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The Legacy of Slavery, Cognitive Shortcuts, and Biased News: The Mass Media's Vilification of Black Males and the Resulting "Reasonableness" of Excessive Force by Law Enforcement

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The Legacy of Slavery, Cognitive Shortcuts, and Biased News: The Mass Media’s Vilification of Black Males and the Resulting “Reasonableness” of Excessive Force by Law Enforcement

By Janyl Relling Smith

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I. INTRODUCTION

Kadiatou Diallo was thrilled to hear the excitement in her son’s voice when he called her on January 31, 1999 from New York City. “I’m so happy right now, Mom! I am going to do it.” “Do what?” she asked from her home in Guinea. “Enroll in college,” he enthusiastically replied. She asked him if he needed her help, and he said, “No, I only need your prayers.” That was the last phone call Kadiatou Diallo had with her son, Amadou.¹

Amadou Diallo was born on September 2, 1975 in Sinoe County, Liberia.² Amadou grew up in Liberia where he attended kindergarten in Monrovia.³ From 1980 through 1986 he attended primary and secondary school in Lome, Togo.⁴ From 1987 through 1989, Amadou attended middle school in Gbessia, Conakry, Guinea.⁵ He was a well-rounded child who loved to read.⁶ From 1990 to 1994, he attended high school at the French International School in Bangkok, Thailand.⁷ As he grew older, his desire to go to college became of paramount importance to him.⁸ He continually encouraged his younger brothers and sister to attend college as well.⁹ He firmly believed that an education was key in the achievement of dreams.¹⁰

Prior to leaving for the United States, he had not only lived in different countries with his family, but he also travelled to different countries on his own.¹¹ In addition to Guinea, Liberia, Togo and Thailand, he had traveled to France, Asia, and Japan.¹² He attended the Computer Institute in

¹ Kadiatou Diallo, *A Mother’s Message*, THE AMADOU DIALLO FOUNDATION, http://www.amadoudiallo.org/mother_message.html (last visited Feb. 28, 2017).

² *About Amadou*, THE AMADOU DIALLO FOUNDATION, <http://www.amadoudiallo.com/about-amadou/> (last visited Feb. 28, 2017).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ The Amadou Diallo Foundation, *supra* note 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² The Amadou Diallo Foundation, *supra* note 2.

Singapore, which is an affiliate of The Cambridge University of England.¹³ He spoke five languages—Amadou was fluent in Fulani (the native language of Guinea), as well as English, French, Spanish and Thai.¹⁴

In September 1996, Amadou departed for America seeking greater educational opportunities.¹⁵ He left behind a handwritten note for his mother that had only two lines, “The solution is U.S.A. Don’t leave my brothers and sister here.”¹⁶ Like the millions of people who embarked on this journey before him, Amadou believed in the opportunity America promised.¹⁷ He refused help from his parents because he wanted to make them proud and achieve success on his own—his goal was to earn a degree in computer science.¹⁸

Once in New York, Amadou lived a simple life.¹⁹ He shared an apartment with two roommates and worked 10–12 hour days, six days a week, selling videotapes and other items from a table directly in front of a convenience store in lower Manhattan.²⁰ He befriended many and always enjoyed conversations that stimulated the intellect as well as the spirit.²¹ He was an avid reader and enjoyed his books that ranged from subjects such as physics and technology to one of his favorites, a book titled, *Guidelines for Dialogue Between Christians and Muslims*.²² He was a devout Muslim who neither smoked nor drank alcohol.²³ His uncle Mamadou told him to be careful because he heard stories of many families in Guinea who lost their sons to shootings on the streets in the United States.²⁴ Amadou reassured him that the U.S. dealt with crime in an organized fashion.²⁵ “‘It is safe here,’ said Amadou. ‘I am not worried.’”²⁶

In the early morning hours of February 4, 1999, after returning to his apartment in the Bronx, Amadou conversed with his roommate, Momodou Kujabi, and left the apartment. Momodou assumed Amadou was going out

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ The Amadou Diallo Foundation, *supra* note 2.

¹⁸ *Id.*

¹⁹ Ray Moses, *Edited & Annotated Opening Statements: The Amadou Diallo Killing*, <http://criminaldefense.homestead.com/diallo.html> (last visited Feb. 28, 2017).

²⁰ *Id.*

²¹ The Amadou Diallo Foundation, *supra* note 2.

²² *Id.*

²³ Michael Cooper, *Officers in Bronx Fire 41 Shots, And an Unarmed Man Is Killed*, N.Y. TIMES (Feb. 5, 1999), <http://www.nytimes.com/1999/02/05/nyregion/officers-in-bronx-fire-41-shots-and-an-unarmed-man-is-killed.html>.

²⁴ The Amadou Diallo Foundation, *supra* note 2.

²⁵ *Id.*

²⁶ *Id.*

for something to eat, as he often did after coming home from work.²⁷ Amadou, a man who stood at a mere 5'6" and weighed roughly 150 pounds, was confronted by four plain-clothes police officers while he was standing in the vestibule of his building.²⁸ The confrontation ended with 41 shots fired at Amadou, 19 of which struck the 22-year-old, who was armed with a wallet.²⁹

The Chief Medical Examiner's Office determined through an autopsy that Diallo died from multiple gunshot wounds to the torso.³⁰ While bullet wounds to major organs were the cause of death, what killed Amadou Diallo? Was it the impact that systemic racism perhaps had on the lens through which the police officers viewed Amadou—the systemic racism that that once outwardly, but now more covertly colors our views, our decisions, and the value we place on certain individuals? Did Amadou have knowledge of law enforcement's reliance on race to select which individuals will be subject to spontaneous investigatory activities—that racial profiling is arguably born out of the negative stereotypes most often applied to Black males, that they are more dangerous, more prone to violence, and more likely to be criminals than other members of society?³¹ Was it Amadou's ignorance of how residents of the Soundview section of the Bronx, or any area of low socio-economic status comprised of predominantly Black and brown people, were treated by law enforcement because of this American phenomenon?³² Did he lack the understanding that is typically gathered by Black American males early on in life, that he must consciously carry himself in a particular way so as to not appear suspicious or threatening? Was Amadou, an immigrant, completely unaware of the complexities of American society relating to his race? Was he naïve of the vilification of Black males that has been cultivated for centuries in the United States? Did Amadou not know that he "fit the description" and by virtue of the way he looked, could end up in the figurative and literal cross-hairs of law enforcement's sights?

"Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role."³³ This shared

²⁷ Cooper, *supra* note 23.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Cynthia Kwei Yung Lee, Race and Self-Defense: Toward A Normative Conception of Reasonableness, 81 MINN. L. REV. 367, 402–03 (1996).

³² NYC Population Change, Race/Ethnicity Population by Neighborhood: 2000 to 2010, CENTER FOR URBAN RESEARCH, <http://www.urbanresearchmaps.org/plurality/narrative.htm#nabes> (last visited Feb. 28, 2017). As of the year 2000, the population of Soundview was 53.4% Hispanic and 40.7% Black.

³³ Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 322 (1987).

experience, the racial dimension of our history, and the American collective unconscious, results in the fact that we inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race,³⁴ particularly, individuals of color. It is seemingly counterintuitive that, despite hundreds of years of exposure to racially charged societal stimuli, we oftentimes do not recognize the ways in which our cultural experience influences our beliefs and perceptions about race or—and perhaps more importantly in the context of law enforcement and the public—the occasions on which those beliefs affect peoples' actions and the centrifugal impact that results.³⁵

This Note will examine the inability or unwillingness of American society to look introspectively at how the nation's subcutaneous racism has communicated itself and continues to impart itself into areas of society—namely our justice system—in which fair, impartial treatment fundamentally determines the quality and effectiveness of the institutions that comprise this system. Specifically, this Note will examine how these implicit feelings, which are both common and expected, manifest in the practices and actions of police officers; those with whom society has entrusted the privilege to serve and protect as well as the discretion to use force, deadly if necessary, to carry out their important objective. Because of themes within this Note and the inquiries raised therefrom, it must be noted that this piece is designed to incite an examination of human and institutional behavior using conceptual, interdisciplinary tools often unfamiliar or unembraced by those who study or practice law.³⁶ This Note

³⁴ *Id.* at 323. Professor Lawrence clarifies this statement in footnote 26, “In using the term ‘collective unconscious,’ I refer to the collection of widely shared individual memories, beliefs, and understandings that exist in the mind at a non-reporting level. This non-reporting mental activity is widely shared because individuals who live within the same culture share common developmental experiences. This use of the term ‘collective unconscious’ is to be distinguished from Jung’s ‘collective unconscious,’ which he described as that part of the psyche that retains and transmits the common psychological inheritance of humankind. Henderson, *Ancient Myths and Modern Man*, *MAN AND HIS SYMBOLS* 104, 107 (C. Jung ed. 1964). It should also be distinguished from Freud’s ‘archaic remnants,’ which Jung described as ‘mental forms whose presence cannot be explained by anything in the individual’s own life [and] which seem to be aboriginal, innate, and inherited shapes of the human mind.’ Jung, *Approaching the Unconscious*, *MAN AND HIS SYMBOLS*.”

³⁵ Lawrence, *supra* note 33.

