Policing, Race, and Place

*I. Bennett Capers**

Most Americans live in neighborhoods and communities segregated along racial lines, and take this segregation for granted. To the extent they view their communities as racially segregated at all, they assume that this segregation is largely the result of individual choice, socio-economic status, or perhaps a remnant of de jure *segregation. The ambition of this Article is to draw attention to a component of segregation that has been largely ignored: the significant role that criminal law and procedure have played, and continue to play, in maintaining racialized spaces.*

This is not a matter of little consequence: spatial separateness allows social relationships to be structured along racial lines, which in turn has the effect of perpetuating and reinforcing social and economic inequality. The thesis of this Article is straightforward: If we hope to achieve our goal of a more perfect union where true racial equality exists, it is critical that we examine and understand the link between policing, race, and place.

I. Introduction

Forty years after the passage of the Fair Housing Act,[1] a particular contradiction stands out. America has never been more racially diverse or racially egalitarian. And yet, America remains very much racially segregated. Most Americans continue to live in neighborhoods and communities segregated along race lines. Even more troubling, this residential segregation is often relegated to "a minor footnote"[2] in the ongoing debate about equality and race. We assume that residential segregation along race lines is largely the result of individual preference, socio-economic status, or perhaps a remnant of *de jure* segregation. We assume that the government's role in maintaining and perpetuating segregation is a thing of the past.[3] We assume that

* Visiting Associate Professor, Fordham Law School (2008-2009). Associate Professor of Law, Hofstra University School of Law. B.A. Princeton University; J.D. Columbia Law School. Assistant U.S. Attorney, Southern District of New York (1995-2004). The author can be reached at i.bennett.capers@hofstra.edu. This Article benefited from insightful comments from Alafair Burke, Laura Berend, Xavier de Souza Briggs, Donald Dripps, Seth Michael Forman, Akilah Folami, Liz Glazer, Jennifer Gundlach, Astrid Gloade, Babe Howell, Darren Hutchinson, Yale Kamisar, Sonia Katyal, Katy Kuh, Holning Lau, Orly Lobel, Eric Miller, Darren Rosenbaum, Narciso Saavedra, Erika Thomas-Yuille, and from workshops and presentations at Fordham Law School, University of San Diego School of Law, Hofstra Law School, the 2008 Law and Society Conference in Montreal, Canada, and the NEPOC Conference in Boston, MA. This Article also benefited from a generous research grant from Hofstra Law School, and the excellent research assistance of Toni Aiello, reference librarian at Hofstra Law School.

[1] 42 U.S.C. §§ 3601-19, 3631 (2000). The Fair Housing Act was originally enacted as Title VIII of the Civil Rights Act of 1968, and it was augmented by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-420, 102 Stat. 1619.

[2] Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass 16 (1993).

[3] One of the many ways the government maintained and perpetuated segregation was through the Federal Housing Authority's and the Department of Veterans Affairs' race-based loan programs during the 1940s and 1950s, which facilitated the suburbanization of America

there is nothing more we should do. And we assume that, aside from prohibiting discrimination in housing—which we have already done—there is nothing we *can* do. If there were a box, we could go ahead and mark it "Done."

As a starting point, this Article makes the argument for moving residential segregation from the footnotes to the body of the text, and treating it as a subject of some urgency that should concern us all. Spatial separateness allows social relationships to be structured along racial lines, which in turn has the effect of perpetuating and reinforcing social and economic inequality. The ambition of this Article is to do more than point out the harm of continued residential segregation. It is to draw attention to a component of segregation that has been largely ignored: the significant role that criminal law and procedure have played, and continue to play, in maintaining racialized spaces. My thesis is straightforward: If we hope to achieve our goal of a more perfect union where true racial equality exists, it is critical that we examine and understand the link between policing, race, and place.

Part II of this Article examines the collateral consequences of residential segregation. Many of these consequences are already well-known. Entrenched segregation tends to deny racial minorities equal access to jobs,[4] government resources,[5] amenities,[6] and as we were recently reminded in the Seattle[7] and Louisville[8] cases, quality schools.[9] Segregation also tends to disproportionately burden racial minorities with society's detritus: power plants and hazardous waste facilities,[10] group homes for the mentally disabled, halfway houses, shelters for the homeless, and public housing

---

along racial lines. *Id.* at 51-54; *see also* GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 132-33 (1999).

[4] *See* James R. Elliot, *Social Isolation and Labor Market Insulation: Network and Neighborhood Effects on Less-Educated Urban Workers*, 40 SOC. Q. 199, 199-216 (1999) (finding that minority neighborhoods often lack access to job networks); Stuart A. Gabriel & Stuart S. Rosenthal, *Commutes, Neighborhood Effects, and Earnings: An Analysis of Racial Discrimination and Compensation Differentials*, 40 J. URB. ECON. 61, 61-83 (1996) (concluding that minority neighborhoods often lack access to transportation to available jobs).

[5] *See, e.g.*, Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843, 1850-51 (1994).

[6] *Id.*

[7] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (invalidating school district's voluntary integration plan). As the Court noted, Seattle implemented its school integration plan to combat the effects of racially identifiable housing patterns. *Id.* at 2747.

[8] Meredith v. Jefferson County Bd. of Educ., 127 S.Ct. 2738 (2007) (invalidating school district's voluntary integration plan).

[9] *See, e.g.*, Nancy Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795 (1996); john a. powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749 (1996); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043 (2002).

[10] *See* Shelia Foster, *Justice from the Ground Up: Distributive Inequalities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 788-89 (1998); Rachel Godsil, *Environmental Justice and the Integration Ideal*, 49 N.Y.L. SCH. L. REV. 1109, 1125 (2004).

projects.[11] Many of these consequences may be obvious; however, racial segregation is also harmful in other, less visible ways.

Part II focuses on these less visible harms. Building upon recent scholarship in social capital theory,[12] Part II.A begins with the observation that residential segregation structures social relationships—i.e., with whom we bowl or golf, with whom we watch the Superbowl or *American Idol*, with whom we discuss politics and shop, and so on—and argues that residential segregation harms individuals by reducing their social capital. Part II.B builds upon this analysis and argues that another consequence of residential segregation is that it contributes to race-making by producing and reproducing racial difference and white privilege,[13] drawing upon Cheryl Harris's concept of "whiteness as property."[14] This section expands on Harris's work, arguing whiteness *because of* property. Finally, Part II.C functions as a gateway for this Article's discussion of crime and policing and argues that segregation contributes to the entrenchment of deleterious norms, including deleterious norms about crime and criminality.

Having examined some of the collateral consequences of residential segregation, Part III of this Article turns to criminal procedure, criminal law, and policing. In particular, I argue that our current methods of policing contribute to residential segregation. All aspects of policing contribute to residential segregation: policing our national borders,[15] the continued policing, well after *Loving v. Virginia*,[16] of interracial intimacy,[17] and especially the way we police our neighborhoods. Part III discusses several types of policing that contribute to residential segregation, including *Terry* stops.[18] In critical race theory, it is fashionable to follow Mari Matsuda's admonishment to "look to the bottom" to those most affected by discrimination as a starting

---

[11] *See generally* JAMES P. LESTER, DAVID W. ALLEN & KELLY M. HILL, ENVIRONMENTAL INJUSTICE IN THE U.S.: MYTHS AND REALITIES 14, 57-58, 104-06 (2001); Vicki Been, *What's Fairness Got to Do With It?: Environmental Justice and the Siting of Locally Undesirable Land Use*, 78 CORNELL L. REV. 1001, 1013-14 (1993).

