.[270]

The white officer then escalated the encounter. He asked Mersadeze "why she had been fighting," to which Mersadeze responded that she "had *not* been fighting."[271] Mersadeze later testified that the officer began asking accusatory questions.[272] Because both Bailee—who said "[t]hose Mexican girls are chasing me"—and the interrogating officer were white, Mersadeze believed that the white officer was treating Mersadeze like a suspect rather than a victim on

262. *See* State v. Riojas, No. 31386–7, 2014 WL 5362042, at *1–2 (Wash. Ct. App. Oct. 21, 2014).
263. *Id.* at *1.
264. *Id.*
265. *Id.*
266. *See id.*; Tony Buhr, *A Gang Savvy Detective*, WALLA WALLA UNION–BULL. (Dec. 6, 2017), https://www.union-bulletin.com/news/a-gang-savvy-detective/article_b598b994-dabd-11e7-9e19-9b88ca100c52.html [https://perma.cc/9P9Y-X4U9].
267. *Riojas*, 2014 WL 5362042, at *1.
268. *Id.* at *2.
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*

account of her race.[273] Mersadeze said, "fuck this," and walked away.[274] When the white officer told her she was being detained, Mersadeze responded, "[f]uck you," and continued to walk away.[275]

Next, the white officer grabbed Mersadeze's arm without warning.[276] She later explained that when he grabbed her arm, "she felt pain. . . . [and] was very surprised by the action."[277] Mersadeze then swung her other arm, hitting the white officer in the lip in the process.[278] She later testified that her response to the officer's painful arm grab was an "automatic reaction."[279] But she was not allowed to testify that this reaction was commensurate with her self-defense class training.[280] Specifically, Mersadeze had been trained to "try to pull away" from someone who grabs you from behind and "hit their arm down."[281] The white officer later testified that Mersadeze's striking him was "pretty much an 'instantaneous thing.'"[282]

According to one witness, a struggle then ensued that ended with the white officer and another officer slamming Mersadeze to the ground, causing her face to hit the ground.[283] Mersadeze was then arrested and charged with felony assault on a law enforcement officer.[284]

Washington's criminal culpability statute does not contain a voluntariness requirement, but its courts have recognized this requirement.[285] At least one aspect of the Washington courts' conception of involuntariness is broader than that of the MPC's. Whereas the MPC excludes unconscious habitual conduct from the scope of involuntary conduct,[286] Washington's courts have specifically held that automatic conditioned responses are involuntary.[287] For example, an

273. *See id.* ("Ms. Riojas would later testify that the sergeant's questions were '[a]ccusatory . . . so I told him believe what he wants, obviously he is white, he is going to believe [Ms. Culver] because she is white.'" (alterations in original)).

274. *Id.*

275. *Id.*

276. *Id.*

277. Brief of Appellant at 14, *Riojas*, 2014 WL 5362042 [hereinafter Riojas Appellant Brief].

278. *Riojas*, 2014 WL 5362042, at *2.

279. *Id.* at *10.

280. *Id.*

281. Riojas Appellant Brief, *supra* note 277, at 13.

282. *Id.* at 9.

283. *Id.* at 11.

284. *See Riojas*, 2014 WL 5362042, at *2; WASH. REV. CODE § 9A.36.031(2) ("Assault in the third degree is a class C felony.").

285. *See Riojas*, 2014 WL 5362042, at *9 (recognizing that Washington State's courts have "analyzed a defense of conditioned response as bearing on voluntariness as a component of a crime's actus reus").

286. *See* MODEL PENAL CODE § 2.01(2)(d) (AM. L. INST., Official Draft and Revised Comments 1985) (excluding unconscious but habitual conduct from the scope of involuntariness); *id.* § 2.01 cmt. 2, n.29 (noting that some states, unlike the MPC, do not explicitly exclude habitual conduct from scope of involuntary conduct).

287. *See, e.g.*, State v. Utter, 479 P.2d 946, 949–50 (Wash. Ct. App. 1971).

involuntariness defense is available to a veteran whose military training caused them to automatically strike someone who startled them from behind.[288]

Prosecutors, however, are not required to affirmatively prove voluntariness in Washington. Instead, the state's courts have construed contestations of voluntariness as a "lack of volition" affirmative defense.[289] The Supreme Court has held that "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required."[290] Thus, states are permitted to require the accused to prove an affirmative defense, often by a preponderance of evidence.[291] Accordingly, the trial court was permitted to place the burden regarding voluntariness on Mersadeze and not the prosecution.[292]

The lack-of-volition affirmative defense did not ensure a determination of Mersadeze's claim of involuntariness. Mersadeze intended to argue that her striking the police officer was not a conscious action but instead a nonconscious reflexive response borne of her self-defense training.[293] To prevail on this affirmative defense, Mersadeze had to prove by a preponderance of evidence that she was in an unconscious or automatistic state at the time of the conduct giving rise to her prosecution.[294]

To be sure, Mersadeze had evidentiary support for her affirmative defense. The officer who arrested Mersadeze was an evolutionarily and culturally relevant fearsome threat. By escalating the encounter, the officer may have evoked fear of aggressive men. Indeed, one team of researchers detected physiological threat responses in women who were shown a short video simulation of an attacking man.[295] Mersadeze faced this threat in real life, as the male arresting officer grabbed her.[296] In addition to posing a physical and gendered threat, the white officer who grabbed Mersadeze after the white woman told him "[t]hose Mexican girls are chasing me"[297] posed a racial threat. As this fearsome threat—that is, the arresting officer—forcefully grabbed her from behind, the fearful Mersadeze might have lost control of her actions and reflexively struck the officer, especially if she was primed to do so by her self-defense training.

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288. *See id.* at 947–48, 950–51 (recognizing military veteran's defense that his violent act was an automatic response conditioned by his military training was cognizable, but affirming his conviction because he failed to provide sufficient evidence in support of his volitional defense).

289. *See* State v. Deer, 287 P.3d 539, 543 n.6 (Wash. 2012) (en banc); State v. Gardner, No. 69726–9, 2014 WL 5577309, at *10 (Wash. Ct. App. Nov. 3, 2014).