³⁶ Robert J. Cottrol, *Law, Politics and Race in Urban America: Towards A New Synthesis*, in *Race, Law, and American History 1700–1990, The Age of Jim Crow: Segregation from the End of Reconstruction to the Great Depression* 44 (Paul Finkelman ed., 1992).

has a deliberately race-conscious orientation in part to dispel the notion of neutrality under the law.³⁷

Part II of this Note will provide a brief historical narrative of the policing and vilification of Blacks during slavery, as well as early laws and legal decisions that encouraged these behaviors. It will also discuss the majority's attitude in a post-slavery United States, how these attitudes bled into crucial decision-making processes during Reconstruction. Further, it will discuss how laws and policies related to policing Blacks, coupled with the way in which a newly freed people were portrayed in society, stifled their assimilation into American culture and effectively kept them outside of societal norms. Part II of this Note will also discuss the culture of American society in the 20th and 21st centuries relating to the continued media perpetuation of the "boogie man" concept and how it encourages racial profiling, as well as contemporary laws enacted to specifically target communities of color. Importantly, Part II will highlight the different ways in which systemic racism was forced to manifest itself during the emergence of its unacceptability in American society. Essentially, Part II will provide a historical analysis from the origination of this underlying problem to present day.

Part III will identify the problematic, establishment-backed schools of thought prevalent in America's justice system culture. Specifically, Part III will examine how the idea that the Black male is a threat dangerous enough to justify not only heightened policing by law enforcement, but the use of excessive force—which was created during slavery—is still prevalent in modern society and perpetuated in part by the modern news media. The identification of this problem will be illustrated through cases of police brutality and excessive force where the officers in question were indisputably the person responsible for the injury or fatality. Part III will also briefly examine statutory language and legal standards in these cases and the effect that implicit conceptions of a particular group can have on a purported race-neutral judicial system.

Part IV will discuss a proposed method to confront and remove implicit bias from the judicial aspect of the justice system and, by weaving in the themes of slavery-era tropes and the bias-driven reasoning that allows society to find excessive force against Black males reasonable, argue that the proposed test is not pragmatic in a purportedly colorblind America. Part IV will also recommend one method as a potential springboard towards race-neutral justice.

³⁷ Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILLINOIS L. REV. 893, 901 (1995). Inspiration for this Note was drawn from Professor Bell's hope that scholarly resistance would serve as a foundation for "wide-scale resistance," and his belief that standards and institutions that were created by and serve to strengthen white supremacy should be resisted.

II. EARLY VILIFICATION, POLICING THE OUTGROUP, AND STIFLING ASSIMILATION: A BRIEF HISTORICAL LOOK AT INSTITUTIONALIZED RACISM

“An expanded historical sensibility must be brought to the debate over racial justice.”³⁸ Due to an enormous body of scholarship, it should now be impossible for any serious historian, hopefully any reasonably well-educated person, to discuss such traditional themes in American legal historiography as democracy, egalitarianism, prosperity, or populism without an awareness of the Black dimension to these themes, a perspective often at a sharp contrast with the White one.³⁹ “Where previously legal history had been valued chiefly for its ability to shed light on current law by unearthing old doctrine, today there is a realization that legal history may be the best way of learning about the symbiotic relationship between law and the social process”⁴⁰ To understand how doctrines evolved and, perhaps more importantly, how the legal system has behaved in response to this evolution, requires both a sophisticated understanding and appreciation for social stratification, economic development, and political power. Absent such understanding, our knowledge of the law’s development is dangerously incomplete⁴¹ The southern legacy of caste system, Black oppression, policing, and the racist sentiments that accompany these phenomena—as discussed later in Part II—are firmly rooted in American soil. The southern legacy’s roots are so deep, so sturdy, and so far-reaching that they reside beneath the entire surface area of the country, cracking the foundation that purported race-neutral laws, programs, and systems were built upon. National institutions, particularly those legal in nature, helped spread southern views of caste throughout the country.⁴² These roots, and the way in which they have historically infected the country and compromised the foundation on which Blacks have always tried to gain a steady footing, have spread Southern ideals so that they are generally shared by White Americans, regardless of region. Yet, despite this American legacy, it is common to view racial tension in areas north of the Mason Dixon Line and west of the Mississippi as a recent twentieth century phenomenon.⁴³

³⁸ Cottrol, *supra* note 36.

³⁹ *Id.* at 45–46.

⁴⁰ *Id.* at 46.

⁴¹ *Id.*

⁴² *Id.* at 59.

⁴³ *Id.*

A. Law, Procedure, Early Policing, and Legal Sentiments of the High Court: Systems and Institutions as They Related to Blacks in an Antebellum America

1. Slave Codes

From 1619 to 1865, slave codes embodied criminal law and procedure applied against enslaved Africans.⁴⁴ The codes not only enumerated the applicable law, but also prescribed the social boundaries for slaves insofar as where they could go, what types of activities they could engage in.⁴⁵ Without such systems, Whites would have had a difficult time developing and maintaining their ideology of racial superiority.⁴⁶ Under the codes, the harshest criminal penalties were reserved for those acts that threatened the institution of slavery, for example, the murder of someone White or a slave insurrection.⁴⁷ In 1834, under Virginia law for example, a slave convicted of the crime of murdering a White victim would be sentenced to death, whereas a White person who was convicted of an identical crime would have a *maximum penalty* of death.⁴⁸ Slaves lived with the constant fear that at any moment they might be charged and convicted of crimes they did not commit.⁴⁹ They also lived with the knowledge that if they were victims of crime, there was no avenue of redress.⁵⁰

2. Fear and Subsequent Vilification of Black Slaves

The early vilification of Blacks, particularly males, was directly related to the lack of acquiescence of the first Africans to their

⁴⁴ KATHERYN RUSSELL-BROWN, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS* 35 (Richard Delgado & Jean Stefancic eds., 2d ed. 2008). The codes that regulated slave life from birth to death were practically uniform across states, and had the same underlying goal of preserving the property interest slave owners had.

⁴⁵ *Id.*

⁴⁶ HOMER HAWKINS & RICHARD THOMAS, *WHITE POLICING OF BLACK POPULATIONS: A HISTORY OF RACE AND SOCIAL CONTROL IN AMERICA, IN OUT OF ORDER: POLICING BLACK PEOPLE* 66 (Ellis Cashmore & Eugene McLaughlin eds., 1991).

⁴⁷ RUSSELL-BROWN, *supra* note 44, at 37. Under Maryland law, for example, a slave convicted of murder was to be hanged, beheaded, then drawn and quartered. Following this, the head and body were to be publicly displayed. These brutal executions were designed to keep slaves in their place.

⁴⁸ A. Leon Higgenbotham, Jr. & Anne Jacobs, *The "Law Only as Enemy": The Legitimization of Racial Powerlessness through the Colonial and Ante-Bellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 1058 (1992).

⁴⁹ RUSSELL-BROWN, *supra* note 44, at 15.

⁵⁰ *Id.* at 16–17. Particularly, rapes committed by White men against Slave women were not considered crimes under most slave codes.

enslavement. The fear of slave revolts and the early vilification of the Black slave as a potential defector from the White system was an integral in the creation of and, in the eyes of White colonists, need for laws, customs⁵¹, and policing that were instituted for the purpose of containing the Black population and ensuring their inferiority was preserved and an efficient system of slavery was maintained.⁵² One of the early caricatures that vilified Black males during the 18th century was the ‘Black Brute’⁵³ caricature, later known as the ‘Nat’⁵⁴ caricature. The ‘Nat’ caricature was a popular slavery-era literary stereotype that characterized Black males as angry, crazed, revengeful brutes with a bloodthirsty hatred for Whites.⁵⁵ This grotesquely exaggerated and falsified depiction of Black males served the White establishment’s agenda to justify the imposition of slave codes. Nat was the rebel who was a cunning, treacherous, and savage, and defied all rules of plantation society.⁵⁶ He retaliated when attacked by Whites, led guerrilla activities, killed overseers, and burned plantation buildings when he was abused.⁵⁷ This literary caricature was subdued and punished only when overcome by “superior numbers of firepower.”⁵⁸ This fantastic, super-human conception of the Black male colored the lens through which society viewed the way this population was to be policed and punished to maintain the hierarchy. Whites’ collective fear of the population whom they characterized as inherently dangerous and fundamentally lawless not only justified, but necessitated, the creation of de jure and de facto policies and laws to control and contain Blacks in White nation.

⁵¹ Herbert Aptheker, *American Negro Slave Revolts*, 1 SCI & SOC’Y 4, 512–13 (1937). “Laws and customs provided for abysmal ignorance, patrols, and passes in order to leave the plantation, no arms to slaves, no resistance to whites, no anti-slavery agitation, and a policy of divide and rule: division between poor whites and slaves, domestic and field slaves, and the drivers and mass of Negro slaves. Spying and the ‘Christian doctrine of resignation’ reinforced these instruments of class rule in the American slave system.”

⁵² *Id.*

⁵³ David Pilgrim, *The Brute Caricature*, JIM CROW MUSEUM OF RACIST MEMORABILIA, (2012), <http://www.ferris.edu/HTMLS/news/jimcrow/brute/#>.

⁵⁴ David Pilgrim, *The Nat Caricature*, JIM CROW MUSEUM OF RACIST MEMORABILIA, (2012), <http://www.ferris.edu/HTMLS/news/jimcrow/nat>.

⁵⁵ *Id.*

⁵⁶ John W. Blassingame, *The Slave Community: Plantation Life in the Antebellum South* 225 (1979).