[12] For an introduction to social capital theory, see SOCIAL CAPITAL: THEORY AND RESEARCH (Nan Lin et al. eds., 2001).

[13] The term "race-making" comes from sociologist David R. James, *The Racial Ghetto as a Race-Making Situation: The Effects of Residential Segregation on Racial Inequalities and Racial Identity*, 19 LAW & SOC. INQUIRY 407, 420-29 (1994).

[14] Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

[15] *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 563-64 (1976) (allowing race as a permissible factor in conducting border stops); *see also* Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 230-33 (1983) (discussing use of race at border stops).

[16] 388 U.S. 1 (1967) (invalidating prohibition of interracial marriage as violative of due process and equal protection).

[17] *See, e.g.*, I. Bennett Capers, *The Crime of Loving*: Loving, Lawrence, *and Beyond, in* THE AFTERMATH OF LOVING: INTERRACIAL MARRIAGE AND ITS IMPACT IN THE UNITED STATES (Kevin Noble Maillard ed.) (forthcoming 2008); *see also* Kevin R. Johnson, *Taking the "Garbage" Out in Tulia, Texas: The Taboo on Black-White Romance and Racial Profiling in the "War on Drugs*," 2007 WIS. L. REV. 283 (noting police targeting of interracial couples).

[18] Terry v. Ohio, 392 U.S. 1 (1968) (authorizing "stop and frisk" practices when based on articulable reasonable suspicion).

place for effecting change.[19] This Article takes a different approach by looking to the middle. My focus is not on the outliers, minority law-breakers; rather, my focus is on the vast middle: minority law-abiders, especially middle-class minorities. After all, it is the law-abiding, middle-class minority who is best positioned to not only cross, but also tear down, racial barriers. Collectively, they are also best positioned to disrupt what social cognition researchers have identified as the implicit biases about race we all hold, notwithstanding our protestations to the contrary.[20]

Consider the law enforcement practice of taking into consideration racial incongruity in assessing whether reasonable suspicion exists to justify a *Terry* stop. As a result of this practice, law-abiding minorities entering predominantly white neighborhoods are frequently stopped and questioned as to the reason for their presence in the neighborhood.[21] These stops effectively discourage integration. Using racial incongruity as a factor for determining reasonable suspicion reinforces the notion that certain neighborhoods are white, certain neighborhoods are black (or brown or yellow), and never the twain shall meet. Furthermore, stopping law-abiding citizens suggests a "racial tax"[22] that comes with crossing geographic borders and demonstrates the existence of state action in the service of segregation. Another way of thinking about this is to consider the number of minority professors who have been stopped by the police based on their presence in predominantly white neighborhoods. When racial incongruity functions as a factor for stopping Cornel West,[23] William Julius Wilson,[24] and Devon Carbado,[25] to name just a few, it not only points to a flaw in how we police but also sends the expressive message[26] from a representative of the state about who belongs and who does not.

Changing the way we police, the project I outline in Part IV, will not alone result in the eradication of residential segregation. But new policing

---

[19] Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.–C.L. L. REV. 323 (1987).

[20] *See, e.g.*, Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004). For more discussion of implicit biases, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1505-17 (2005).

[21] Law-abiding whites entering predominantly minority neighborhoods are likewise stopped, though the questions put to them are decidedly different. The police often ask if whites are present to purchase drugs. Alternatively, police sometimes assume whites are lost. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 142 (1998).

[22] *Id.* at 159.

[23] CORNEL WEST, RACE MATTERS xii (2001) (describing being stopped while driving to Williams College because of police suspicion that he was a drug dealer, and being stopped three times in his first ten days at Princeton for driving too slowly on a residential street).

[24] *See* Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, NEW YORKER, Oct. 23, 1995, at 59 (describing the *Terry* stop of William Julius Wilson near a small New England town by a policeman who wanted to know what Wilson "was doing in those parts").

[25] *See* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 953 (2002) (describing various incidents of "over-policing").

[26] On the promulgation of social meaning generally, see Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

methods can play a vital role in making all neighborhoods appear welcoming to racial others. As it stands now, too many neighborhoods are perceived as spaces where racial others are by default cast as aliens, intruders, and suspects. At a minimum, changing the way we police can eliminate the perceived racial borders that our police now patrol. After all, these perceived racial borders function as very real barriers to integration. And as this Article will hopefully make clear, eradicating such barriers is key to equal access to opportunity and, ultimately, to our democratic project itself.

II. The Consequences of Race and Place

In the legal academy in particular there has been quite a bit of race talk since the dawn of the critical race studies movement. Talk about race and voting. Talk about race and education. Talk about race and crime. Talk about race and employment. But, surprisingly, there has not been a lot of talk about race and place.

The numbers alone make this surprising. According to the most recent U.S. census, black/white segregation remains staggeringly high.[27] Approximately a third of all blacks live in areas categorized as hyper-segregated, i.e., reflecting extreme racial isolation.[28] And while rates of segregation are declining—black/white segregation is at its lowest level in decades[29]—the rate of decline leaves much to be desired. As sociologist John Logan put it, "[the decline is] at a rate that my grandchildren, when they die, will still not be living in an integrated society."[30] Nor can this segregation be explained solely by economic status. High-income blacks are residentially segregated from high-income whites; poorer blacks are residentially segregated from poorer whites.[31] To make matters worse, the small decline in black-white residential segregation does not extend to Asians and Hispanics. Since 1980, Asians and Hispanics have in fact seen a slight increase in segregation.[32] Lastly, most whites live in racially segregated neighborhoods.[33] Al-

---

[27] *See* U.S. Census Bureau, Racial and Ethnic Residential Segregation in the United States: 1980-2000, at 4 (2002).

[28] *Id.* at 72; *see also* Massey & Denton, *supra* note 2, at 74-77.

[29] John R. Logan et al., *Segregation of Minorities in the Metropolis: Two Decades of Change*, 41 Democracy 1, 7, 9, 11 (2004).

[30] *Talk of the Nation*: *Segregation in the Cities* (National Public Radio broadcast May 10, 2001).

[31] *See* Douglas S. Massey & Mary J. Fischer, *Does Rising Income Bring Integration?: New Results for Blacks, Hispanics, and Asians in 1990*, 28 Soc. Sci. Res. 316 (1999); *see also* Logan, *supra* note 29, at 3. Two communities just outside of Washington, D.C., are emblematic. The median income in Fort Washington in Prince George's County, Maryland, is $81,000. This is identical to the median income of neighboring Fairfax County, Virginia. Despite identical median incomes, these areas are racially very separate. The vast majority of homeowners in Fort Washington are black; the vast majority of homeowners in Fairfax County are white. *See* Sheryl Cashin, The Failures of Integration: How Race and Class Are Undermining the American Dream 130, 167 (2004).

[32] Lewis Mumford Center for Comparative Urban and Regional Research, Ethnic Diversity Grows, Neighborhood Integration Lags Behind 1 (2001), *available at*

though whites have become more open to residential integration in recent years,[34] whites are still less open to residential integration than other racial groups.[35] Indeed, in metropolitan areas, whites are likely to be more racially isolated than blacks, Hispanics, or Asians.[36] Given these statistics, it should come as little surprise that the average reader of this Article lives in, or at least grew up in, a racially homogenous area.