290. Patterson v. New York, 432 U.S. 197, 210 (1977); *see also* Dixon v. United States, 548 U.S. 1, 17 (2006) ("[W]e presume that Congress intended the petitioner to bear the burden of proving the defense of duress by a preponderance of the evidence."); Stanley v. Mabry, 596 F.2d 332, 333 (8th Cir. 1979) ("[W]e find no constitutional violation occurred by placing the burden of proof on petitioner to prove his insanity by a preponderance of the evidence.").

291. *See Patterson*, 432 U.S. at 206–07, 211.

292. *See* State v. Riojas, No. 31386–7, 2014 WL 5362042, at *10 (Wash. Ct. App. Oct. 21, 2014).

293. *See id.* at *7, *9.

294. *See Gardner*, 2014 WL 5577309, at *10.

295. Bertram et al., *supra* note 22, at 4, 10, 14.

296. *Riojas*, 2014 WL 5362042, at *2.

297. *See id.* at *1.

Further, the arresting officer testified that she reacted instantaneously to his grabbing her from behind without warning.[298] Instantaneity suggests another marker of involuntariness, automaticity, which is a basis for exculpation under Washington's lack-of-volition affirmative defense.[299] Once the officer grabbed Mersadeze's arm, she was unable to escape contact and may have experienced an automatic defensive response.

But while trying to satisfy her burden of proof, Mersadeze encountered an evidentiary obstacle: the trial court's exclusion of Mersadeze's pertinent testimony about her self-defense training, which would have supported her argument that her resistance was an automatic conditioned response to being assaulted from behind.[300] The reason the court provided for this exclusion was that Mersadeze did not present expert testimony regarding automatism.[301] Mersadeze might not have been put to this weighty burden if the prosecutor had the burden of proving her resistance was voluntary.

Having found that Mersadeze did not satisfy her burden of proof, the trial court did not issue a voluntariness jury instruction.[302] The jury, then, was not required to grapple with the fact that Mersadeze was a Latina so concerned for her safety that she took a self-defense class—and then was painfully grabbed from behind by a white man at night. Instead, the jury was presented a decontextualized version of the arrest.

Moreover, the *mens rea* requirement did not require Mersadeze's prosecutor to prove voluntariness. In Washington, the crime of assaulting a law enforcement officer requires a *mens rea* of intent.[303] But, unlike Oregon, Washington does not define *intent* as entailing a "conscious objective."[304] Instead, it defines *intent* as an "objective or purpose to accomplish a result."[305] This capacious language may be (mis)read to cover even automatic defensive actions, such as nonconsciously striking an officer who grabs one from behind. Hence, without a voluntariness instruction, the jury could have voted to convict Mersadeze despite having reasonable reasons to doubt whether she consciously chose to resist the officers who assaulted her.

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298. *See* Riojas Appellant Brief, *supra* note 277, at 9.

299. *See Riojas*, 2014 WL 5362042, at *9 (describing the conditioned-response affirmative defense as necessitating an "unconscious or automatistic act" (citing State v. Utter, 479 P.2d 946, 949 (Wash. Ct. App. 1971)); *Gardner*, 2014 WL 5577309, at *10 ("Here, as in *Utter*, Gardner presented no evidence that his head injury caused an involuntary or unconscious action. The court did not err in refusing to instruct the jury on lack of volition.").

300. *See Riojas*, 2014 WL 5362042, at *9.

301. *Id.* at *10.

302. *See id.* ("Because she offered no qualified expert testimony that her reaction was automatistic, her offer of proof fell short of the expert testimony that *Perkins* held is required to present a defense of conditioned response."); Court's Instructions to the Jury, *Riojas*, 2014 WL 5362042.

303. *See* WASH. REV. CODE § 9A.36.031; *Riojas*, 2014 WL 5362042, at *9 ("Intent is an implied element of third degree assault.").

304. OR. REV. STAT. § 161.085(7).

305. WASH. REV. CODE § 9A.08.010(a).

The *mens rea* element failed to capture the breadth of subjective and objective determinants of involuntary conduct.[306] Regarding the former, *mens rea* did not capture whether Mersadeze's resistance was nonconscious—that is, whether it was a manifestation of a nonconscious automatic defensive response, as opposed to a manifestation of a conscious intent to resist. Regarding the latter, *mens rea* did not capture whether Mersadeze was able to refrain from resisting given the circumstances surrounding the resistance.

Mersadeze was found guilty as charged and sentenced to twenty days in custody (although she was permitted to go to work), a year of community supervision, and a thousand dollars in fees.[307] An appellate court affirmed her conviction, finding that Mersadeze had not presented evidence that she was "*qualified to* express an opinion on the automatistic nature of her response."[308]

C. MAYFIELD V. STATE

In some resisting cases, trial courts may subvert the voluntariness requirement by letting it go unremarked during criminal proceedings. An example of this means of subversion may be found in the prosecution of Jerome Mayfield.

After an officer informed Jerome, a black man in Georgia, that he was being placed under arrest for driving under the influence and with a broken windshield, Jerome resisted and ran away.[309] Once the officers caught up to Jerome, he "aggressively came toward" one of the officers, who then pepper sprayed him twice.[310]

After being pepper sprayed, Jerome struggled against both the effects of the pepper spray and the arresting officers as they tried to capture and shackle his body.[311] An officer aimed his firearm at Jerome, who continued to struggle against the officers.[312] Jerome was arrested and charged with a host of criminal charges, including two counts of felony obstruction of a law enforcement officer for kicking an officer in the groin and struggling with another officer.[313] The acts

306. *See supra* Part I.

307. Judgment & Sentence (Felony) at 1, 4–5, 7, *Riojas*, 2014 WL 5362042.

308. *Riojas*, 2014 WL 5362042, at *12–13. The appellate court also affirmed the denial of Mersadeze's request for a self-defense instruction, noting that Washington does not "permit[] citizens to claim a right of self-defense against law enforcement officials who are performing their duty in good faith and who do not place citizens in an imminent threat of serious bodily injury." *Id.* at *4, *12 (quoting State v. Mierz, 901 P.2d 286, 297 (Wash. 1995) (en banc)). Thus, the court tacitly communicated that the "good citizen" does not resist police violence not likely to cause a serious bodily injury. *See also* I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 654 (2018) ("Embedded in the Supreme Court's criminal procedure jurisprudence—at times hidden in plain sight, at other times hidden below the surface—are asides about what it means to be a 'good citizen.'").