⁵⁷ *Id.*

⁵⁸ *Id.*

3. Policing: Control and Property Preservation

Slave patrol or “patterollers” operated to keep a tight rein on slave activity.⁵⁹ For Whites, the “Black Brute” caricature reinforced the need for these law enforcement agents. Whites greatly feared slave insurrection and the slave patrols were established to monitor and quell suspicious slave conduct.⁶⁰ These patrols, enumerated by the slave codes, were the first uniquely American form of policing.⁶¹ Slave patterollers, who worked in conjunction with the militia, were permitted to stop, search, and beat slaves.⁶² Further, White members of the community were enlisted to participate in the patrols; for example, in Alabama, all slave owners under 60 and all other Whites under age 45 were legally required to perform slave patrol duties.⁶³ By the mid-1850s, slave patrols existed in every Southern colony.⁶⁴ White policing of Black populations was an integral component of each stage of White racial dominance of Blacks.⁶⁵ Such policing contributed to the Black Brute caricatures of slaves because heightened policing served to create essentially a “self-fulfilling prophecy”—racially targeted policing substantiated the White population’s fear of Black slave such that it confirmed the fear that this was a disobedient, violent, problem population. Further, this police practice served to maintain the hierarchy through the disproportionately harsh punishments doled out to Blacks.⁶⁶

B. Emancipation and Reconstruction: The Former System Re-Dressed

Reconstruction began after the end of the Civil War in 1865 under the Johnson administration and established basic rights of citizenship for Blacks under the law.⁶⁷ Before the Civil War, both northern and southern states practiced widespread discrimination against Black Americans, slave and free.⁶⁸ The establishment of legally recognized rights for Blacks

⁵⁹ RUSSELL-BROWN, *supra* note 44, at 40.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 41.

⁶⁴ *Id.*

⁶⁵ Hawkins & Thomas, *supra* note 46, at 67.

⁶⁶ See, e.g., Higginbotham & Jacobs, *supra* note 48, at 1054. (“Any aggressive gesture toward a white by a Black was punishable, and Blacks received a heavier penalty than whites did for assaulting whites.”).

⁶⁷ DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW 58 (4th ed. 2000). See also the Reconstruction Amendments codified at U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

⁶⁸ Eric Foner, The Supreme Court and the History of Reconstruction—and Vice-Versa, 112 COLUM. L. REV. 1585, 1586 (2012).

represented a radical change in the nature of American life; to understand the widespread sentiment of the day, it is crucial to recognize just how revolutionary and rattling this departure was from what was historically and generally accepted by White citizens for generations.⁶⁹ Slavery had been an intrinsic part of not only the Constitution and federal law, but American society—for at least the Southern portion of the nation—for almost 250 years preceding Reconstruction.⁷⁰ There was a reaction of disapproval and disappointment among White slave owners. For example in 1866, in Florida, it was difficult for many to comprehend that they no longer owned Blacks.⁷¹ White former slave owners had a lingering hope that they would receive some sort of compensation or that a system of “apprenticeship” would be established in order for them to retain their Black labor force.⁷² In addition to pushback in reaction to the destruction of slavery as a legal institution, White Americans took issue with the efforts of the federal government to uplift and protect former slaves.⁷³ These efforts, largely employed by the congressionally established Freedman’s Bureau,⁷⁴ came to be seen by many White Americans as a form of favoritism.⁷⁵ President Johnson played upon this sentiment in his veto of the 1866 Civil Rights Bill. “[T]he distinction of race and color is . . . made to operate in favor of the colored and against the White race.”⁷⁶ In the 1866 congressional elections, the northern public overwhelmingly rejected Johnson’s outlook.⁷⁷ Despite northern rejection of southern ideology, the nation abandoned Reconstruction in 1877, abdicating the responsibility it had assumed for protecting the basic rights of the former slaves.⁷⁸ In retrospect, Reconstruction was indeed a “tragic era”; it was a tragedy because of the opportunity that was lost. The chance to set the nation in a motion toward equality was present, and for a brief moment the

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Joe M. Richardson, *Florida Black Codes*, in 3 *Race, Law, and American History 1700–1990, Emancipation and Reconstruction* 625 (Paul Finkelman ed., 1992).

⁷² *Id.* at 626.

⁷³ Foner, *supra* note 68, at 1589.

⁷⁴ Herman Belz, *The Freedmen’s Bureau Act of 1865 and the Principle of No Discrimination According to Color*, in 3 *RACE, LAW, AND AMERICAN HISTORY 1700–1990, EMANCIPATION AND RECONSTRUCTION I* (Paul Finkelman ed., 1992). The Freedman’s Bureau was committed to the principle of equal justice under law. The changed legal status of the freedmen created peculiar problems which demanded the enactment of protective legislation.

⁷⁵ Foner, *supra* note 68, at 1588.

⁷⁶ *Id.* at 1589.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1587–88.

engines of government and law both moved in that direction.⁷⁹ There followed a long period in which the laws and constitutional amendments, although remaining on the books, had no bearing on the actual conditions of life for Blacks in the South.⁸⁰ Federal laws and efforts to protect Blacks were hampered by the restrictions on the civil rights of the freedmen that the Confederate states enacted.⁸¹

1. Black Codes

The first Black codes were adopted in 1865, a year before President Johnson vetoed the 1866 Civil Rights Bill.⁸² While new rights were granted, such as the ability of Blacks to marry one another as well as enter into certain contracts, laws were enacted that undercut these newly bestowed rights.⁸³ At the end of 1866, many agents reported that the local courts, on which the Freedman's Bureau had relied so heavily on, had not complied with the Bureau's wishes in providing fair and equal justice for Blacks.⁸⁴ The Black codes substantively curtailed the rights of Blacks through laws criminalizing gun possession, voting, vagrancy, and assembly after sunset.⁸⁵ Throughout the South, laws regulating debtors, laborers, loiterers, all nominally "indiscriminate," were exclusively enforced against Blacks.⁸⁶ Further, Blacks were not allowed to deal in merchandise, and were subject to greater penalties than Whites for identical crimes.⁸⁷

2. Continued Vilification of Blackness and Post-Slavery Policing Tactics

The vilification of Blackness was ever-present during Reconstruction, through the Compromise of 1877, and beyond. To Whites in the post-bellum South, the policeman stood as the first line of defense against the

⁷⁹ Paul Finkelman, *Introduction*, to 3 *Race, Law, and American History 1700–1990, Emancipation and Reconstruction*, vii, viii (Paul Finkelman ed., 1992).

⁸⁰ Foner, *supra* note 68, at 1588.

⁸¹ See, e.g., John Hope Franklin, *The Enforcement of the Civil Rights Act of 1875*, in 3 *RACE, LAW, AND AMERICAN HISTORY 1700–1990, EMANCIPATION AND RECONSTRUCTION 1* (Paul Finkelman ed., 1992) (discussing States' resistance to the new legislation and the proposal of bills at the state level to curtail the impact of the Civil Rights Act of 1875).

⁸² Kathryn K. Russell, *The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, Police Harassment, and Other Microaggressions* 19 (1998).

⁸³ *Id.*

⁸⁴ James Oakes, *A Failure of Vision: The Collapse of the Freedmen's Bureau Courts*, in 3 *RACE, LAW, AND AMERICAN HISTORY 1700–1990, EMANCIPATION AND RECONSTRUCTION 589* (Paul Finkelman ed., 1992).

⁸⁵ RUSSELL, *supra* note 82, at 20.

⁸⁶ Oakes, *supra* note 84.

⁸⁷ *Id.*

Blacks, who were viewed in light of the caricatures assigned to them, the most dangerous being the brute.⁸⁸ Since the only contact that most of the White policemen had with Blacks was with the criminal element, these conditions fostered feelings of mutual distrust and hostility.⁸⁹ Crackdowns aimed specifically at Blacks in the post-bellum era heightened antagonisms.⁹⁰ Methods that law enforcement used to gain control over this “neo-colony” included arrests on the grounds of suspicion, for example, as *The Atlanta Constitution* observed, “A Negro with a bundle on his shoulders at the dead hour of the night is always an object of suspicion to a policeman.”⁹¹ In Montgomery, Alabama, in 1887 most of the 120 persons arrested on suspicion were undoubtedly Black.⁹² In Richmond, Virginia, a Black man was charged with being “a suspicious character” and sent to jail for thirty days.⁹³ Not only were Blacks subject arrests based on race, they were subject to brutality by law enforcement as well. Throughout the period, Black citizens brought suits against officers for using excessive force, and were met with occasional success.⁹⁴ In 1866, two Nashville policemen were charged with beating a Black laborer without cause.⁹⁵ One of them told his partner to “kill the God damned Black son of a bitch,” and when the victim’s wife pleaded that they stop the beating, she was told, “you God damned Black bitch, I’ll shoot your brains out.”⁹⁶ The mayor of Nashville, supported by the captain of police, dismissed the men from the force after a brief hearing.⁹⁷ In Atlanta in 1882, a policeman was sentenced to three years in the penitentiary for killing a Black male who was allegedly resisting arrest.⁹⁸ In 1885, a policeman who was described as “one of the best officers on the force” was suspended for firing shots at a Black thief.⁹⁹ Later, in 1889, a longtime member of the Nashville police department was dismissed after he accidentally shot and wounded a young Black male.¹⁰⁰

⁸⁸ Howard N. Rabinowitz, *The Conflict Between Blacks and the Police in the Urban South*, in 8 RACE, LAW, AND AMERICAN HISTORY 1700–1990, RACE AND CRIMINAL JUSTICE 318 (Paul Finkelman ed., 1992).

⁸⁹ *Id.* at 324.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Rabinowitz, *supra* note 88, at 324 n.35.

⁹³ *Id.*

⁹⁴ *Id.* at 325.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Rabinowitz, *supra* note 88, at 325.