The lack of conversation about race and place—especially given all the race talk about voting, education, crime, and employment—is surprising because place affects all of these issues. Race-conscious electoral redistricting to redress identified past discrimination is only possible because of residential segregation.[37] Our concerns regarding unequal schools and unequal funding, court-ordered desegregation and busing, and school districts' attempts to create integration plans are all rooted in residential segregation.[38] The affirmative action battles in higher education, from *Regents of University of California v. Bakke*[39] to *Grutter v. Bollinger*,[40] are traceable to residential segregation: the unequal access to quality primary education puts minority students at a disadvantage that affirmative action attempts to rectify.[41] Place also affects employment—especially when employment oppor-

---

http://mumford.albany.edu/census/WholePop/WPreport/MumfordReport.pdf. Part of this rise is attributable to an increase in Asian and Hispanic immigration. *Id.* at 20.

[33] Indeed, studies suggest that whites on average are willing to pay a 13% premium to live in predominantly white neighborhoods. John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1101 (1998) (collecting studies).

[34] Massey and Denton observe:

> In 1942, for example, 84% of white Americans polled answered "yes" to the question "Do you think there should be separate sections in towns and cities for Negroes to live in?"; and in 1962, 61% of white respondents agreed that "white people have a right to keep blacks out of their neighborhoods if they want to, and blacks should respect that right." It was not until 1970 that even a bare majority of white respondents (53%) disagreed with the latter statement.

MASSEY & DENTON, *supra* note 2, at 49.

[35] Lawrence D. Bobo, *Racial Attitudes and Relations at the Close of the Twentieth Century, in* 1 AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 273 (Neil J. Smelser, William Julius Wilson, and Faith Mitchell eds., 2001).

[36] Logan, *supra* note 29, at 8. According to Logan, as of 2000, a randomly selected white metropolitan resident would find that approximately 80% of her neighbors were also white. *Id.* The percentage of same-race neighbors was lower for other metropolitan minorities. *Id.* One possible explanation for this is that minorities may be more likely to live in minority-diverse communities. In other words, a randomly selected black metropolitan resident may be more likely to live in a community that is part Hispanic or Asian.

[37] Although the Court has never explicitly so held, implicit in its decisions is the assumption that race-conscious redistricting is justified to remedy past discrimination (in voting) and to achieve compliance with the federal Voting Rights Act. *See* Miller v. Johnson, 515 U.S. 900, 920-27 (1995).

[38] *See* powell, *supra* note 9.

[39] 438 U.S. 265 (1978) (holding that schools could consider race as one factor in admissions in an effort to ensure the educational benefits of a diverse student body).

[40] 539 U.S. 306, 328-38 (2003) (upholding the use of race as one of many possible factors in law school admissions based on the compelling interest of securing diversity in higher education).

[41] One problem with race-conscious school integration plans and affirmative action plans in higher education is that they attempt to palliate a symptom (i.e., lower test scores on stan-

tunities require exams such as the ones at issue in *Washington v. Davis*[42] and *Griggs v. Duke Power Co*.[43]—because exam performance is tied to quality primary schools.[44] Additionally, the suburbanization of jobs in areas inaccessible by mass transportation plays a significant role in minority underemployment.[45] Finally, place is crucial to crime. Crime tends to be high in minority neighborhoods not because of the presence of minorities, but largely because the neighborhoods themselves tend to be criminogenic due to disproportionate lack of educational opportunities, jobs, services, and concern.[46] Equal access to legislative representation, education, employment opportunities, and a host of other quality of life concerns are all contingent upon place.

The sections below focus on three collateral consequences of residential segregation that are subtle and often invisible. Indeed, these consequences are all the more harmful precisely *because* of their invisibility. These are consequences of social capital, race-making, and norm-making. The sociologist Xavier de Souza Briggs has argued: "The case for action against residential segregation, a key to the racial divide in America, rests on understanding not only how such segregation operates but with what effects. The case is in the consequences."[47] The ambition of this Part is to in fact make that case.

A. Social Capital and Place

I began this Article by invoking the social relationships we have. The relationships we have with our golf or running buddies, the wonks with whom we talk politics, the friends with whom we shop, and so on. Although

---

dardized tests) but do little to address the underlying cause (unequal access to quality primary schools, which in turn is a consequence of residential segregation). In fact, minority segregation in schools has only increased since the 1980s. *See* Erica Frankenberg, Chungmei Lee & Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, C.R. PROJECT, HARVARD U. Jan. 2003, http://www.civilrightsproject.ucla.edu/research/reseg03/AreWeLosingtheDream.pdf. As Justice Ginsburg observed in *Grutter*, nearly 72% of African American children, and 76% of all Hispanic children, attend schools that are overwhelmingly attended by minorities. *See Grutter*, 539 U.S. at 345.

[42] 426 U.S. 229 (1976) (use of written personnel test).

[43] 401 U.S. 424 (1971) (use of high school education or standardized general intelligence test).

[44] *See* Roslyn Arlin Mickelson, *Achieving Equality of Educational Opportunity in the Wake of Judicial Retreat from Race Sensitive Remedies: Lessons from North Carolina*, 52 AM. U. L. REV. 1477, 1504 (2003).

[45] Xavier de Souza Briggs, *More* Pluribus*, Less* Unum*? The Changing Geography of Race and Opportunity, in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 17, 35 (Xavier de Souza Briggs ed., 2005) [hereinafter de Souza Briggs, *More* Pluribus*, Less* Unum*?*].

[46] *See, e.g.*, Douglas S. Massey, *Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas*, *in* 1 AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES, *supra* note 35, at 391, 422-24; *see also infra* text accompanying note 80.

[47] Xavier de Souza Briggs, Social Capital and Segregation: Race, Connections and Inequality in America 6 (Feb. 2002) (unpublished manuscript, on file with author) [hereinafter de Souza Briggs, Social Capital and Segregation].

such relationships may at first seem inconsequential, these relationships are a critical part of our social capital—that varied bundle of resources and connections we have at our disposal, sometimes without realizing it, as a result of our social relationships.

These relationships impact economic success, both in terms of job opportunities and job advancement.[48] We learn about job opportunities through such networks. Such contacts often serve as "ins," connections that function as calling cards, introductions, a foot in the door to job interviews and prospects. We often advance at jobs, secure better work assignments, negotiate increased responsibility, and obtain promotions as a direct result of the social relationships we cultivate.[49] Indeed, unequal access to social networks often explains the workplace glass ceiling faced by women, lesbians and gays, and religious and racial minorities.[50]

Equally important, these relationships impact our quality of life, happiness, well-being, and life chances.[51] As Robert Putnam observed in his influential *Bowling Alone*, social capital helps make us "healthy, wealthy, and wise."[52] Recently, I was socializing with friends and the topic turned to useful tax strategies and gift and estate planning. My access to this useful information was due in no small part to the access I have to these acquaintances.[53] I am now, quite literally, the richer for it.

Now consider how space and race impact social capital. As others have observed, there is a strong connection between geography and opportunity.[54] Better neighborhoods mean better schools, better services, and better returns on housing investments.[55] There is even a cachet to certain geographies, as anyone familiar with the *Seinfeld* episode dealing with an area code change

---

[48] Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community 319 (2000).

[49] *See, e.g.*, Joel M. Podolny & James N. Baron, *Resources and Relationships in the Workplace: Social Networks and Mobility in the Workplace,* 62 Am. Soc. Rev. 673 (1997). Social capital also explains advancement in the legal profession. *See* Ronit Dinovitzer, *Social Capital and Constraints on Legal Careers*, 40 Law & Soc'y Rev. 445 (2006) (examining the role of social capital in the career paths of Jewish lawyers).