309. *See* MAYFIELD WARRANT, *supra* note 26; Mayfield v. State, 623 S.E.2d 725, 726 (Ga. Ct. App. 2005).

310. *Mayfield*, 623 S.E.2d at 726.

311. *See id.*

312. *See id.*

313. *Id.*

giving rise to these two charges occurred just after Jerome was pepper sprayed,[314] and as he was presumably still experiencing the effects of the pepper spray.

At trial, Jerome argued that "his physical resistance was a disoriented or involuntary response to the pepper spray."[315] This argument was credible. Pepper spray may induce "acute burning pain" on one's skin, eye swelling, inflammation of mucus membranes, choking, sneezing, shortness of breath, chest tightness, disorientation, fear, hyperventilation, and—notably—"loss of body motor control."[316] In 2015, a team of researchers noted that "[s]ince 1993, over 70 in-custody deaths have involved the use of OC [pepper] spray during the arrest process."[317]

But neither Georgia's criminal culpability statute nor its pattern jury instructions contain an explicit voluntariness requirement.[318] Georgia's felony obstruction statute also does not contain any such requirement.[319] As a result, a person may be found criminally culpable in Georgia without any explicit determination of whether their conduct was voluntary.

To be sure, at least one Georgia appellate court has reversed a conviction on voluntariness grounds. But this case, *Smith v. State*, narrowly recognized a voluntariness defense for people with "unconsciousness disorders."[320] In *Smith*, the appellate court reversed a conviction because the accused person was denied a voluntariness instruction, despite claiming that he was sleepwalking when he engaged in the conduct at issue.[321] In explaining its decision, the court noted that "the Model Penal Code provides that a person who commits an act during unconsciousness or sleep has not committed a voluntary act."[322] Thus, an involuntary act under *Smith* is one carried out while the actor is not awake or aware of their surroundings.

Jerome's conduct, however, does not fit under this narrow definition of involuntariness; he was undoubtedly conscious when he resisted the arresting officers. But Jerome still may not have consciously chosen to resist the officers; instead, his resistance may have been reflexive or otherwise nonconscious.

The involuntariness defense effectively being foreclosed, Jerome argued that the prosecution had not satisfied its burden of proving the requisite *mens rea*,

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314. *Id.*

315. *Id.*

316. MF Yeung & William YM Tang, *Clinicopathological Effects of Pepper (Oleoresin Capsicum) Spray*, 21 H.K. MED. J. 542, 544–46 (2015).

317. *Id.* at 547.

318. *See* GA. CODE ANN. § 16-2-1(a) ("A 'crime' is a violation of a statute of this state in which there is a joint operation of an act or omission to act and intention or criminal negligence."); 2 COUNCIL OF SUPERIOR CT. JUDGES OF GA., SUGGESTED PATTERN JURY INSTRUCTIONS: CRIMINAL CASES (4th ed. 2021), https://georgiasuperiorcourts.org/wp-content/uploads/2021/08/criminal_pattern_jury_instructions_July_2021.pdf.

319. *See* GA. CODE ANN. § 16-10-24.

320. 663 S.E.2d 155, 156–57 (Ga. 2008).

321. *Id.* at 156–58.

322. *Id.* While this court repeatedly referenced the voluntary act requirement in *James v. State*, that case did not define "voluntary act," and ultimately determined that the accused person's passive possession of a concealed weapon while being transported by law enforcement did not constitute the voluntary act of carrying a concealed weapon. 112 S.E. 899, 900 (Ga. 1922).

intent.[323] Georgia, however, does not require a finding that an act be consciously carried out in order to find that the act was intentional.[324] A jury, then, could find a person guilty for conduct the jury believes the accused was not in conscious control of but intended to perform.

Ultimately, Jerome's defense was unavailing, and the jury found Jerome guilty of both counts of felony obstruction.[325] For each count of obstruction, Jerome was sentenced to five years in prison without the possibility of parole, to be served consecutively; [326] effectively, he was sentenced to ten years' incarceration for resisting arrest at gunpoint after being pepper sprayed multiple times.

This result may have been different if voluntariness had been treated as an essential element of the charges; the jury would have had to grapple with the possibility that Jerome was unable to refrain from resisting as he suffered from the effects of the pepper spray. The State of Georgia's failure to enshrine an explicit voluntariness element in its resisting offenses enabled the subversion of the voluntariness requirement in Jerome's case.

The juries in the foregoing cases should have been required to determine whether there was reasonable doubt regarding the voluntariness of the resistance at issue. Instead, the resisters were convicted without any such determination. This, despite the circumstances of each of the cases casting doubt on the voluntariness of the resisters' actions.

In each of the foregoing cases, the resister's ability to consciously control their response to the arresting officer may have been impaired by a reflexively wired compulsion to protect themselves from bodily harm. The sheer violence

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323. *See* Mayfield v. State, 623 S.E.2d 725, 726 (Ga. Ct. App. 2005) ("He argued that his physical resistance was a disoriented or involuntary response to the pepper spray and therefore he lacked the required criminal intent."). The *Mayfield* court tasked the prosecution with proving "criminal intent," *id.* at 726–27, but the statute Jerome was convicted under requires a *mens rea* of knowledge or willfulness, *see* GA. CODE ANN. § 16-10-24.

324. Georgia does not define intent or willfulness in its criminal statutes, *see, e.g.*, GA. CODE ANN. §§ 16-10-24, 16-8-18, and there is no case law requiring a preliminary finding of consciousness in order to find intent.