Despite these few cases where law enforcement was punished for brutality or extra-legal killings, most of the officers charged with excessive force, if charged at all, were not found guilty. The post-bellum south is fraught with these instances that are illustrative of the overall sentiment of the valuelessness of Black life. The Richmond Dispatch warned in 1866 that, “[t]he Negroes seem determined to try resistance to the police, but whenever they do so, they will find that they have begun a most unwise course. The laws of the State and city must be enforced, disorder and crime must be put down, if it takes every White man in the city to do it.”¹⁰¹ Seemingly carrying out the aforementioned objective, in 1890, a Black man was dragged through the streets by three Atlanta policemen, “as though he had been a brute.”¹⁰² Acts of torture and brutality inflicted upon Blacks were not exclusive to those in uniform as lynchings became the method through which White citizens terrorized Blacks in an effort to subordinate them during this period.¹⁰³ “By its very nature, lynching denied its victims the right to their say in court. We shall never know, therefore, how many persons suffered violent deaths, labeled ‘fiends’ or ‘brutes’ by the press for crimes they were alleged to have committed, who with the benefit of a hearing might have been cleared of the charges against them.”¹⁰⁴ In 1919, it was estimated that from 1883 to 1899, Whites committed more than 2,500 lynchings and the great majority of victims were Black—although recent studies cite much higher figures.¹⁰⁵ Even with these estimates, one commentator notes that we will never know how exactly how many Black men and women were beaten, flogged, mutilated, and murdered in the first years of emancipation.¹⁰⁶ Moreover, he notes that neither an accurate body count, nor statistical breakdown would reveal the barbaric savagery and depravity that often characterized the assaults made on freedman in the name of restraining *the freedman’s* perceived savagery and depravity—a perception resulting

¹⁰¹ *Id.* at 326.

¹⁰² *Id.*

¹⁰³ David A. Gerber, *Lynching and Law and Order: Origin and Passage of the Ohio Anti-Lynching Law of 1896*, in 9 RACE, LAW, AND AMERICAN HISTORY 1700–1990, LYNCHING, RACIAL VIOLENCE, AND LAW 190 (Paul Finkelman ed., 1992).

¹⁰⁴ *Id.* (citing NAACP, *Thirty Years of Lynching in the United States 1889–1918* (1919), <https://archive.org/details/thirtyyearsoflyn00nati>).

¹⁰⁵ EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 16 tbl.1 (2d ed. 2015). Between 1877 and 1950, a total of 4,075 Blacks were lynched in following twelve states: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. That equates to approximately 1.07 Black Americans lynched per week—more than 55 people per year—for 73 years.

¹⁰⁶ Bell, *supra* note 67, at 59 (citing Leon f. Litwack, *Been In The Storm So Long: The Aftermath of Slavery* 276–77 (1979)).

from a caricature concocted by the assailants themselves.¹⁰⁷ Certainly, the perpetuation of the negative stereotypes assigned to Blacks—particularly the brute trope—in conjunction with focused, agenda-driven policing by Whites made asserting oneself the deadliest choice for a freedman, for then the Black person becomes “militant” in White eyes, a threat to be put down by any means necessary.¹⁰⁸

In 1883, a Georgia newspaper reported a statement made by the police commissioner, “[t]he moment a Negro steals, or robs, or commits some other crime, his person seems to become sacred in the eyes of his race, and he is harbored, protected, and deified. If he is captured, resists an officer and is shot, as he should be, and as a White criminal would be, immediately the leading Negroes drum up a mass meeting and proceed to pass a string of senseless but sympathetic resolutions, after a series of harangues that would disgrace the Zulus.”¹⁰⁹ This statement is not only overtly racist, but it condescendingly and purposefully does not acknowledge how difficult and dangerous life in the South was for Black citizens. One noted academic identifies these sentiments by Whites as examples of “racial exhaustion” which is rhetoric that operates as a “persistent discursive instrument utilized to contest claims of racial injustice and to resist racial egalitarianism.”¹¹⁰

The message, the mindset, the discourse—the exhaustion¹¹¹—this short statement encapsulates are themes and sentiments that continued to define the relationship between White society, law enforcement, and Black America through the turn of the century and in contemporary culture. In fact, the statement—its construction, tone, implied message, and overt sentiment—is one that, save some terms that have fallen out of favor, is transferrable to contemporary society and could easily be the narrative of

¹⁰⁷ *Id.*

¹⁰⁸ Steven R. Morrison, Will to Power, Will to Reality, and Racial Profiling: How the White Male Dominant Power Structure Creates Itself as Law Abiding Citizen Through the Creation of Black as Criminal, 2 NW. J. L. & SOC. POL’Y 1, 65 (2007).

¹⁰⁹ Rabinowitz, *supra* note 88, at 329.

¹¹⁰ Darren L. Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 922 (2009).

¹¹¹ *Id.* at 926–27 (“[O]pponents to racial justice measures have frequently contested such policies with a strikingly consistent discourse that depicts racial remedies as redundant, unnecessary, vexatious, futile, and unfair to whites. This rhetoric of racial exhaustion contends that persons of color (most often Blacks) have benefitted from a protracted and costly social project that has defeated and adequately remedied racism. Accordingly, any lingering social and economic inequality that corresponds with racial status results from nonracial factors such as poverty, individual pathology, or lack of merit. Racial exhaustion rhetoric depicts the United States as a post-racist society that rationally views claims of racial injustice and demands for remedial state action with suspicion.”).

a modern-day conservative political pundit or police benevolent association spokesperson.¹¹²

III. CONTEMPORARY VILIFICATION AND REASONABLE POLICING THROUGH THE EYES OF A FEARFUL SOCIETY

During the latter part of the Jim Crow¹¹³ era in the south, Blacks experienced formerly White-instituted laws, customs, methods of disenfranchisement, and mechanisms of control similar to those of the Slave Codes and Black Codes carried over into the middle twenty-first century. Racial segregation between Blacks and Whites during Jim Crow not only provided White redeemers with political power through the relegation of Blacks to second-class citizenry, but effectively set up impenetrable boundaries through de jure segregation.¹¹⁴ These boundaries encouraged the disenfranchisement of Blacks and fostered the ignorance, fear, and feelings of superiority the police officers that were enlisted to keep Blacks in their place possessed. As cultural norms started to

¹¹² Compare with a fictional, analogous modern-day statement: “The moment an African-American steals, or robs, or commits some other crime, his person seems to become sacred in the eyes of the African-American community, and he is harbored, protected, and deified. If he is caught, resists arrest, and is shot by an officer, as he should be, and as a white criminal would be, immediately Al Sharpton, Jesse Jackson, and other civil rights leaders drum up a mass meeting and proceed to pass a string of senseless but sympathetic resolutions, after a series of harangues that would disgrace Dr. King.”

¹¹³ Thomas Dartmouth “Daddy” Rice appeared on stage in 1828 as “Jim Crow”—an exaggerated, highly stereotypical Black character. The Origins of Jim Crow, *Jim Crow Museum of Racist Memorabilia*, FERRIS STATE U. <http://www.ferris.edu/HTMLS/news/jimcrow/origins.htm> (last visited Feb. 28, 2017). The Jim Crow trope would become a mainstay in minstrel shows, portraying Blacks as “singing, dancing, grinning fools.” *Id.* The popularity of minstrel shows helped spread Jim Crow as a racial slur; however, this use of the term only lasted half a century. *Id.* By the end of the 19th century, the phrase Jim Crow was mostly being used to describe laws and customs which oppressed Blacks. *Id.* The Jim Crow era as a social phenomenon arguably lasted from 1896, when *Plessy v. Ferguson* was decided, until *Brown v. Board of Education* shattered the standard in *Plessy* in 1954. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (affirming state statutory segregation on the principle of “separate but equal”); see also *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (overturning *Plessy v. Ferguson* and holding separate was “inherently unequal”). While Jim Crow and segregation are both indispensable aspects of the American narrative generally, and the topic of this piece specifically, a discussion of Jim Crow will not be fully developed in this Note. An enormous body of scholarship exists on this topic and related issues. See C. Vann Woodward, *The Strange Career of Jim Crow*, 34 TEXAS L. REV. 500 (1956); Stephen J. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the “Separate But Equal” Doctrine, 1865–1896*, 28 AM. J. LEGAL HIST. 17 (1984); C. Vann Woodward, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). See also RUSSELL, *supra* note 82, at 19.

¹¹⁴ *Id.* at 136.

transform during the middle to late twentieth century, socially acceptable practices changed shape, and society became more integrated; the historical model of outwardly oppressive laws, widespread vilification of Blacks, heightened policing in communities of color, and different definitions of justice for different groups became outfitted such that the characteristics we had seen historically were now thinly-veiled to provide the perception of post-racial progress.

A. Discriminatory Intent Goes Covert: The Equal Protection Challenge

The discriminatory intent rule requires equal protection plaintiffs to demonstrate that the government defendant engaged in purposeful discrimination.¹¹⁵ It is well settled that heightened equal protection scrutiny applies only to intentional invidious discrimination and not to facially neutral conduct that has disparate effects on Black and White citizens. As a practical matter, intentional discrimination is presumptively illegitimate, and virtually always unconstitutional, while disparate impact discrimination is presumptively legitimate, and nearly always upheld.¹¹⁶ Seemingly, the body of law and legal theory that governs the application of the equal protection clause to cases of alleged racial discrimination oftentimes blinds itself to what is known about the unconscious.¹¹⁷ From a practical standpoint, the lack of consideration for the unconscious is socially and legally irresponsible, and renders the discriminatory intent rule virtually useless. Our national unconscious relating to how Blacks, particularly males, are viewed has been keenly developed over time through the information we receive by way of various societal delivery systems: textbooks, fiction and non-fiction books, oral family histories, networks and affinity groups, fraternities, posters and billboards, newspaper clippings, music, television, movies, radio, social media—there is a seemingly infinite way we receive information. I maintain that because the caricatures of Black males consistently perpetuated throughout American history, particularly the Black Brute trope, are validated both obviously and covertly through coded messages by a seemingly agendaed bar, powerful media—no member of society is immune from the penetration of bias into his or her unconscious.

¹¹⁵ Hutchinson, *supra* note 110, at 922.

¹¹⁶ David Cole, The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction," 83 GEO. L.J. 2547, 2550 (1995.)

¹¹⁷ Lawrence, *supra* note 33, at 330.