[50] For a discussion of how "patterns of interaction" undergird glass ceilings, see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 470-71 (2001).

[51] *See* Claude S. Fischer, *Network Analysis and Urban Studies*, *in* Networks and Places: Social Relations in the Urban Setting 19, 19 (Charles S. Fischer ed., 1977) ("Social networks are important in all our lives, often for finding jobs, more often for finding a helping hand, companionship, or a shoulder to cry on.").

[52] Putnam, *supra* note 48, at 287.

[53] Such financial knowledge may contribute to the wealth gap that continues to exist between whites and blacks, even when income levels are the same.

[54] *See, e.g.*, Manuel Pastor, Jr., *Geography and Opportunity*, *in* 1 America Becoming: Racial Trends and Their Consequences, *supra* note 35, at 435.

[55] *Cf.* Cashin, *supra* note 31, at 3-4 (discussing idea that place "defines what schools you will go to, what employers you will have access to, and whether you will be exposed to a host of models for success").

will recall.[56] Hailing from New York carries a different set of assumptions than hailing from New Jersey, just as having an address in Manhattan carries a different set of assumptions than having an address in Queens and living on the Upper East Side carries a different set of assumptions than living on the Lower East Side.[57] And this cachet travels, as de Souza Briggs argues: "the reputation of our neighborhoods and neighbors, particularly if driven by stereotypes, might 'travel' with us into . . . other settings, affecting the way we are treated and what we expect to aspire to in the realms of education, work, and civil life."[58]

Better neighborhoods can also mean increased social capital in terms of opportunities for interaction. Put differently, where we live affects the group of people with whom we interact, our "set" if you will, which in turn affects both our economic prospects and life chances.[59] The impacts of social capital are prevalent in the schools we attend. We aspire to send our children to schools such as Harvard, Yale, and Princeton not only because of the educational benefits we associate with these institutions, but also because these institutions of learning are elite. Our children will benefit from the connections made in these geographic spaces, and the association with those spaces will grant entrance into other opportunities. This same thinking extends to the primary schools where we enroll our children,[60] to the summer camps to which we hope to send them, to belonging to the right country club (or at least to a country club). The converse, of course, is that less desirable spaces translate into less social capital.

Now consider the impact of race and the fact that space in America is already very much racialized. Some of us live in neighborhoods similar to Wisteria Lane on *Desperate Housewives*. Others of us live in neighborhoods

---

[56] A similar discombobulation occurred when the U.S. Postal Service changed the prestigious 10021 zip code on the Upper East Side of Manhattan. *See* Clyde Haberman, *On East Side Addresses Lose Panache*, N.Y. TIMES, July 24, 2007, at B1 ("When the change kicked in, some East Siders were distressed, dismayed, distraught, and all of the other disses imaginable.").

[57] The theme song to the television show *The Jeffersons* makes precisely this point:

> Well we're movin on up,
> To the east side.
> To a deluxe apartment in the sky.
> Movin on up
> To the east side.
> We finally got a piece of the pie.

Lyrics on Demand, The Jeffersons Theme Lyrics, http://www.lyricsondemand.com/tvthemes/thejeffersonslyrics.html (last visited Nov. 6, 2008).

[58] de Souza Briggs, Social Capital and Segregation, *supra* note 47, at 26.

[59] *See, e.g.*, Lee Anne Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. 1227, 1228 (2006) (noting that "people spend large sums of money to locate themselves in the 'right' neighborhood and, conversely, incur significant costs to keep away the 'wrong' neighbors").

[60] *See* Robert Worth, *For $300 an Hour, Advice on Courting Elite Schools*, N.Y. TIMES, Oct. 25, 2000, at B12 (describing parents' desire to place kids in the right primary schools, even the right nurseries, so that they can get into Harvard); *see also* Jane Gross, *Right School for 4-Year Old? Find an Adviser*, N.Y. TIMES, May 28, 2003, at A1.

similar to the Towers on *The Wire*. Very few of us live in the type of mixed neighborhoods that seem to exist on *The King of Queens* or *Family Guy*. When out-groups (here, racial minorities) live in segregated neighborhoods, they are more likely to attend segregated schools,[61] more likely to live segregated lives, and less likely to form social bonds that add to their bundle of resources aiding upward mobility or life chances.[62] The economist Glenn Loury, for example, has observed that unequal access to the benefits of informal social ties—social capital—is a significant contributing factor to the comparatively lower earning power and wealth of blacks and other racial minorities.[63] A study of the earning capacity of black women found that black women who learned about jobs from neighbors earned less than those who learned about jobs from contacts outside of their neighborhood.[64] The study also supports the conclusion of several scholars that cross-racial ties—such as those that have benefited Barack Obama—facilitate minority success.[65] Moreover, lack of access to networks that can increase the likelihood of upward mobility is likely to be self-perpetuating and involve feedback loops.[66]

---

[61] For example, the average black student attends a school that is more than 50% black. The average Latino student attends a school that is more than 50% Latino. And approximately 38% of blacks and 39% of Latinos attend schools that are over 90% minority. *See* GARY ORFIELD & CHUNGMEI LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 9-10 (2006), *available at* http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf (using data from 2003-2004).

[62] Xavier de Souza Briggs, *Brown Kids in White Suburbs: Housing, Mobility, and the Many Faces of Social Capital*, 9 HOUSING POL'Y DEBATE 177, 178 (1998) (observing that public housing residents relocated to integrated suburbs fare better, on the whole, than public housing residents who remained in hyper-segregated communities).

[63] *See* Glenn Loury, *A Dynamic Theory of Racial Income Differences, in* WOMEN, MINORITIES, AND EMPLOYMENT DISCRIMINATION 153, 176 (P.A. Wallace & A. LeMund eds., 1977).

[64] *See* James H. Johnson, Jr., Elysa Jayne Bienenstock, Walter C. Farrell, Jr., & Jennifer L. Glanville, *Bridging Social Networks and Female Labor Force Participation in a Multi-ethnic Metropolis*, *in* PRISMATIC METROPOLIS: ANALYZING INEQUALITY IN LOS ANGELES 383 (Lawrence D. Bobo et al. eds., 2000); *see also* Manuel Pastor, Jr. & Ara Robinson Adams, *Keeping Down with the Joneses: Neighbors, Networks, and Wages*, 26 REV. OF REGIONAL STUD. 115 (1996).

[65] de Souza Briggs, *More* Pluribus, *Less* Unum*?*, *supra* note 45, at 37; Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1173-74 (2007) (discussing benefits of cross-racial interactions in the context of advantages mixed-raced students appear to have over other blacks at elite colleges).

[66] By contrast, when in-groups (here, middle and upper class whites) live in segregated neighborhoods, they are more likely to develop social contacts that lead to increased economic success and life chances. In a society that aspires to be a meritocracy, this, too, is problematic.

The argument could be made, though, that the connection between residential segregation and social capital should be a weak one. After all, very few of our social contacts these days are neighborhood dependent. Our social connections are made at work, through interest organizations, or even online through websites such as MySpace and Facebook. However, this argument ignores the influence of early connections. Our chances of engaging in cross-racial socializing as adults are heavily influenced by whether we were exposed to cross-racial opportunities for socializing as children. That being said, space is not everything. Nor is the relation between space and life chances a direct one. Rather, space shapes institutional access and participation, which in turn shape social relations, which in turn shape life chances.