325. *Mayfield*, 623 S.E.2d at 726. Jerome was also found guilty of making a terroristic threat in contravention of Section 16-11-37 of the Code of Georgia because, once he arrived at the jail, he threatened to kill one of his arresting officers. *Id.*

326. Straight Time Sentence at 1, *Mayfield*, 623 S.E.2d 725 (No. 03-FCR-238-T), https://ecert.gsccca.org/api/document/8CKQT-XEX59-S3CH [https://perma.cc/C63T-3JG6]. Jerome was sentenced to an additional five-year consecutive sentence for threatening his arresting officer after his arrest. *Id.* Tellingly, at the same trial, Jerome was not charged with driving under the influence. *See Mayfield*, 623 S.E.2d at 726. *See generally* GA. STATE PATROL, GEORGIA UNIFORM TRAFFIC CITATION, SUMMONS AND ACCUSATION (Apr. 14, 2004), https://ecert.gsccca.org/api/document/TV87K-3CY35-7FG5 [https://perma.cc/VE8B-64H6]. Moreover, he was found not guilty of refusing to submit to a breathalyzer test and driving with a broken windshield. *Id.* at 3–4, 7–8. That is, Jerome was ultimately sentenced to a decade in prison for resisting officers who pulled him over on suspicion of criminal activity that he would ultimately be acquitted of. *See Mayfield*, 623 S.E.2d at 726 (noting the arresting officers initially pulled Jerome over after "receiv[ing] a broadcast . . . to be on the look up for a possible impaired driver" and "observ[ing] that [Jerome's] vehicle had a broken windshield"). Jerome was incarcerated on May 13, 2004, and released from prison on May 5, 2018. *Find an Offender*, GA. DEP'T OF CORR., https://services.gdc.ga.gov/GDC/OffenderQuery/jsp/OffQryRedirector.jsp [https://perma.cc/B9XX-WUY7] (last visited Sept. 4, 2024).

of these arrests calls into question the voluntariness of these resisters' defensive responses.

These cases demonstrate that a state's mere recognition of the voluntariness requirement does not ensure that juries will be permitted to make a determination on credible claims of involuntariness. Moreover, granting trial courts discretion to disallow direct contestations of voluntariness—by, for example, denying requests for voluntariness jury instructions—increases the risks of credible contestations of voluntariness going unheard. Put differently, granting trial courts such discretion does not ensure that pertinent voluntariness determinations will be made in resisting cases.

Unlike the resisters in the foregoing cases, most accused people do not contest *mens rea*, assert affirmative defenses, or request jury instructions at trial—because the overwhelming majority of these cases end in guilty pleas. Over ninety percent of state and federal criminal cases end in plea bargains, which predominantly entail accused people pleading guilty in exchange for relatively less severe sentences that,[327] in some instances, may secure their release from a lengthy period of pretrial incarceration.[328] The lack of adequate safeguards protecting involuntary resisters may significantly contribute to perceptions that the odds of an acquittal at trial are remote. As a result, prosecutors may feel emboldened to pursue criminal charges against involuntary resisters. Relatedly, the subversion of the voluntariness requirement diminishes the bargaining position of involuntary resisters during criminal prosecutions. This may lead more resisters to plead guilty than would otherwise.

There is, therefore, a need for interventions that reduce and eliminate the harmful criminalization and punishment of involuntary resisters.

IV. ELEVATING THE VOLUNTARINESS REQUIREMENT

This Part argues that voluntariness should be made an explicit, essential element of resisting offenses. That is, statutes criminalizing resistance should be amended to explicitly include voluntariness as an essential element. Elevating the voluntariness requirement would force fact finders to make a determination on the pivotal issue of voluntariness in resisting trials. In this way, an explicit, essential voluntariness element would provide involuntary resisters more protection against the harms of criminalization and incarceration.

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327. Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), https://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html (noting that "97 percent of federal cases and 94 percent of state cases end in plea bargains, with defendants pleading guilty in exchange for a lesser sentence").

328. *See* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 715–16 (2017); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529, 530, 543 (2017).

If *actus reus*, alongside *mens rea*, is one of "the traditional elements of the underlying crime that render an individual criminally liable,"[329] then the burden should be on the state to prove voluntariness.[330] As the Supreme Court held in *Mullaney v. Wilbur*, "no unique hardship on the prosecution . . . would justify requiring the defendant to carry the burden of proving a fact so critical to criminal culpability."[331] Voluntariness is one such fact.

An explicit, essential voluntariness element would force prosecutors to prove voluntariness beyond a reasonable doubt.[332] It would also force prosecutors and fact finders to confront the fearsome, racially subordinating dimensions of punitive policing, which play a key role in precipitating fearful, involuntary resistance.[333]

Making voluntariness an explicit element of resisting offenses may also spur more criminal defense attorneys to raise voluntariness challenges in resisting cases. Defense attorneys would not have to rely on general culpability statutes, obscure appellate opinions, or burdensome affirmative defenses. Resisters could testify about the fear they felt when the arresting officer attempted to capture their bodies, ordered a canine to attack them, grabbed them from behind, or pepper-sprayed them multiple times at gunpoint. Even if resisters did not testify, witnesses could provide testimony regarding the great fear that may have been evident from the resister's facial expressions, cries for help, or body language.

Even without this reform, defense attorneys representing people accused of resisting should, when efficacious, challenge the voluntariness of the resistance in question. To avoid Mersadeze's fate, defense attorneys might retain experts in psychology or neuroscience to educate fact finders on involuntary stress responses and defensive automatic behaviors. Such experts could also opine on whether the circumstances of an arrest impaired a person's ability to choose alternative responses. If a jurisdiction's general culpability statute only permits assigning criminal culpability for voluntary acts, defense attorneys should argue that this voluntariness requirement is an implied element of the offense and that the prosecutor has the burden of proving voluntariness beyond a reasonable doubt. Similarly, if an appellate court in the jurisdiction has recognized the voluntariness requirement, then, again, defense attorneys should argue that this amounts to an implied element.

In addition, if the voluntariness requirement were elevated, appellate courts would be more likely to reverse convictions for resisting. Indeed, some of the

329. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 426 n.271 (2000).

330. *See* Corrado, *supra* note 21, at 1555 ("An issue that bears on the definition [of a crime] must be proved by the state beyond a reasonable doubt, while it is within the discretion of the legislature to decide who will bear the burden as to affirmative defenses, and what that burden will be.").