B. Contemporary Vilification Through Modern Media

There is an undeniable connection between the media as institutions with social power and the ideas that they circulate.¹¹⁸ The media is powerful because it influences how we “see” our social relations and ourselves—it enters into and informs our ideals, actions, and practices as a society.¹¹⁹ Media is not only powerful because of how it effects our perception of others and ourselves around us, it is powerful due to the sheer rate in which its presence in American lives has grown throughout recent history. For the better part of three decades, the supply of digital media presented to individuals and households in America has been growing at compounded rates ranging between 9% and 30% per annum for the majority of the media Americans watch, listen to or communicate with.¹²⁰ Society is bombarded with imagery from the Tyler Perry motion picture filled to the brim with every imaginable Black caricature and stereotype packaged and ready for mainstream consumption by the White masses to the “light bites” of Black exploitation found on television screens in easy to digest four minute music videos and on smartphone screens via viral videos.

Specifically, the mainstream American media perpetuates the “boogie man” perception of individuals of color—particularly Black males—thereby continuing to mold the implicit views of the public, the police, and the policy-makers in a way adverse to the Black community receiving equal treatment in our legal system. For most, television’s overpowering images of Black deviance—its regularity and frequency—are impossible to ignore.¹²¹ I have chosen to focus on the television news media to support this proposition, as generally, stereotypes found in the news are harder to resist because of the general public perception that the news is both real and factual.¹²²

The onslaught of criminal images of Black males in the news causes many Americans to incorrectly conclude that most Black men are criminals, Blacks are responsible for committing the majority of crime, or both.¹²³ This assertion is supported by an inquiry made into this issue 25 years ago. Professor Robert Entman conducted a study that explored the impact of local television news on Whites’ attitudes toward Blacks, which

¹¹⁸ MEDIA STUDIES: A READER 267 (Paul Marris & Sue Thornham eds., 2d ed. 2000).

¹¹⁹ *Id.* at 272.

¹²⁰ James E. Short, How Much Media? 2013 Report on American Consumers, Institute for Communications Technology Management, University of Southern California Marshall School of Business 8 (Oct. 2013), <http://classic.marshall.usc.edu/assets/161/25995.pdf>.

¹²¹ RUSSELL-BROWN, *supra* note 44, at 14.

¹²² D. Marvin Jones, Fear of a Hip Hop Planet 62 (2013).

¹²³ RUSSELL-BROWN, *supra* note 44, at 14.

supported the hypothesis that local news contributes to phenomenon described in the study as “modern” (or “symbolic”).¹²⁴ This phenomenon informs us that individuals from the disliked outgroup—in the case of the study, Blacks—are homogenized and assimilated to a negative stereotype by the ingroup (Whites), whereas those in the ingroup see themselves as individual members of a diverse group impossible to stereotype.¹²⁵ Human information processing appears to operate using stored categories called schemas, which are themselves similar to stereotypes; therefore, it is easy for people to fall into stereotyped thinking.¹²⁶ For audiences, this inherent bias of information processing, combined with the imagery of stereotyped news subjects, such as the “threatening young Black male,” work to implicitly promote those familiar caricatures developed by the ingroup hundreds of years ago.¹²⁷

To gather the ways in which mass cultural institutions may promote negative stereotypes that are congruent with modern racism, the study analyzed the subtle distinctions between the visual representations of Blacks and Whites in the television news media.¹²⁸ The study revealed that visual messages were coded. When still photos were used for those accused of violent crimes, Blacks were named less frequently when compared to rate in which Whites’ pictures were shown with a name.¹²⁹ The practice of omitting the accused’s name suggests that there are no significant differences among individual members of the outgroup and that the visual representation on the screen is a part of a larger, undifferentiated group—in this case the dangerous Black male stereotype. Also, Blacks were also less likely to be shown in motion video when compared to Whites—the study suggests that motion video creates individualization and humanization of the accused.¹³⁰ Moreover, Blacks were more likely to be shown in street or jail garb when compared to Whites, which also

¹²⁴ Robert Entman, Representation and Reality in the Portrayal of Blacks on Network and Television News, 71 JOURNALISM QUARTERLY, no. 3, 511–12 (1994).

¹²⁵ *Id.* at 17.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Robert M. Entman, *Blacks in the News: Television, Modern Racism and Cultural Change*, 69 JOURNALISM QUARTERLY, no. 2, 347–48 (1994). The study was based on content analysis of approximately 55 days of local television news in Chicago as broadcast by WBBM (CBS affiliate), WGN (Independent), WMAQ (NBC), and WLS (ABC) sampled from the period of December 1, 1989 through May 10, 1990. The program analyzed was the 10 o’clock news for the three network affiliates and the 9 o’clock news for WGN.

¹²⁹ *Id.* at 350. Forty–nine percent (49%) of Blacks were shown with name; Sixty–five percent (65%) of whites were shown with a name.

¹³⁰ *Id.* at 351.

perpetuates the fear of the dangerous Black male with “nothing to lose.”¹³¹ Blacks were more likely to be portrayed in the grip of a retraining police officer than Whites, which clearly suggests that the accused is more menacing and dangerous than someone who is not shown in the physical grip of law enforcement.¹³² Whites were more than twice as likely to have pro-defense sound bites as compared to Blacks.¹³³ Not only does this suggest that Whites are less likely to be subjected to the general pro-prosecution slant which is so prevalent in crime news stories, but it suggests that the White accused is a human being with an individual story and unique perspective, rather than a part of a homogenized mass of criminals.¹³⁴ Lastly, while Blacks accused of crimes were frequently discussed by both White police officers or both Black and White police officers in the same story, Whites accused of crimes were almost always discussed only by White police officers.¹³⁵ These statistics suggest a symbolic segregation of police authority that was once an in-fact segregation of police authority.¹³⁶ The lack of imagery of Black officers discussing White accused implicitly suggests that Black officers cannot and should not exert power and authority over Whites.¹³⁷

To the extent that these negative images have been seared into our collective unconscious,¹³⁸ Black people as a “problem population” and the police practice of containment in the Black communities mutually reinforce and support one another.¹³⁹ The problem population’s perceived affinity for deviant behavior is often attributed to a non-culpable developmental cause of criminal violence: racial character.¹⁴⁰ “Centuries of criminalizing Black males through over policing, coupled with the

¹³¹ *Id.* The study notes that this also attributed to the differences in social class of those accused in the news stories.

¹³² *Id.* Thirty-eight percent (38%) versus eighteen percent (18%).

¹³³ *Id.* at 353 n.43. Twenty-nine percent (29%) versus eleven percent (11%). For both races, the vast majority of the accused were not heard speaking; however, when they were, whites were more than twice as likely to speak than Blacks (14% v. 6%).

¹³⁴ *Id.* at 354.

¹³⁵ *Id.* at 353.

¹³⁶ *Id.*

¹³⁷ Rabinowitz, *supra* note 88, at 323 (citing HELEN G. EDMONDS, *THE NEGRO AND FUSION POLITICS IN NORTH CAROLINA, 1894–1901* 130 (2003)). The “symbolic segregation of police authority” portrayed television news in the early 1990’s is eerily similar to the explicit position of the white mayor of Greenville, North Carolina in 1896 who stated, “[N]o Negro policeman had ever arrested a white man . . . ‘as Mayor, I have expressly ordered Negro policeman not to arrest any white person, but to report any disturbance to the white policeman who would make the arrest.’”

¹³⁸ RUSSELL-BROWN, *supra* note 44, at 14.

¹³⁹ MEDIA STUDIES, *supra* note 188, at 272.

¹⁴⁰ Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1314 (1995).

demonization of this group through the creation and perpetuation of evil, violent, barbarous caricatures has resulted in the majority has steadily communicating a racialized assignment of deviant pathology to Blacks.”¹⁴¹ The perception of Blacks as pathological and the resulting cognitive homogenization of this group work together within our collective unconscious such that we are led to conclude that excessive policing, including excessive use of force if necessary, is acceptable because the hyper-criminalized nature of Blacks is not only believable, but expected. The pathological stereotype of the Black criminal is dangerous because, by way of its construction, it is circular in nature and stubbornly resistant to change.¹⁴²

C. Reasonable Policing of a Problem Population

Police quickly point to disparate arrest patterns that “prove” minorities commit more crimes when defending the use of race as a legitimate variable when choosing which citizens to pull over, stop and frisk, and/or arrest.¹⁴³ Therefore, by relying on these statistics, police contend that it is not racist or discriminatory to treat Blacks differently.¹⁴⁴ A closer examination of arrest statistics, however, reveals that these numbers are highly misleading.¹⁴⁵ Empirical studies show that “racial discrimination by police officers in choosing whom to arrest most likely causes arrest statistics to exaggerate what differences might exist in crime patterns between Blacks and Whites, thus making any reliance on arrest patterns misplaced.”¹⁴⁶ Use for example the statistic that a Black man born in 1991 has a 29% chance of being imprisoned, compared with a 4% chance for a White man born in the same year.¹⁴⁷ One commentator explains that this exaggeration results from a self-fulfilling statistical prophecy: stereotypes of the pathological criminal propensity of Blacks influence police to arrest minorities more frequently than non-minorities, thereby generating statistically disparate arrest patterns and imprisonment rates that in turn

¹⁴¹ *Id.*

¹⁴² Monnica T. Williams, *The Circular Nature of Pathological Stereotypes*, PSYCHOLOGY TODAY (Dec. 27, 2011), <https://www.psychologytoday.com/blog/culturally-speaking/201112/the-circular-nature-pathological-stereotypes>.

¹⁴³ Erika L. Johnson, “A Menace to Society”: The Use of Criminal Profiles and Its Effects on Black Males, 38 HOW. L.J. 629, 633–34 (1995).