B. Place and Race-Makings

In a 1954 experiment, 22 boys from similar, middle-class backgrounds were selected, divided into two groups, and transported to Robbers Cave State Park in Oklahoma.[67] The two groups were at first kept separate, and members of each group quickly bonded. One group, without any outside prompting, named themselves the "Rattlers"; the other group, also without prompting, dubbed themselves the "Eagles." Over time, each group became aware that there was another group. Their cohesiveness increased. And when the groups finally met, their interactions were marked by distrust, and the notion that the members of the other group were different. They weren't.

Even though the participants were all white, this study illustrates how spatial separateness can transform an otherwise similar group into a group of "others." Race-making works the same way, but is even more pernicious since race becomes the default explanation for the difference. Segregation along race lines, therefore, both produces and reproduces race.

Critical race scholars and geneticists commonly think of race as a social construct.[68] Race itself has little, if any, inherent meaning. Rather, it is the social meaning that we attach to race (skin color, difference in phenotype) that invests it with meaning. Residential segregation helps to explain how that construction works and how that construction is maintained.[69]

First, spatial separateness along racial lines fosters an atmosphere in which similarities are downplayed, and differences are magnified.[70] Building upon the Robbers Cave study above, imagine a group of similarly situated blacks and whites[71] who live together, attend the same schools and churches, and socialize together. In such circumstances, blacks and whites—who in this scenario comprise one group—are likely to share interests, goals, and norms. Now imagine that all whites are separated into

---

[67] *See* MUZAFER SHERIF ET AL., INTERGROUP COOPERATION AND COMPETITION: THE ROBBERS CAVE EXPERIMENT (1961).

[68] *See, e.g.*, MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 55 (2d ed. 1994) (describing racial formation as the "sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed"); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.–C.L. L. REV. 1 (1994).

[69] As Martha Mahoney observed over a decade ago, "[r]esidential segregation is both cause and product in the processes that shape the construction of race in America." Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1659 (1995).

[70] This is the flip side of the "contact hypothesis," which posits that intergroup contact increases tolerance and reduces prejudice. *See* Thomas F. Pettigrew, *Intergroup Contact Theory*, 49 ANN. REV. PSYCHOL. 65, 66 (1998).

[71] I am sensitive to the pitfalls of using a black/white narrative, but the binary here is justified by the racial hierarchy that exists when it comes to neighborhood racial composition preferences, with whites being the most preferred out-group and blacks being the least preferred out-group. *See* Camille Zubrinsky Charles, *Can We Live Together?: Racial Preferences and Neighborhood Outcomes*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 45, 51 (Xavier de Souza Briggs ed., 2005).

Group A, and that all blacks are separated into Group B. Over time, members of Group A and Group B, because of spatial separation alone, will likely develop different interests, different tastes in music, different styles of dress, and different ways of interacting. Moreover, experience suggests that members of both groups, instead of attributing these differences to spatial separation, will instead attribute these differences to race. From the point of view of the white group, the members of Group B listen to "black music," wear "black clothes," and "talk black," and do so *because they are black.*[72] The effect of spatial separateness is obscured, and difference is attributed to race.[73]

Conversely, from the point of view of the black group, the members of Group A listen to "white music," "dress white," and "talk white" *because they are white*.[74] Add to the equation either positive or negative assumptions, and the effect of racial separateness is even more pronounced. Assume Group B experiences high unemployment, a higher rate of crime, and has poorer, underperforming schools. To Group A, this may become "Blacks don't work as hard, are more likely to engage in crime, and are not as intelligent."[75] Racial separateness also fosters an atmosphere in which we "race" ourselves.[76] Group A members are likely to perceive themselves differently, as industrious, hardworking, law-abiding, and smart, but perhaps not as good at sports or on the dance floor, *because of race*.[77] Meanwhile, blacks may come to perceive themselves as not law-abiding, but natural athletes and good dancers, *because of race*. They may even come to perceive themselves as not as smart, *because of race*. Indeed, one of the harms of residential segregation, especially hyper-segregation, is the internalization of negative beliefs. Continuing with the black-white binary, the converse of white privilege is not just black under-privilege, it is the internalization of a potentially limiting belief system.

Allow me to offer an example of how this operates in practice and produces feedback loops. A black person may be disadvantaged in obtaining a job because a white employer perceives him to be different, in part because of assumptions that result from racial separateness. The black applicant will not fit in here, will not share our social interests, will not work as

---

[72] *See* James, *supra* note 13, at 413 ("The concentration of poor African Americans in high-poverty neighborhoods is not only an effect of racial prejudice and discrimination. It is a powerful referent in the minds of whites that defines how blacks are different from whites.").

[73] This is taken to such extremes that a black person who does not listen to "black music" or "talk black" may be perceived as not "really" black.

[74] Likewise, a white person who prefers "black music" and "dresses black" may be perceived as an "honorary black" or a "wigger."

[75] Survey data bear this out. Ratings based on the 1990 General Social Survey reveal that, at least as of 1990, 54% of whites believed blacks are less intelligent than whites, 62% of whites believed blacks are less industrious, and 54% of whites believed blacks are more prone to violence. *See* Bobo, *supra* note 35, at 277.

[76] *See* Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261, 297 (2006).

[77] For a humorous take on this, see the website Stuff White People Like, at http://stuffwhitepeoplelike.com (last visited October 17, 2008).

hard, and may even steal. But it is not only the potential employer's perception that is problematic. The black applicant's perception may be problematic as well. The applicant may exhibit nervousness or discomfort because he perceives the employer to be different, or he may assume that he is underqualified for the position, or that he will have nothing in common with other employees. Finally, because of racial separateness, the black applicant may in fact have a different speech pattern,[78] dress differently, or even have an ethnic-sounding name that disadvantages him.[79] The more serious result is that this scenario, repeated over and over again, is likely to result in higher unemployment in black neighborhoods,[80] which is likely to lead to higher crime, lower property values, and reduced opportunities in these areas; conversely, it will result in higher employment in white neighborhoods, which in turn will allow for better funded schools, more resources, and better opportunities.[81] All of this serves to reinforce notions of racial difference, with unequal outcomes for everyone.

The property value in whiteness, white privilege if you will, is in a very real sense traceable to real property, namely racially segregated neighborhoods. As Cheryl Harris observed in her influential article "Whiteness as Property":

> In ways so embedded that it is rarely apparent, the set of assumptions, privileges, and benefits that accompany the status of being white have become a valuable asset – one that whites sought to protect and that those who passed [for white] sought to attain — by fraud if necessary. Whites have come to expect and rely on those benefits, and over time these expectations have been affirmed, legitimated, and protected by the law. Even though the law is neither uniform nor explicit in all instances, in protecting settled expectations based on white privilege, American law has recognized a property interest in whiteness that, although unacknowledged, now forms the background against which legal disputes are framed, argued, and adjudicated.[82]

---

[78] Adams, *supra* note 76, at 282 (observing that social isolation "can lead to the development of speech patterns that are often inconsistent with economic upward mobility"); *see also* MASSEY & DENTON, *supra* note 2, at 162-65 (citing linguistic studies and identifying residential segregation as "among the most powerful influences on black speech"); George C. Galster, *Polarization, Place, and Race*, 71 N.C. L. REV. 1421, 1431 (1993).

[79] *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).

[80] Massey, *Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas*, *supra* note 46, at 422-24 ("[S]egregation is directly responsible for the perpetuation of socioeconomic disadvantage among Blacks.").

[81] *See* Adams, *supra* note 76, at 283 ("[S]eparateness tends to both generate more inequality and to direct blame where it least belongs.").