331. 421 U.S. 684, 702 (1975).

332. *See supra* notes 99–101; *see also* State v. Sanchez, 393 S.W.3d 798, 803 (Tex. App. 2012) (prohibiting trial courts from "deviat[ing] from . . . statutorily-mandated language by adding or deleting language").

333. *See supra* Section II.A.

most well-known appellate opinions discussing the voluntariness requirement reversed convictions of people whose conduct was actually or potentially evoked by police officers' uses of force.[334] More courts would similarly give the voluntariness requirement its due if it were elevated because a court's failure to require a prosecutor to affirmatively prove an essential element of a charged offense would contravene the accused's rights under the Due Process Clause of the Fourteenth Amendment.[335] Appellate courts may be less likely to discount or disregard the voluntariness requirement if it carried this constitutional heft.

This elevated voluntariness requirement would also better protect involuntary resisters from criminalization and incarceration than would affirmative defenses, implied voluntariness requirements, and discretionary pattern jury instructions.[336] Involuntary resisters would no longer have to shoulder the onerous burden of proving affirmative defenses. Trial courts would be required to issue voluntariness jury instructions. Most jurors would conscientiously follow voluntariness

334. *See* People v. Martino, 970 N.E.2d 1236, 1238, 1240 (Ill. App. Ct. 2012) (reversing conviction of aggravated battery because the evidence suggested that the battery was a result of the accused person being tased by a police officer); Martin v. State, 17 So. 2d 427, 427 (Ala. Ct. App. 1944) (reversing conviction of public drunkenness because the accused person was only in public because officers took him from his home to the highway); People v. Newton, 87 Cal. Rptr. 394, 397, 404, 406, 415 (Ct. App. 1970) (reversing conviction for voluntary manslaughter because the trial court did not instruct the jury on unconsciousness, despite evidence that the accused person shot the decedent officer due to an unconscious reflexive reaction to being shot by the decedent first).

335. *See supra* note 99 and accompanying text.

336. In some cases, the inclusion of the voluntariness requirement in a general culpability statute may actually make it harder for involuntary resisters to secure voluntariness jury instructions. For example, Texas's general culpability statute provides: "A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession." TEX. PENAL CODE ANN. § 6.01(a). Texas courts have interpreted this statute to impose an affirmative burden on the state to prove voluntariness. *See* Valenzuela v. State, 943 S.W.2d 130, 132 (Tex. App. 1997) ("[T]he burden lies with the State to prove that the accused acted voluntarily." (citing Lynn v. State, 860 S.W.2d 599, 601 (Tex. App. 1993))). And yet, accused people are not entitled to a voluntariness jury instruction pursuant to this statute. This is because, under Texas state law, a contestation of voluntariness is merely an attempt to negate an element of an offense. And, while an accused person may be entitled to jury instructions on affirmative defenses, they are not entitled to such instructions to negate elements of an offense. *Id.* ("[T]he question of whether the defendant acted voluntarily, as opposed to involuntarily or accidentally, is not truly a defense but rather an element of the State's case in chief. And, when the accused raises that particular issue . . . he is doing nothing more than trying to negate an element of the State's case. Thus, he is not entitled to an affirmative instruction on the matter." (citations omitted)). Moreover, the accused are only entitled to a voluntariness instruction if a judge determines that the evidence suggests the conduct at issue was involuntary. *See Lynn*, 860 S.W.2d at 601 ("If the evidence does not raise the issue of involuntary conduct, the trial court need not include that instruction in its charge to the jury." (first citing George v. State, 681 S.W.2d 43, 47 (Tex. Crim. App. 1984) (en banc); then citing Williams v. State, 630 S.W.2d 640, 644 (Tex. Crim. App. 1982); and then citing Gaona v. State, 733 S.W.2d 611, 617 (Tex. App. 1987))); Henry v. State, No. 07-02-0021, 2003 WL 194724, at *2 (Tex. App. Jan. 29, 2003) (affirming denial of voluntariness instruction because the accused could not point to record evidence suggesting involuntariness). As a result, even though prosecutors formally have a burden to affirmatively prove voluntariness, the accused effectively have the burden of proving involuntariness. Hence, a jurisdiction's recognition of the voluntariness requirement does not adequately protect involuntary resisters from criminalization and punishment.

instructions by putting prosecutors to their burden of proof.[337] And prosecutors forced to affirmatively prove voluntariness would decline more resisting cases than they would otherwise.[338]

The call to make voluntariness an explicit element of resisting offenses departs from commentators who advocate for affirmative partial defenses for people whose capacity for rationality is episodically substantially diminished due to stress or grief;[339] whose neurodivergence is "rationality-diminishing";[340] or whose alleged criminal conduct was "semi-voluntary."[341] These partial defenses would not be exculpatory; instead, they would allow accused persons to effectively be found guilty, but partially responsible.[342]

Such calls for affirmative partial defenses are rooted in fears that broader defenses may "open the floodgates to bogus claims."[343] These fears are overblown. Resisters have an incentive not to make incredible voluntariness arguments because doing so would impair their credibility with the fact finder, thereby hurting their chances of acquittal. Moreover, patently incredible contestations of voluntariness are unlikely to prevail in criminal court. If voluntariness were an explicit element, resisters would only be acquitted on voluntariness

337. *See* Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199, 1234 (1998) ("Whatever a jury's capacity with regard to law application, considerable evidence suggests that jurors are conscientious about and committed to following instructions and correctly applying rules, and they *believe* they understand most instructions.").

338. The reason for not pursuing a prosecution may vary. A prosecutor may decide that they cannot prove a particular resisting case beyond a reasonable doubt. A prosecutor could also determine that they categorically cannot prove the voluntariness of resistance or flight beyond a reasonable doubt. Alternatively, they may decide not to pursue such cases even if they determine that they can meet their burden to prove voluntariness. Why? Because they may conclude that punishing resistance to or flight from the violence of arrest is unjust. *See generally* Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011) (examining and evaluating prosecutorial nullification in relation to general prosecutorial discretion); W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173 (2021) (examining the possibilities of prosecutorial nullification as an expression of democratic political will).