¹⁴⁴ *Id.* at 633.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Paul Butler, Much Respect: Toward a Hip-Hop Theory of Punishment, 56 STAN. L. REV. 983, 986 (2004).

form the basis for further selectivity.¹⁴⁸ A recent example of selective policing practices that disproportionately affected Blacks was uncovered through the Department of Justice’s investigation into the policing and court practices in Ferguson, MO, in the wake of the death of 18-year-old Michael Brown.¹⁴⁹ The report exposed that, “African-Americans experience disparate impact in nearly every aspect of Ferguson’s law enforcement system. Despite making up 67% of the population, African-Americans accounted for 85% of the Ferguson Police Department (“FPD”) traffic stops, 90% of FPD citations, and 93% of FPD arrests from 2012 to 2014.”¹⁵⁰ Indeed, the report also went on to state “[o]ur investigation indicates that this disproportionate burden on African-Americans cannot be explained by any difference in the rate at which people of different races violate the law. Rather, our investigation has revealed that these disparities occur, at least in part, because of unlawful bias against and stereotypes about African-Americans.”¹⁵¹ Certainly, young Michael had the deck stacked against him when he, probably viewed as the quintessential “Black brute” either consciously or unconsciously by law enforcement generally, encountered a police officer likely indoctrinated into the racially biased practices of the police force he had been a part of for four years.¹⁵² From the statistical data presented in the Department of Justice report of its findings following the FPD investigation, it can be inferred that in the case of Michael Brown, the encounter with Darren Wilson would have at least resulted in a citation or, more probably, an arrest.¹⁵³ Unfortunately, the result of the encounter was not an arrest; rather, it ended with the death of young, college-bound Michael whose body was left medically unattended to bleed out in the middle of the road for hours while the scene of the shooting was altered,

¹⁴⁸ Sheri L. Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983) (noting that police admit race is an important factor in determining whether to detain a suspect).

¹⁴⁹ Mark Berman & Wesley Lowery, *The 12 Key Highlights from the DOJ’s Scathing Ferguson Report*, THE WASH. POST (Mar. 4, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/03/04/the-12-key-highlights-from-the-doj-s-scathing-ferguson-report/>.

¹⁵⁰ INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV. 4 (March 4, 2015), <https://assets.documentcloud.org/documents/1681145/departement-of-justice-report-on-the-ferguson-mo.pdf>.

¹⁵¹ *Id.* at 5.

¹⁵² Jake Halpern, *The Cop: Darren Wilson was not indicted for shooting Michael Brown. Many people question whether justice was done*, THE NEW YORKER (Aug. 10, 2015), <http://www.newyorker.com/magazine/2015/08/10/the-cop>.

¹⁵³ INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 150, at 11–12. (“FPD’s weak systems of supervision, review, and accountability . . . have sent a potent message to officers that their violations of law and policy will be tolerated, provided that officers continue to be ‘productive’ in making arrests and writing citations.”).

officers convened, and residents cried out about the abuse they were witnessing. These cries of abuse were the same as those uttered during the slave codes, Black codes, and Jim Crow—and were met with the same indifference.

1. Abuses That Result From Heightened Policing: Dominance Over the Neo-Colony¹⁵⁴

When there is a higher incidence of interaction between law enforcement and Blacks, two groups that, historically, have had a relationship fraught with discourse with one another, it follows logically that many encounters will result in violence. Police brutality is generally understood to be force that crosses the line of objective reasonableness, becoming “excessive.”¹⁵⁵ The Supreme Court standardized the definition in *Graham v. Connor*,¹⁵⁶ a decision that not only crippled Fourth Amendment protections, but created a rule that purposefully rejected inquiries into a police officer’s underlying intent or motivation when determining objectivity in “all claims that law enforcement officers have used excessive force—deadly or not—in the course of an investigatory stop, or other ‘seizure’ of a free citizen.” In an opinion by Chief Justice Rehnquist,¹⁵⁷ the Court held that use of force is excessive if it is not objectively reasonable in view of all “the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”¹⁵⁸ Acts of police brutality usually occur under conditions of split-second antagonism, intense emotion, and the specter of criminality (whether actual or suspected), with few witnesses present—which makes the perception—and narrative—reliant standard established by the Court particularly concerning for those who are targeted most frequently by law enforcement.¹⁵⁹ It follows logically that “official stories” are uniquely prone to narrative distortion and dilution.¹⁶⁰ It seems that most of the

¹⁵⁴ Steven R. Morrison, Will to Power, Will to Reality, and Racial Profiling: How the White Male Dominant Power Structure Creates Itself As Law Abiding Citizen Through the Creation of Black As Criminal, 2 NW. J. L. & SOC. POL’Y 63 (2007).

¹⁵⁵ David Dante Troutt, Screws, Koon, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions, 74 N.Y.U. L. REV. 18, 103–04 (1999).

¹⁵⁶ *Graham v. Connor*, 490 U.S. 386, 395 (1989).

¹⁵⁷ For information on William Rehnquist’s stance on race jurisprudence and questionable racial objectivity, see Paul Butler, *Rehnquist, Racism, and Race Jurisprudence*, 74 GEO. WASH. L. REV. 1019 (2006).

¹⁵⁸ Lawrence, *supra* note 33, at 336.

¹⁵⁹ *Graham v. Connor*, *supra* note 156, at 396–97.

¹⁶⁰ Troutt, *supra* note 155.

reported incidents of police violence tend to coalesce around similar “plot” situations.¹⁶¹ One review of the empirical literature describes the typical excessive force occurrence as involving (1) an encounter initiated by police, (2) often, with more than one police officer present, (3) where the responding officers are from a department known for regarding abuse of physical force as a minor to mid-level offense, and (4) where the suspect demonstrates a lack of deference toward the law enforcement official.¹⁶² Accompanying this all-too-typical scenario, are the real people and situations that give life to this generalized framework, oftentimes involving White police officers and men of color, particularly Blacks.¹⁶³

The coalescence of various official narratives has a psychological component, which requires unpacking to further understand this phenomenon. According to Professor Steven L. Winter, Idealized Cognitive Models (ICMs) are “oftentimes scenarios or scripts, metaphors, or ‘a related group of propositions grounded in a physical or cultural experience,’ and share at least two of the following features: (1) ICMs are grounded in or draw upon direct physical or cultural knowledge; (2) they are highly generalized in order to capture and relate together a broad range of particularized fact situations; (3) they are unconscious structures of thought that are invoked automatically and unreflexively to make sense of new information; and (4) they are not determinate, objective characterizations of reality, but rather idealized structures that effectively characterize some but not all of the varied situations that humans confront in their daily interactions with their physical and social environment.”¹⁶⁴ For example, ICMs about Black men driving expensive cars in predominantly White, especially suburban, neighborhoods;¹⁶⁵ the fleeing suspect of color;¹⁶⁶ the Black teen wearing “street clothes,” such as a

¹⁶¹ *Id.*

¹⁶² See Troutt, *supra* note 155, at 98 (citing Hubert G. Locke, The Color of Law and the Issue of Color: Race and the Abuse of Police Power, in *Police Violence: Understanding and Controlling Police Abuse of Force* 129, 144 (William A. Geller & Hans Toch eds., 1996)).

¹⁶³ Troutt, *supra* note 155, at 99 (citing William A. Geller & Michael S. Scott, *Deadly Force: What We Know: a Practitioner’s Desk Reference on Police-Involved Shootings* 143 (1992)).

¹⁶⁴ *Id.* at 86 (citing Steven L. Winter, The Cognitive Dimension of the Agony Between Legal Power and Narrative Meaning, 87 MICH. L. REV. 2225, 2234 (1989)).

¹⁶⁵ Jonny Gammage, a 31-year-old Black man, died of asphyxiation because of compression to his chest and neck following a traffic stop in a Pittsburgh suburb. See Brian Jenkins, *Three white police officers charged in death of Black man*, CNN (Nov. 27, 1995, 9:53 PM), <http://www.cnn.com/US/9511/gammage/>. Five white policemen engaged in a struggle with the victim, who was stopped while driving a Jaguar that belonged to his cousin, a professional football player.

¹⁶⁶ Nathaniel Levi Gaines, a 25-year-old Black man was unarmed and fatally shot in the back fleeing from police on an empty Bronx subway platform. The officer was sentenced

hooded sweatshirt;¹⁶⁷ the Black man who shows a lack of deference when confronted by law enforcement¹⁶⁸; and the young Black male who may be armed, and is there for automatically dangerous, because he was *possibly* heard uttering the word “gun.”¹⁶⁹ It seems clear that due to the frequency and similarity of these incidents, this related group of highly generalized scenarios grounded in a shared cultural experience—the collective conditioning to fear and homogenize Black life—has infiltrated the unconscious such that when one is presented with new, particularized information, the automatic response is to idealize the information with a cognitive shortcut. The aforementioned partial list of brutality ICMs are recurrent in contemporary stories¹⁷⁰—most without an official voice—and parallel scenarios throughout American history that all speak to the mindset of institutionalized “White dominance”¹⁷¹ over the Black public.

to 5 to 15 years in prison. See Randy Kennedy, *Prison Term for Officer Who Killed Unarmed Man*, N.Y. TIMES (July 22, 1997), <http://www.nytimes.com/1997/07/22/nyregion/prison-term-for-officer-who-killed-unarmed-man.html>. At the time of this article, the transit officer perpetrator “was believed to be just the third New York City officer ever sentenced to prison for committing homicide while on duty.”