[82] Harris, *supra* note 14, at 1713-14.

The status or property value in whiteness that Harris identifies is predicated on, and indeed could not exist without, difference. Much of this difference, however, is produced by spatial separateness. The property value of whiteness is in part contingent upon the perceived value of racialized real property, i.e., living in a "white" neighborhood and not a "black" or "brown" or "yellow" neighborhood.[83] A corollary to whiteness as property is thus whiteness because of property.[84] To the extent we are concerned about rendering bankrupt the notion of any color having a property value, we must also concern ourselves with bankrupting the notion of real property having a value because of color.

C. Place, Norms, and Crimes

There is another consequence of segregation along race lines: the entrenchment of residential segregation also leads to the entrenchment of deleterious norms, including deleterious norms about crime and criminality. As social psychologist Tom Tyler demonstrated in *Why People Obey the Law*, the general assumption that individuals comply with the law to avoid punishment is only partially true.[85] What is at least equally important is the role societal and community norms play in policing behavior and compliance with the law.

Taking the link between norms and crime seriously, however, also means attending to the role social capital and place play in norm formation.[86] For example, in one community—say, a white, middle class community—the prevailing norm may be that laws exist to maintain public order. In another community—say, a poor, minority community—the prevailing norm may be that laws exist to maintain a race-based and class-based hierarchy, or in simpler words, to keep us down.[87] The minority community may also take umbrage at the fact that its neighborhood is heavily policed[88]—in

---

[83] Another way of thinking about this is to consider the transition many first generation immigrants, including Jews, Italians, and the Irish, made from being non-white to white. One way in which they accomplished this transition was by gradually moving from first generation ethnic enclaves such as the Lower East Side in New York, to non-ethnic, predominantly white neighborhoods. This process of spatial assimilation arguably facilitated their transition from being perceived as non-white to being perceived as white. In short, whiteness was secured in part by moving from an ethnic neighborhood to a white one. *See generally* MASSEY & DENTON, *supra* note 2, at 150.

[84] Michelle Adams makes a similar point: "By definition, segregation funneled countless social benefits to white beneficiaries; thus, integration was dangerous because it threatened to reduce the value of whiteness." Adams, *supra* note 76, at 277.

[85] TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

[86] As several scholars have noted, social capital refers not only to social networks, but also to social norms that develop because of these networks. *See* Robert E. Lang & Steven P. Hornburg, *Introduction: What Is Social Capital and Why Is It Important to Public Policy?*, *in* 9 HOUSING POL'Y DEBATE 1, 4 (1998).

[87] *See* James, *supra* note 13, at 424.

[88] *See, e.g.*, Jeffrey Fagan, Valerie West, & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1559 (2003)

part because of the implicit association of minorities with criminality[89]—which has implications for perceptions of legitimacy. This question of legitimacy in turn affects voluntary compliance with the law.[90] Thus, in minority communities in particular, norms may weigh in favor of not assisting the police by providing information about a crime. Norms may also weigh in favor of disregarding jury duty, or serving but voting to acquit a guilty defendant to send a message about police practices.[91] Equally troubling, segregation likely contributes to deleterious norms about criminality itself. Norms may favor gang membership,[92] or wearing baggy jeans and hoodies that invite scrutiny;[93] they may also trigger ordinances that prohibit dressing in a certain manner.[94] Norms may even favor an alternative status system that is defined in opposition to mainstream norms, attaching "value and meaning to a way of life that the broader society would label as deviant and unworthy."[95] Another problem is that under the prevailing norms, individuals may simply not see certain forms of criminality, especially non-violent criminality, as a problem.[96] This likelihood is particularly acute today, when incarceration rates among black and Hispanic males are high, in part due to targeting certain drug offenses. An individual growing up in an area that suffers from high unemployment *and* a high concentration of incarceration, where as many as 10% of all males age 25 to 29 may be behind bars,[97] may

---

(finding that neighborhoods with high rates of incarceration "invite closer and more punitive police enforcement and parole surveillance, contributing to the growing number of repeat admissions and the resilience of incarceration, even as crime rates fall").

[89] *See* Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787 (1994) ("[T]he depressing conclusion [is] that, for many Americans, crime has a black face."); *see also* Jon Hurwitz & Mark Peffley, *Public Perception of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375 (1997).

[90] *See* I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835 (2008).

[91] *Id.*

[92] For example, one study found that juveniles in high-crime neighborhoods were more likely to believe that gang membership was viewed positively by their peers. *See* LOUIS HARRIS & ASSOC., BETWEEN HOPE AND FEAR: TEENS SPEAK OUT ON CRIME AND THE COMMUNITY 104 (1995). This number was substantially lower among teens in low-crime communities. *See id.*; *see also* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence,* 83 VA. L. REV. 349, 374 (1997).

[93] Jerome Skolnick has observed that officers often view youth dressed in such clothes as "symbolic assailants." JEROME SKOLNICK, JUSTICE WITHOUT TRIAL 95 (1966).

[94] *See* Niko Koppel, *Are Your Jeans Sagging? Go Directly to Jail*, N.Y. TIMES, Aug. 30, 2007, at D1 (describing ordinances banning baggy jeans).

[95] MASSEY & DENTON, *supra* note 2, at 167; *see also* Douglas S. Massey, *Getting Away With Murder: Segregation and Violent Crime in Urban America*, 143 U. PA. L. REV. 1203 (1995); James, *supra* note 13, at 424 (describing the new "street" culture as "an oppositional culture that rejects the possibility of participating in the wider, predominantly white society").

[96] *See, e.g.*, Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural) Tolerance of Deviance: The Neighborhood Context of Racial Difference*, 32 LAW & SOC'Y REV. 777, 800-01 (1998) (finding that neighborhoods of concentrated disadvantage display elevated levels of tolerance of deviance generally).

[97] *See* THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: THIRTY-THREE CONSECUTIVE YEARS OF GROWTH (Dec. 2006), *available at* http://www.sentencingproject.org/pdfs/1044.pdf (describing the disproportionate impact of incarceration on African American com-

view incarceration as inevitable, as a right of passage, or as normal. Such an individual may see criminality as acceptable or even desirable.[98]

The Supreme Court's landmark *Gautreaux* ruling, like the Robbers Cave example, is another experiment illustrating how place, not race, is the principle factor in distinguishing groups.[99] Stemming from a class action suit charging the Chicago Housing Authority ("CHA") and the U.S. Department of Housing and Urban Development ("HUD") with unlawfully concentrating federal housing projects in minority-only neighborhoods, the ruling required CHA to grant rent subsidy vouchers to 7100 black families to enable them to relocate from minority communities to majority white communities.[100] Longitudinal studies compared the children of relocated families to the children of families that remained in segregated neighborhoods. Stark differences emerged: once in the suburbs, the children of relocated families achieved higher grades, were less likely to drop out of school, were less likely to be involved in criminal activity, were more likely to attend college, were more likely to have cross-racial ties, and were more likely to express norms that accorded with the norms of their suburban neighbors.[101] Furthermore, while at the beginning of the litigation it may have seemed that the children of the not-yet-relocated minority families and the children of the white suburban families were very different because they were of different races, the *Gautreaux* relocation shows that the children were not that different after all. The differences were not a result of race but rather of place.

D. The Case Is in the Consequences

It is my hope that in the sections above, I have made the case for action against residential segregation. It is not only the visible effects that are troubling—unequal access to quality primary education, unequal job opportunities, unequal resources, higher crime rates. The less visible effects are

---

munities in which "one of every eight black males in the age group 25-29 is incarcerated on any given day").