339. *See, e.g.*, Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 299–300 (2003) (calling for a "guilty but partially responsible" affirmative defense for those whose capacity for rationality is substantially diminished at the time of the alleged criminal conduct); COPPOLA, *supra* note 76, at 161 (calling for a "situational generic partial excuse," which would entail the accused proving that their conduct was the result of objectively and subjectively distressing circumstances).

340. *See, e.g.*, E. Lea Johnston & Vincent T. Leahey, *Psychosis, Heat of Passion, and Diminished Responsibility*, 63 B.C. L. REV. 1227, 1270–72 (2022) (calling for a "diminished rationality" affirmative defense that requires proof that the accused was mentally differently abled).

341. *See, e.g.*, Denno, *supra* note 21, at 360–61 (calling for a partial excuse for those whose criminal acts were semi-voluntary and involuntary but evincing future dangerousness).

342. *See* Morse, *supra* note 339, at 299.

343. Johnston & Leahey, *supra* note 340, at 1272. Part of the federal government's basis for not adopting an explicit voluntariness requirement for criminal culpability was the worry that such a prosecutorial burden could result in the "evasion of limitations placed on defenses such as intoxication and mental illness through inquiries as to voluntariness." THE NAT'L COMM. ON REFORM OF FED. CRIM. L., FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 27 (1971).

grounds if a fact finder—that is, a judge or jury—found a reasonable reason to doubt that the resistance at issue was voluntary.

Myriad lawmakers and courts already treat fact finders as fit to determine voluntariness. For instance, if an accused person argues that their unlawful behavior was a result of involuntary intoxication, then fact finders may be tasked with determining the voluntariness of the intoxication.[344] Similarly, fact finders are charged with determining whether someone charged with an inchoate crime voluntarily abandoned their attempt to commit the crime.[345] Fact finders are also charged with determining whether possession of a weapon or controlled substance was voluntary.[346] In addition, fact finders may determine whether an alleged confession was voluntarily made.[347]

In some jurisdictions, fact finders are explicitly empowered to determine the voluntariness of allegedly criminal behavior, either as a general matter or when evidence of involuntariness is in the trial record.[348] For example, the Hawai'i

344. *See, e.g.*, DEL. CODE ANN. tit. 11, § 423 (providing for an involuntary intoxication defense); THE SUP. CT. COMM. ON STANDARD JURY INSTRUCTIONS IN CRIM. CASES, FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, at 3.6(e)(1), https://www.floridabar.org/rules/florida-standard-jury-instructions/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-3/ [https://perma.cc/96L3-X492] (last visited Sept. 4, 2024) ("[I]f you find that the defendant was involuntarily intoxicated to the extent of being incapable of forming [a premeditated design to kill] [the intent to (specific intent charged)], or if you have a reasonable doubt about it, you should find the defendant not guilty of (crime charged or appropriate lesser-included offenses)."); UJI-CRIMINAL 14-5106, N.M. CTS. (Nov. 1, 2019), https://supremecourt.nmcourts.gov/wp-content/uploads/sites/2/2024/02/UJI-14-5106.pdf [https://perma.cc/VFC9-5F29] ("An issue you must consider in this case is whether the defendant was intoxicated . . . and if so, whether the intoxication was involuntary.").

345. *See* McClover v. State, 125 So. 3d 926, 927 (Fla. Dist. Ct. App. 2013) ("It is a defense to a charge of criminal attempt, . . . that, under circumstances manifesting a complete and voluntary renunciation of his or her criminal purpose, the defendant: (a) [a]bandoned his or her attempt to commit the offense or otherwise prevented its commission." (alterations in original) (quoting Longval v. State, 914 So. 2d 1098, 1100 (Fla. Dist. Ct. App. 2005))).

346. *See* State v. Chapa, No. H-92-034, 1993 WL 323617, at *1–2 (Ohio Ct. App. Aug. 27, 1993) ("The court also instructed the jury that possession [of a weapon] required a voluntary act on the part of the defendant."); People v. Larry, 578 N.E.2d 1069, 1074 (Ill. App. Ct. 1991) ("[I]t was reversible error for the trial court to refuse to instruct the jury on voluntary possession [of a weapon]."); State v. Thomas, No. CAAP–14–0000448, 2016 WL 797066, at *1 (Haw. Ct. App. Feb. 29, 2016) ("[T]he jury instructions given by the Circuit Court properly precluded the jury from finding Thomas guilty absent a finding that he committed a 'voluntary' or conscious act in possessing the drug.").

347. *See* State v. McDonald, 194 N.W.2d 183, 185 (Neb. 1972) ("Where the question of the voluntariness of an oral or written confession is in issue,. . . . [i]t is the duty of the court not only to instruct as to what constitutes a voluntary confession, but also to instruct the jury to disregard the alleged confession if found to be involuntary.").

348. *See, e.g.*, People v. Fardan, 628 N.E.2d 41, 44 (N.Y. 1993) ("[T]he People remain responsible for proving the fundamental elements of *mens rea* and *actus reus* beyond a reasonable doubt." (citation omitted)); People v. Martino, 970 N.E.2d 1236, 1238, 1240 (Ill. App. Ct. 2012) (reversing conviction of aggravated domestic battery because the prosecution did not prove the voluntariness of the acts at issue beyond a reasonable doubt); State v. Winstead, 836 A.2d 775, 778 (N.H. 2003) (affirming conviction where the evidence established "beyond a reasonable doubt the *actus reus* set out in a motor vehicle statute" (quoting State v. Willard, 660 A.2d 1086, 1088 (N.H. 1995))); State v. George, 313 P.3d 543, 546 (Ariz. Ct. App. 2013) ("The jury was properly instructed that it could find George guilty only if it found beyond a reasonable doubt that she committed a voluntary act. . . ."); Baird v. State, 604 N.E.2d 1170, 1176 (Ind. 1992) ("[O]nce evidence in the record raises the issue of voluntariness, the state must

Pattern Jury Instructions, approved by the state's Supreme Court, provides in pertinent part: "In any prosecution it is a defense that the conduct alleged in the charged offense does not include a voluntary act. . . . The burden is upon the prosecution to prove beyond a reasonable doubt that the Defendant's conduct as to the . . . charge included a voluntary act."[349] Other states have similar pattern voluntariness instructions.[350] Moreover, some state appellate courts have reversed or vacated criminal convictions due to trial courts' failure to issue voluntariness jury instructions or fact finders' failure to give due consideration to claims of involuntariness.[351] Hence, making voluntariness an explicit, essential element would be consistent with myriad legislatures' and courts' tacit recognition that fact finders are competent to determine voluntariness.