¹⁶⁷ Trayvon Martin, a 17-year-old Black teenager, was unarmed when he was fatally shot by a neighborhood watch volunteer, George Zimmerman, in a gated Sanford, FL community. See Julia Dahl, *Trayvon Martin shooting: A timeline of events*, CBS NEWS (July 12, 2013, 5:11 PM), <http://www.cbsnews.com/news/trayvon-martin-shooting-a-timeline-of-events/>. Although Trayvon was not killed by a law enforcement official, the reasons he was suspicious to—and being followed by—a neighborhood watchman are grounded in the same characterizations made by a police officer who either consciously or subconsciously reacts upon the same ICM Zimmerman used to characterize the situation. Furthermore, this scenario can be analogized to the civilian paterollers who, acting under de facto law policing authority, enforced the slave codes via, stopping, searching, and beating slaves. See *supra* note 59.

¹⁶⁸ Anthony Baez, a 29-year-old asthmatic Latino, died of asphyxiation when a white police officer, Francis X. Livoti, argued with Baez, then attempted to restrain him with a choke hold. Livoti was angered when the football Baez and his relatives were playing with hit his patrol car. See Clifford Krauss, *Clash Over a Football Ends With a Death in Police Custody*, N.Y. TIMES (Dec. 30, 1994), <http://www.nytimes.com/1994/12/30/nyregion/clash-over-a-football-ends-with-a-death-in-police-custody.html>. See also *infra* text accompanying note 179.

¹⁶⁹ Sean Bell, a 23-year-old Black man, was leaving his bachelor party in the early morning hours of his wedding day when five officers fired a total of 50 bullets into the car Bell was in because one thought he heard the word, “gun.” The barrage killed Bell and severely wounded two of his friends. See Al Baker, *Police Statements Vary on Firing at a Vehicle*, N.Y. TIMES (Nov. 30, 2006), <http://www.nytimes.com/2006/11/30/nyregion/30cars.html>.

¹⁷⁰ See *infra* notes 178–80 and accompanying text.

¹⁷¹ One particularly gruesome case of police brutality was that of Abner Louima, a 30-year-old Haitian immigrant who was arrested on August 9, 1997 after a fight ensued at a night club (which Louima was later found to have no involvement in). Louima was brutally beaten and sodomized with a broken broomstick at the police precinct station house. The officer who brutalized Louima, Justin Volpe, was convicted and sentenced to 30 years. See

IV. EXTRA-LEGAL BRUTALITY AND KILLINGS: STANDARDS DANGEROUSLY UNWITTING TO RACIAL BIAS

A. Excessive Force Cases

The historical vilification of Blacks, specifically males, as it relates to the most threatening trope—the Black brute—has a peculiar and inescapable impact on how judicial standards impact cases of police brutality where the officer is White and the victim is Black. For instance, in one jurisdiction, in order for a plaintiff to prevail in an excessive force case against an officer where the victim survived, the plaintiff must demonstrate that the officer’s response was greater than that reasonably necessary under the circumstances.¹⁷² In assessing whether the amount of force used was reasonable, the court deems that the appropriate factors to consider include: (1) the amount of force exerted; (2) the means or instruments by which force was applied; (3) the manner or method of applying force; (4) the circumstances under which force was applied; and (5) differences in the size, age, sex, and relative strength of the participants.¹⁷³ In cases of excessive force resulting in death, the United States Supreme Court has held that deadly force may be used only to stop a subject who poses a threat of injury or death to an officer or others and is attempting to evade capture.¹⁷⁴ Per *Tennessee v. Garner*, where a suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend [the suspect] does not justify the use of deadly force.¹⁷⁵ Both standards, in light of the historical and contemporary references and data presented in this Note, inadequately and detrimentally fail to account for implicit associations and dehumanization associations that shape what is considered “objectively reasonable” under the aforementioned circumstances.¹⁷⁶

A series of studies published in 2014, one of which measured police officers’ perceptions of Black male children in a criminal justice context, demonstrated that the dehumanization of these children facilitated the

Maria Hinojosa, *NYC officer arrested in alleged sexual attack on suspect*, CNN (Aug. 14, 1997, 4:29 AM), <http://edition.cnn.com/US/9708/14/police.torture/>. For a detailed commentary on the events of August 9, 1997, the community protest that followed, and the state and federal prosecutions, see Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999). Professor Alfieri comments that, “[d]riven by that impulse [for dominance], Volpe and the other arresting officers deploy physical and sexual forms of violence to underwrite their own masculinities, thereby asserting the supremacy of their own ‘racialized masculinities’ of whiteness.” *Id.* at 1192.

¹⁷² See generally *Mason v. Banks*, 581 S.W. 2d 621, 621 (Tenn. 1979).

¹⁷³ See generally *Byrd v. Isgitt*, 338 So. 2d 374 (3d. Cir. 1976).

¹⁷⁴ See generally *Tennessee v. Garner*, 471 U.S. 1 (1985).

¹⁷⁵ *Id.* at 11.

¹⁷⁶ See *infra* notes 177–87.

perception of Black male youth as both older than their age and less innocent than their non-Black peers.¹⁷⁷ Sixty police officers from a large urban police department, which polices a population of more than 250,000 people, participated in the study. Approximately seventy-three percent of the participants self-identified as “White,” ten percent as “Black,” thirteen percent responded “Latino,” and three percent identified as “Other.”¹⁷⁸ The results of the study revealed that participants overestimated the age of Black child crime suspects; a particularly noteworthy outcome found that 13-year-old Black “felony suspects” were overestimated by 4.59 years and therefore miscategorized as adults by the police officer participants.¹⁷⁹ White children were not subjected to age overestimations.¹⁸⁰ The second part of this study consisted of a sample of one hundred sixteen police officers who were assigned to patrol duty from a large urban department.¹⁸¹ Approximately seventy-one percent of the participants self-identified as “White,” eight percent as “Black,” eight percent responded “Latino,” four percent identified as “Other,” and nine percent did not respond.¹⁸² The study aimed to examine the relationship between explicit and implicit attitudes and the use of force against Black children.¹⁸³ The analysis indicated that the more officers implicitly dehumanized Blacks, the greater the frequency with which they used force against Black children.¹⁸⁴ These studies provide insight regarding the perception the Cleveland officer who shot and killed 12-year-old Tamir Rice had of his pre-teen victim.¹⁸⁵ Perhaps, as the first study concluded, he viewed young Tamir as an adult Black male and therefore assigned him greater culpability and potential for violence.¹⁸⁶ Furthermore, the second study provides understanding regarding society’s acceptance of Ferguson police officer Darren Wilson’s dehumanizing characterization of Michael Brown as a “demon” as justification for his use of deadly force against the teen.¹⁸⁷

¹⁷⁷ Phillip A. Goff, Matthew C. Jackson, et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 528 (2014).

¹⁷⁸ *Id.* at 533.

¹⁷⁹ *Id.* at 535.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 536.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Elahe Izadi & Peter Holley, *Video shows Cleveland officer shooting 12-year-old Tamir Rice within seconds*, THE WASH. POST (Nov. 26, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/11/26/officials-release-video-names-in-fatal-police-shooting-of-12-year-old-clevelandboy/?utm_term=.cb496072bb41.

¹⁸⁶ *See supra* note 177, at 544.

¹⁸⁷ Josh Sandburn, *All the Ways Darren Wilson Described Being Afraid of Michael Brown*, TIME (Nov. 25, 2014), <http://time.com/3605346/darren-wilson-michael-brown->

The dehumanization triggers in these studies, which produced the racially disparate results discussed above, undoubtedly evoked conceptions of the centuries old Black brute caricature within the psyches of the sample group.¹⁸⁸ Due to the perception that this dehumanized trope was subdued and punished only when overcome by “superior numbers of firepower,” it follows that even the greatest amount of force the public expects can be exerted in an encounter with an officer, the discharge of a firearm, is likely a reasonable decision.¹⁸⁹ This idea of the superhuman Black brute that American culture has sustained over centuries has rendered it reasonable for the use of a firearm against an unarmed person. In the case of Michael Brown, the national media quickly noted the victim’s height and weight: 6’5”, 289lbs—a practice rarely seen in the media as it relates to White victims.¹⁹⁰ Further, as it relates to height and weight, it was almost irrelevant that Darren Wilson was merely an inch shorter and roughly 50lbs lighter than Michael Brown.¹⁹¹ Alas, Brown’s Blackness gave him such an advantage over Wilson that, even while fleeing, he posed a threat imminent enough to reasonably justify deadly force. Several months later, after the nation witnessed Eric Garner breathe his last breath at the hands of the NYPD, the media again focused on the size of the 6’3”, 350lb asthmatic so as to implicitly justify the method of applying force by law enforcement as reasonable under the circumstances—despite the prohibition of the chokehold under NYPD policy.¹⁹² Historical tropes such as the Nat caricature of violent Black males; modern news media that provides skewed imagery and selective

demon/ (“And then after he [tried to take Wilson’s gun] he looked up at me and had the most intense aggressive face. The only way I can describe it, it looks like a demon, that’s how angry he looked.”).

¹⁸⁸ Nick Haslam, *Dehumanization: An Integrative Review*, 10 PERSONALITY & SOC. PSYCHOL. REV. 252, 254 (2006) (discussing that dehumanization involves referring to negatively valued superhuman creatures such as demons, monsters, etc. when referring to a group).

¹⁸⁹ See generally *supra* note 60.

¹⁹⁰ *Id.*; Peter Eisler, *Ferguson case: By the numbers*, USA TODAY (Nov. 25, 2014, 7:19 PM), <http://www.usatoday.com/story/news/nation/2014/11/25/ferguson-case-by-the-numbers/70110614/>.

¹⁹¹ Eisler, *supra* note 190.