[98] Tracy Meares, who has written extensively about norms and crime, attributes this phenomenon to the effect of linked fate among community members, in which law-abiding minorities recognize that their fates are linked to those of law-breaking minorities. Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 682-83 (1998).

[99] Hills v. Gautreaux, 425 U.S. 284 (1976).

[100] *Id.*

[101] LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA 164-76 (2000); James Rosenbaum, Stefanie Deluca, & Tammy Tuck, *New Capabilities in New Places: Low-Income Black Families in Suburbia, in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 150 (Xavier de Souza Briggs ed., 2005). Similar effects were obtained when poor minorities relocated to suburban Baltimore neighborhoods as part of the Moving to Opportunity program, authorized by Congress in 1993. *See* Jens Ludwig, Greg J. Duncan & Helen F. Ladd, *The Effects of MTO on Children and Parents in Baltimore, in* CHOOSING A BETTER LIFE?: EVALUATING THE MOVING TO OPPORTUNITY SOCIAL EXPERIMENT 153 (John Goering & Judith Feins eds., 2003).

equally worrisome: unequal social capital, reification of race as difference, and formation of harmful norms.

The conventional thinking is that the persistence of racialized spaces is the product of *de jure* segregation and/or the product of individual choices to live in neighborhoods of like others, especially when such neighborhoods boast better schools and services. A more nuanced, but still rather conventional, approach also attends to the role the government has played: first, encouraging residential segregation after WWII through its subsidized loans program; second, combating discrimination in housing through the enactment of the FHA; and, third, its current position of retrenching from race-conscious efforts to address race-based discrimination.[102]

While these explanations—*de jure* segregation and individual choice—tell part of the story, they fail to tell the whole story. After all, what motivates individual choice? More troubling, these explanations give the impression that the government has ceased to play an active role in maintaining segregation. Part III of this Article challenges that impression by turning to criminal procedure, criminal law, and policing.

How, what, and whom we police play a very real role in perpetuating residential segregation by influencing individual choice. To make this point, we need to begin with a paradigm shift. Currently, the majority of criminal law and criminal procedure articles that address race focus on minority law breakers. However, instead of "looking to the bottom,"[103] my approach focuses on the vast middle: law-abiding, middle-class minorities. After all, it is law-abiding, middle-class minorities who are best positioned to disrupt our implicit biases, and to not only cross, but also tear down, racial barriers. Yet, many law-abiding, middle-class minorities choose not to live in predominantly white communities. Policing influences this choice. In recent years, scholars such as Jeannie Suk,[104] Melissa Murray,[105] and others[106] have begun to explore the ways in which criminal law *structures* the home. The next question, addressed in Part III, is how criminal law and procedure—which in large part privilege the sanctity of the home[107]—also structures *where* people choose to call home.

---

[102] *See, e.g.*, Mahoney, *supra* note 69.

[103] Matsuda, *supra* note 19.

[104] *See, e.g.*, Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006).

[105] *See, e.g.*, Melissa Murray, *The Space Between: The Intersection of Criminal Law and Family Law in* State v. Koso (unpublished manuscript, on file with author).

[106] *See, e.g.*, Dan Markel, Jennifer M. Collins, & Ethan Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147; Jennifer M. Collins, Ethan Leib, & Dan Markel, *Punishing Family Status*, 88 B.U. L. REV. (forthcoming 2008).

[107] The Court has repeatedly identified the home as the site most deserving of Fourth Amendment protection. *See, e.g.*, Payton v. New York, 445 U.S. 573, 589 (1980) (asserting that the warrantless "breach of the entrance to an individual's home" is the clearest violation of Fourth Amendment values); United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972) (stating that the "physical entry of the home [without a valid warrant] is the chief evil against which the . . . Fourth Amendment is directed"). Criminal law also privileges the home through its treatment of burglary, domestic abuse, and defense-of-home rules.

III. Policing Race, Policing Place

> We have learned that there are cars we are not supposed to drive, streets we are not supposed to walk.
>
> —Don Jackson[108]

Consider the following. Edward Lawson, a businessman and occasional actor, was stopped by the police fifteen times in the space of two years while strolling through an upscale, predominantly white neighborhood.[109] On two occasions when Lawson refused to provide identification in order to "account for [his] presence," he was even arrested. Lawson was charged with violating a vagrancy ordinance requiring suspicious persons to provide "credible and reliable" identification to a requesting police officer, an ordinance that Lawson challenged as facially unconstitutional.[110] Although the Supreme Court eventually sided with Lawson on the narrow ground that the identification portion of the ordinance was unconstitutionally vague,[111] the real impact of the decision is questionable. Ten years after the Court decided *Kolender v. Lawson*, Lawson was stopped again, this time in response to a call that a black man was driving "too slowly" past an elementary school in a predominantly white neighborhood.[112] As Lawson put it, his encounters with the police are "part of being black in this country."[113]

Devon Carbado, a law professor at UCLA, was in a predominantly white neighborhood when he found himself and his brothers surrounded by a phalanx of officers and pinned against a wall at gunpoint outside the apartment they had been visiting.[114] The reason for the brothers' presence at the apartment was simple: it was their sister's apartment. Still, the officers demanded to know if Carbado and his brothers had drugs, and asked if they could search the apartment. The officers apologized, although only after the search revealed no drugs, weapons, or other contraband. The officers explained that a neighbor had reported seeing several black men enter the apartment with guns.

Luis Oliveira, Milton Oliveira, and Elias Moreiro were fiddling with their camcorder as they drove through an affluent and predominantly white area of North Stamford, Connecticut when six police cruisers surrounded

---

[108] Don Jackson, Op-Ed., *Police Embody Racism to My People*, N.Y. Times, Jan. 23, 1989, at A25.

[109] Kolender v. Lawson, 461 U.S. 352, 354 (1983).

[110] *Id.* at 353-54.

[111] The Court concluded that the ordinance "fail[ed] to describe with sufficient particularity" how to satisfy a police request for identification. *Id.* at 361.

[112] Patricia Ward Biederman, *Charges Against Activist Dropped*, L.A. Times, May 9, 1993, at J4. As Lawson explained, he was driving slowly precisely because he was near a school. When Lawson declined to produce identification, he was again arrested. However, since the ordinance now specified the type of identification a "suspicious person" must produce, this part of the stop was no longer subject to a void-for-vagueness challenge. *Id.*

[113] Aaron Epstein, *Court Rejects Loitering Law*, Miami Herald, May 3, 1983, at 11A.