More broadly, elevating the voluntariness requirement would create more opportunities for fact finders to disrupt cycles of harm in communities impacted by violent and racially subordinating policing. As Fred Ginyard, Director of Organizing and Community Engagement at the Philadelphia Bail Fund, explains: "[T]here's a cycle of violence and harm that's happening in our communities. And we need to take every opportunity to break that cycle."[352]

Police violence harms people who sustain physical and psychological injuries while involuntarily resisting arrest. A criminal conviction for resisting only compounds these harms. People like Jerome and Pariss, who are incarcerated for years due to their resistance, may be exposed to elevated levels of violence in carceral facilities.[353] Chronic exposure to such violence "may induce significant

prove the defendant acted voluntarily beyond a reasonable doubt."); Alford v. State, 866 S.W.2d 619, 624 n.8 (Tex. Crim. App. 1993) (en banc) ("[T]he State need not prove voluntariness unless the evidence raises the issue of accident, in which case the State must disprove the theory of accident beyond a reasonable doubt.").

349. COMPENDIUM OF THE HAWAI'I PATTERN JURY INSRUCTIONS – CRIMINAL, *supra* note 244, at 7.16.

350. *See* sources cited *supra* note 244.

351. *See, e.g.*, People v. Newton, 87 Cal. Rptr. 394, 402–03, 406, 415 (Ct. App. 1970) (reversing criminal conviction due to failure to issue jury instruction on unconsciousness despite credible defense that a gunshot wound caused the accused to go into a "reflex shock condition"); State v. Dinkel, 495 P.3d 402, 408 (Kan. 2021) (reversing criminal conviction due to trial court's failure to issue a voluntariness instruction despite the accused's defense that her sexual contact with a minor was the result of her being raped by said minor); Brown v. State, 955 S.W.2d 276, 279–80 (Tex. Crim. App. 1997) (reversing criminal conviction due to trial court's failure to issue a voluntariness instruction despite the accused's defense that the criminal conduct was a result of his being bumped by another person); State v. Tippetts, 43 P.3d 455, 456, 460 (Or. Ct. App. 2002) (reversing a conviction for supplying contraband that was involuntarily introduced into a county jail due to the accused person's arrest); State v. Eaton, 177 P.3d 157–59, 161–62 (Wash. Ct. App. 2008) (vacating sentence enhancement for bringing a controlled substance into jail after a controlled substance was found on the person during a search incident to arrest at a jail).

352. JOCELYN SIMONSON, RADICAL ACTS OF JUSTICE: HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION 48–49 (2023); Tom MacDonald, *'An Unjust System': Philly Advocates Hold 24-Hour Bailout Ahead of the Holidays*, WHYY (Dec. 20, 2022), https://whyy.org/articles/philadelphia-cash-bail-fund-bailout-holidays/ [https://perma.cc/6QRM-MZMK].

353. *See* Benjamin Steiner & Calli M. Cain, *The Relationship Between Inmate Misconduct, Institutional Violence, and Administrative Segregation: A Systematic Review of the Evidence*, *in* RESTRICTIVE HOUSING IN THE U.S.: ISSUES, CHALLENGES, AND FUTURE DIRECTIONS 165, 167 (2016)

and long-standing alterations in the brain pathways that govern judgement; impulse control; empathetic responding; regulation of emotions; interpretation of stimuli, experience and social cues; [and] perception of threat."[354] Moreover, the collateral consequences of a criminal conviction may include the loss of housing, social relationships, social status, employment, earning potential, and cognitive and emotional functioning.[355] Far from promoting a person's future welfare, criminalization and incarceration are harmful and can increase the likelihood that a person may reflexively resist a police officer or impulsively harm a civilian in the future.

Fact finders are in a powerful position to disrupt this cycle of harm. An essential voluntariness element would force fact finders to acknowledge and grapple with the fearsome, violent dimensions of punitive arrests; it would provide fact finders an opportunity to acquit the accused in the face of doubts regarding the voluntariness of their resistance; and it may impel jurors to question the efficacy of punitive arrests as a safety-making strategy. But in order to ensure this interrogation occurs, the voluntariness requirement must be moved from the periphery of criminal adjudication to the center.

There is a risk that elevating the voluntariness requirement could further entrench and legitimate policing and prisons.[356] To be sure, acquitting a resister on voluntariness grounds would not reduce all of the potential physical or mental harms associated with their arrest and prosecution. Nor would it proactively protect people from police violence. Making voluntariness an explicit element of resisting offenses could possibly further isolate and stigmatize those who do voluntarily resist law enforcement. It may also reinforce the belief that an acquittal somehow erases the durable harms caused by punitive arrests, pretrial incarceration, and criminal adjudication.[357] The only way to truly eliminate harms emanating from police violence, criminalization, and incarceration is to create means of responding to

(noting that seven to twenty percent of imprisoned people in the United States reported being "violently victimized" in a six-month period, as compared to two percent of the total U.S. population in a one-year period).

354. COPPOLA, *supra* note 76, at 118.

355. *See* Hanan, *supra* note 150, at 152, 188, 191, 200.