¹⁹² See A Mutated Rule: Lack of Enforcement in the Face of Persistent Chokehold Complaints in New York City, New York City Civilian Complaint Review Board 4 (2014), http://www.nyc.gov/html/ccrb/downloads/pdf/Chokehold%20Study_20141007.pdf (“The purpose of this study is to understand why police–civilian encounters continue to result in chokehold complaints and why the CCRB continues to find instances of misconduct when the practice has been prohibited for more than two decades.”); see also Police Use Of Force In New York City: Findings And Recommendations On Nypd’s Policies And Practices, New York City Department of Investigation Office of the Inspector General for the Nypd 1 (Oct. 1, 2015), http://www1.nyc.gov/assets/oignypd/downloads/pdf/oig_nypd_use_of_force_report_-_oct_1_2015.pdf.

coverage of stories with which the public associates with violence; the pervasive, resilient conception that Blacks are pathologically criminalistic; a law enforcement culture which, since the slave codes, has marked Blacks as targets of disproportionate policing and punishment, all work in concert to silently assist in establishing that officers who employ excessive force against Black males acted reasonably under the circumstances. Both the case of Michael Brown and Eric Garner illustrate the need for a standard that not only addresses, but also honestly accounts for, the inescapable injection of racial bias in the reasonable person standard—particularly in cases of excessive force by police officers against Black males.

B. Preconceptions, Implicit Bias, and Extra-Legal Brutality: Proposed Solutions for a Multifactorial Problem

The recurring issue in cases of excessive force by police officers, particularly when the victim is a Black male, or a person of color,¹⁹³ is that the themes discussed throughout this Note pervert the race-neutral justice system in such a way that, unless the incident is one that is outrageous to even the most callous law enforcement supporter, such as the case of Abner Louima or more recently, Walter Scott,¹⁹⁴ it is to be assumed that the minority victim will not receive fair treatment in our legal system. To solve this problem, the question becomes whether judicial standards can be altered or procedural practices implemented to mitigate the underlying racial issues in supposed race-neutral laws and practices in order to work

¹⁹³ Robert F. Kennedy Human Rights Global Justice Clinic, et al., Inter-American Commission on Human Rights, *Excessive Use of Force by the Police against Black Americans in the United States* 6 (2016), https://rfkhumanrights.org/assets/documents/iachr_thematic_hearing_submission_-_excessive_use_of_force_by_police_against_black_americans.pdf (“According to the U.S. Census Bureau, Black Americans constituted 13.2% of the country’s population in 2014. The proportion of individuals killed by police in 2015 who were Black, however is far higher: At the end of 2015, the *Guardian* counted 1139 people killed by law enforcement that year, of whom 302, or 26.5%, were Black. Among unarmed victims, the discrepancy is even greater: Of the 223 unarmed people killed by the police during the same period, 75, or 33.6%, were Black. The *Washington Post* reported similar numbers: As of December 22, 2015, the newspaper counted 954 people fatally shot by the police in 2015, of whom 242, or 25.4%, were Black. Among the 88 unarmed people shot dead by police, 34 were Black: 38.6% of the total. All except one of these unarmed Black victims were men.”).

¹⁹⁴ On April 4, 2015, Walter Scott, a 50-year-old Black male, fled from officer Michael Slager on foot following a traffic stop. Following a purported altercation, Slager fired his taser at Scott striking him twice. While Scott was continuing to flee, Slager discharged his service weapon eight times at close range. Five bullets fatally struck Scott. Slager then approached Scott’s body and planted his taser in his victim’s hand. Catherine E. Shoichet & Mayra Cuevas, *Walter Scott shooting case: Court documents reveal new details*, CNN (Sept. 10, 2015, 12:10 AM), <http://www.cnn.com/2015/09/08/us/south-carolina-walter-scott-shooting-michael-slager/>.

to mend hundreds of years of bigotry and provide all citizens with access to justice?

One solution is Professor Charles Lawrence's Cultural Meaning Test.¹⁹⁵ A portion of Professor Lawrence's thesis that the equal protection doctrine must address the unconscious racism that underlies much of the racially disproportionate impact of governmental policy, directly addresses the issue at the heart of this article.¹⁹⁶ His challenge questions how a court would identify those cases where unconscious racism operated in order to determine whether to subject an allegedly discriminatory act to strict scrutiny.¹⁹⁷ He proposed a test that would look to the 'cultural meaning' of an allegedly racially discriminatory act as the best available analogue for and evidence of the collective unconscious that we cannot observe directly.¹⁹⁸ This test would evaluate governmental conduct to see if it conveys a *symbolic* message to which the culture attaches racial significance.¹⁹⁹ "The court would analyze governmental behavior much like a cultural anthropologist might: by considering evidence regarding the historical and social context in which the decision was made and effectuated."²⁰⁰ In the case of police brutality against a minority, specifically a Black male, the historical and social context under which a decision to employ excessive force may include the following in support that the police officer's conduct conveys a symbolic message to which the culture attaches racial significance and should therefore be subject to strict scrutiny:

- Historical data on the policing of Blacks including, but not limited to, references to Black codes, slave codes, Jim Crow, Civil Rights Era, the War on Drugs Era, and any relevant jurisdiction-specific historical practices to which there is a clear correlation to both over-policing and police abuse of Blacks.
- Relevant modern-day police practices and statistics within the jurisdiction in question that are either outwardly racially driven, for which there is ample statistical evidence and/or documented instructions by senior officials to target a particular group,²⁰¹ such as

¹⁹⁵ Lawrence, *supra* note 33.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Benjamin Mueller, *New York Police Dept. Agrees to Curb Stop-and-Frisk Tactics*, N.Y. TIMES (Feb. 2, 2017), <https://www.nytimes.com/2017/02/02/nyregion/new-york-police-dept-stop-and-frisk.html>.

Stop-and-Frisk in New York City, or to which analogies to historically racially biased practices may be logically drawn. For example, when the current and documented Ferguson, MO practice of disproportionately arresting and ticketing Blacks resulting in de facto debtors' prisons and overwhelming disparities between the numbers of Blacks and Whites entangled in the criminal justice system, is compared to Southern laws and policing under the Black Codes that regulated debtors, loiterers and other nominally indiscriminate infractions and were exclusively enforced against Blacks, the contemporary and historical practices may be analogized such that it can be logically concluded that modern-day Ferguson practices embody the same racially biased practices employed during Reconstruction via the Black Codes.²⁰²

- Evidence that on local and national levels, the ways in which Black criminality is discussed on the news and in other forms of media work to further the notion of the existence of the Black brute as pathological and violent threat to society. This evidence can be gathered through studies identifying the various coded messages found in the news and other forms of media and is to be used to prove the inescapable nature of how racial bias is communicated to society.

Once Professor Lawrence's Cultural Meaning Test is applied, if the court determined by a preponderance of the evidence that a significant portion of the population thinks of the governmental action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action's meaning had influenced the decision-makers—as a result, it would apply heightened scrutiny.²⁰³ I submit that in order for the cultural meaning test to be effective, particularly in combating the lack of justice received by people of color who were brutalized or killed by law enforcement, Americans must first *accept* the history of policing and law enforcement in racial terms before they are expected to even *consider* it. In contemporary society, there is a tendency for Americas to view these important issues so as to “not make everything about race.” I propose that when individuals are selected to be a part of the determination whether a governmental action was influenced by racial attitudes, they must be given a third-party (non-governmental) test to determine that individual's implicit racial bias under controlled circumstances. The precision of the test in determining exactly which point of the racism spectrum the subject lies is unimportant as it relates to the

²⁰² Investigation of the Ferguson Police Department, *supra* note 150.

²⁰³ Lawrence, *supra* note 33.

test's main function in this exercise—that is to have the subject face the reality of implicit racial biases before he or she is asked to assess the nature of a situation in an effort to assign or not assign racial bias to governmental conduct. While this tactic may not be totally effective in forcing an indifferent subject to become aware of the unconscious, reflexive nature of racially associated thoughts, in absence of an exercise of this nature, the Cultural Meaning Test is sure to fail to post-racial, colorblind individuals unaffected by a refusal to confront the reason a huge segment of the population is brutalized and killed by police. Race—and the historical, social, and psychological realities that accompany Blackness in America. Realities that not only prevent people from experiencing justice, but prevent people from gaining the mere *chance* at experiencing justice time and again.

V. CONCLUSION

State v. Mann held that cruel and unreasonable battery on a slave by the hirer is not indictable because of the recognition of full dominance of the owner over the slave except where the exercise is forbidden by statute.²⁰⁴ Black men are viewed and, as this Note has illustrated, have been viewed for centuries as the profile of crime in America on virtually all fronts—from citizens' and police officers' suspicions, to the use of race in criminal profiles.²⁰⁵ The media, particularly television news, has perpetuated this profile. Television news programs are dominated by stories about crime, and the major message conveyed is that "street" crime is an extreme and imminent threat to our well-being.²⁰⁶ Politicians respond to the purported crisis by getting tough on "street crime," which includes deploying more law enforcement into concentrated areas, building more prisons, instituting more severe sentences, and federalizing many crimes.²⁰⁷

As long as race continues to be considered the primary predictor of criminal propensity, brutality and disproportionate policing against Black males will continue unabated.²⁰⁸ Recognition that our society is not color-blind is the first mammoth hurdle that must be cleared to end this prophecy. While the cultural meaning test may be workable in, ironically, an egalitarian America, it acknowledges without addressing the systemic

²⁰⁴ F. Michael Higginbotham, *Race Law Cases, Commentary, and Questions* 776 (3d. ed., 2010).

²⁰⁵ Johnson, *supra* note 143, at 664.

²⁰⁶ Butler, *supra* note 147, at 986.

²⁰⁷ *Id.*

²⁰⁸ Johnson, *supra* note 143.

infiltration of race-driven conceptions of criminality into the consciousness of those expected to properly employ it. It is only through addressing and accepting the racially biased unconscious within us all, will we be able to implement an effective strategy to destroy the foundation of the system whose architects conceptualized it centuries ago and designed it to operate for centuries to come.