356. *See* Amna A. Akbar, *Demands for A Democratic Political Economy*, 134 HARV. L. REV. F. 90, 104 (2020). As described by Amna Akbar, reformist reforms "aim to improve, ameliorate, legitimate, and even advance the underlying system." *Id.* A key failure of reformist reforms, according to Angela Davis et al., is that they fail "to dismantle, or even address, the harms that are used to buttress the carceral state, including forms of gender and sexual violence." ANGELA Y. DAVIS, GINA DENT, ERICA R. MEINERS & BETH E. RICHIE, ABOLITION. FEMINISM. NOW. 154 (2022). In contrast, non-reformist reforms "aim[] to unleash people power against the prevailing political, economic, and social arrangements and toward new possibilities." Akbar, *supra*, at 102. They, in the words of Ruth Wilson Gilmore, advance "changes that, at the end of the day, unravel rather than widen the net of social control through criminalization." *Id.* at 101 (quoting RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 242 (2007)). While reformist reforms alone are not sufficient to realize a world without police or prisons, they are useful in stymieing the prison industrial complex as organizers and advocates work toward an abolitionist horizon. *See id.* at 104.

357. *See* Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV 1, 19 (2022).

harm and ensuring safety that do not rely on police, prisons, or criminal courts; that is, to abolish the criminal punishment system.[358]

But elevating the voluntariness requirement could form part of a just transition to this abolitionist future. Namely, it would reduce the harms currently meted out by the criminal punishment system without further entrenching the system. Making voluntariness an essential element of resisting offenses—or all criminal offenses—would not increase funding for policing or incarceration, nor would it widen the net of either. Instead, it would provide people prosecuted for experiencing involuntary stress responses with a vehicle to escape criminalization and incarceration. It would equip defense attorneys with a tool for securing their clients' liberty. It would force prosecutors, jurists, and jurors to acknowledge community violence and the impact this violence has on survivors. And, in resisting cases, contestations of voluntariness would help uncover, address, and reduce the harms used to buttress punitive policing.[359]

Invigorating the voluntariness requirement in resisting cases would force jurors to contend with the context in which resistance unfolds rather than just the resistant act itself. In addition to resisters' fearful emotions being relevant, the contextual factors that contribute to fearful appraisals of arresting officers would also be relevant. Juries could hear about the police violence the resister may have experienced or witnessed earlier in their lives or about how the violence a resister experienced during a previous incarceration increased their fear of policing and incarceration.

Resisters could thus use the logic and language of criminal law against the state to call into question the efficacy of punitive policing.[360] The courtroom would then become a site of education about the criminogenic, harm-inducing dimensions of punitive policing and criminal punishment. Like abolitionist lawyers of the Antebellum Era who defended against cases brought under the Fugitive Slave Act, defense lawyers today could make "direct appeals to conscience" and "appeals [that] require[] explicit consideration of the place of

358. *See id.* at 6 ("Criminal courts . . . far more often perpetrate state violence, including by bolstering police legitimacy and enabling police abuse and violence, such as through the issuance of warrants and through deference to police testimony despite persistent patterns of police fabrication."); MARIAME KABA & ANDREA J. RITCHIE, NO MORE POLICE.: A CASE FOR ABOLITION 177 (2022) ("[P]olicing stands in the way of our individual and collective safety: by actively and institutionally perpetrating violence, by failing to offer protection, by diminishing life chances through criminalization, by looting resources from the things we need to generate more genuine and long-term safety for more people, and by sowing fear and capturing our imaginations to prevent anything new from emerging."); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 20 (2003), https://collectiveliberation.org/wp-content/uploads/2013/01/Are_Prisons_Obsolete_Angela_Davis.pdf [https://perma.cc/6N5M-9AYH] ("[F]rameworks that rely exclusively on reforms help to produce the stultifying idea that nothing lies beyond the prison.").

359. *See* DAVIS ET AL., *supra* note 356, at 47 ("Abolition urges us to move away from myopic and individualistic conceits and to focus instead on how particular cases embody and reflect broader concerns and reveal greater threats to safety and freedom than would be evident when viewed in isolation from larger social contexts.").

360. *See* SIMONSON, *supra* note 352, at 11 (describing how organizers "use the legal logic and language of the criminal system—the master's tools—against that system").

morality in the jury's deliberations."[361] A jury's vote to acquit—due to insufficient proof of voluntariness—could be one of a host of collective actions that culminate in the eradication of punitive policing and the atmosphere of violence permeating the carceral state.

CONCLUSION

Punitive arrests are harmful, traumatic, and fearsome. Acute police violence, such as the use of police canines, pepper spray, or guns, may trigger uncontrollable defensive responses. Moreover, by evoking inborn fears of hostile human adversaries and learned fears of police and guns, an arrest may cause a person to reflexively resist without having made a conscious decision to do so. Currently, the state responds to this resistance by inflicting further harm on involuntary resisters in the form of criminal punishment.

Making voluntariness an explicit element of resisting offenses would reduce involuntary resisters' exposure to this harm. The outcome in Pariss's, Mersadeze's, and Jerome's cases may have been different if voluntariness were an explicit, essential element of the resisting offenses levied against them.[362] In Pariss's case, the jury might have found that, while Pariss was aware of his resistance, there was reason to doubt that he was voluntarily resisting as he was being attacked by the canine. Similarly, the jury might have decided there was a reasonable reason to doubt that Mersadeze consciously chose to instantaneously strike the officer when he forcefully grabbed her from behind. And Jerome's jury might have found that, even though he resisted the arresting officers, there was reasonable doubt regarding whether he was able to do otherwise as he was being arrested at gunpoint while suffering from the effects of two pepper spray deployments.

In addition to reducing harm, elevating the voluntariness requirement would amount to an acknowledgment that some—especially black and brown people—appraise arresting officers to be the violent capturers they are and that such appraisals may elicit involuntary resistance. But justice does not solely consist of reducing the harm inflicted on survivors of arrests. Justice also entails eradicating the atmosphere of punitive violence that informs the appraisal of fear. This Article is a part of an ongoing effort to reveal, reduce, and ultimately eradicate the harms stemming from the violence of arrest.

361. COVER, *supra* note 52, at 212.

362. *See* State v. Sanders, No. 28304, 2008 WL 652148, at *3 (Haw. Ct. App. Mar. 12, 2008) (vacating conviction because the accused person's request for a voluntariness instruction, pursuant to the state's general culpability statutes, was denied).