[114] *See* Carbado, *supra* note 25, at 959-62 (2002).

them.[115] The police ordered the men to stop their vehicle, toss out their keys, and place their hands outside the car windows. The men were then ordered from the car, at which point they were handcuffed and searched spread eagle over the hood of the car.[116] Not satisfied with their claim of ownership of the camcorder, officers conducted a canvass of the neighborhood. Only after their canvass failed to reveal a burglary did the officers release the men.[117]

Lastly, consider the experience of sociology professor Laura Fishman, who has described being "stopped, questioned, and even searched" numerous times:

> I was deemed suspicious enough to be stopped simply because I was a black woman. This form of police harassment always occurred whenever I walked in white, affluent neighborhoods. Not only was I rudely questioned about my purpose for walking in these neighborhoods, frequently I was required to give proof that I was not a prostitute, heroin addict, or maniac. In one case, I was warned not to return to the neighborhood unless I was acting in a service capacity for some white household.[118]

Each of the incidents above raises issues concerning criminal law and criminal procedure. In *Kolender v. Lawson*, the issue was the principle of legality and the void-for-vagueness doctrine. In *Oliveira v. Mayer*, and in the Carbado and Fishman incidents, the issue was the leeway given to officers to conduct encounters, "stop and frisks," and arrests under the Fourth Amendment. These incidents problematize the very *place* where criminal law and criminal procedure intersect. It is not only that Edward Lawson was charged with loitering. Our Fourth Amendment jurisprudence permits a forcible stop based on reasonable suspicion that an individual has committed or is about to commit *a* crime. Thus, the Fourth Amendment allowed the police license to stop Lawson on fifteen different occasions on suspicion that he had committed or was about to commit *some* crime, *any* crime, even the misdemeanor crime of loitering.[119] Each of these incidents involved minority law abiders, which is not the group that we tend to think of when we think about our criminal justice system and race. For that very reason, each incident also raises troubling issues about race and policing. These issues are often elided—as in *Kolender*, in which the Supreme Court made no mention of Lawson's race[120]—but are present nonetheless.[121]

---

[115] Oliveira v. Mayer, 23 F.3d 642, 644 (2d Cir. 1994).

[116] *Id.*

[117] *Id.*

[118] Laura Fishman, *The Black Bogeyman and White Self-Righteousness, in* IMAGES OF COLOR, IMAGES OF CRIME 177, 183 (Coramae Richey Mann & Marjorie S. Zatz eds., 2002).

[119] The Court has declined to limit the authority to conduct stop and frisks to investigations of violent crime. *See* United States v. Hensley, 469 U.S. 221, 229 (1985).

[120] *Kolender*, 461 U.S. at 352.

[121] *See* I. Bennett Capers, *Reading Back, Reading Black*, 35 HOFSTRA L. REV. 9 (2006).

These issues have been discussed, explored, debated, and critiqued. However, the incidents described above are emblematic of the problem that has, for the most part, not been sufficiently attended to: the maintenance of racialized spaces. If Part II of this Article can be categorized as making the argument for how race and space help shape inequality, this part makes the argument that our methods of policing help shape race and space. Put differently, our methods of policing have an impact beyond crime reduction. Our methods of policing also serve to limn out and maintain racialized spaces.[122] At a time when residential segregation plays a key role in perpetuating inequality through unequal education, employment opportunities, resources, social capital and norm building, our methods of policing play a key role in perpetuating segregation.

The ambition of the remainder of this Article is to render visible what is too often invisible, this link between how and what we police and the perpetuation of segregation along race lines.

A. Race, Place, and the Way We Police

No case has had greater impact on the way we police than *Terry v. Ohio*,[123] in which the Supreme Court carved out an exception to its probable cause requirement for seizures and gave its imprimatur to limited detentions (stops) based on the lesser standard of reasonable suspicion. The Warren Court held that so long as an officer has specific and articulable facts to believe that "criminal activity may be afoot,"[124] the Fourth Amendment permits a limited detention and questioning of the person. If the officer has reasonable suspicion that a person is armed and dangerous, the officer can couple the limited detention and questioning with a pat down for weapons: in common parlance, a stop and frisk.[125]

The most significant impact of the *Terry* decision is its effect on the apprehension of criminals. It equips the police with the tools they need to do their job and keep the bad guys off the streets. *Terry* is, in part, preventative because it allows the police to stop and question those individuals who they suspect may be about to commit a crime. Indeed, this is what happened in *Terry* itself.[126] The *Terry* case demonstrates why permitting stops and frisks

---

[122] This discomfort with race-based limiting of public spaces explains, in a way that the void-for-vagueness doctrine alone does not, the Court's ruling in *Kolender* and similar rulings from state courts. *See, e.g.*, People v. Bright, 520 N.E.2d 1355 (N.Y. 1988) (voiding loitering statute following arrests of two minorities at public transportation facilities).

[123] 392 U.S. 1 (1968).

[124] *Id.* at 30.

[125] In fact, Chief Justice Warren's majority opinion paid only cursory attention to the authority of officers to engage in stops. *Id.* at n.26. Rather, the crux of the Court's opinion dealt with the authority of officers to engage in frisks. *Id.* at 22-23.

[126] Detective McFadden, who had been a policeman for thirty-nine years and a detective for thirty-five, was patrolling downtown Cleveland for shoplifters when he observed two men repeatedly peering through a store window and suspected the two men of "casing a job, a stick-up." *Id.* at 6. He also feared that the men were armed. *Id.* When Detective McFadden

based on less than probable cause has societal benefits and is utilitarian. The public face of *Terry* is, in short, a good thing.

But *Terry* means something else in practice and has another face that, for many, is less well known. The vast majority of individuals stopped and questioned by the police are not engaged in criminal activity and are not carrying weapons or contraband. In most stops and frisks, the articulable suspicion is simply wrong. The data collected by the New York City Police Department, one of the few departments that require officers to make a record of certain stops and frisks,[127] bears this out. For example, in 2006, the New York City Police Department completed stop and frisk forms for 508,540 individuals. Of that number, the police arrested or served summons on only 50,346.[128] In other words, 458,104 of the individuals stopped and frisked, or 9 out of 10, were found to have engaged in no unlawful activity.[129] The data also reveal that over 85% of those stopped and frisked were black or Hispanic,[130] numbers grossly disproportionate to their representation in the general public.[131] For the vast majority of the law-abiding citizens stopped, questioned, and even frisked by the police before being let go, there is no legal recourse because there is simply no Fourth Amendment violation. Put differently, *Terry* authorizes stops and frisks based on reasonable suspicion regardless of whether those suspicions prove accurate or not.[132] In the rare case where the stop involves excessive force and the victim seeks legal

---

grabbed the men and patted them down, his suspicions proved accurate. Both men had guns, and the men were formally charged with carrying concealed weapons. *Id.* at 7.

[127] New York's practice of documenting such stops was initiated as part of a civil settlement following the police shooting of Amadou Diallo in 1999. *See* Greg B. Smith, *NYPD Yields on Stop-Frisk, Will Settle Class-Action Bias Suit*, N.Y. DAILY NEWS.COM, Sept. 18, 2003, http://www.nydailynews.com/archives/news/2003/09/18/2003-09-18_nypd_yields_on_stop-frisk___.html. It is mandatory for police to fill out UF-250 forms (stop and frisk forms) when certain conditions (physical force, a frisk, an arrest, or the subject's refusal to provide identification) are present. U.S. Commission on Civil Rights, *Police Practices and Civil Rights in New York City: Executive Summary*, http://www.usccr.gov/pubs/nypolice/exsum.htm. Completing the forms when these conditions are not met is optional. The analyses of forms discussed in this Article are primarily limited to stops requiring the completion of UF-250 forms.

[128] *See* Press Release, American Civil Liberties Union, NYCLU Says New NYPD Stop-and-Frisk Database Raises Major Privacy Concerns (Feb. 5, 2007), *available at* http://www.aclu.org/police/searchseizure/28315prs20070205.html.

[129] *Id.*

[130] Of the 508,540 reported stops in 2006, 55% of suspects were black, 30% were Hispanic, and 11% were white. Christopher Dunn, *Civil Rights and Civil Liberties*, N.Y. L.J., Feb. 27, 2007, at 3 col. 1.

[131] The "hit" rate also varied by race, suggesting that the police were more accurate in targeting whites for stops than they were in targeting blacks and Hispanics. Only 1 in every 9.5 blacks stopped was found to be engaged in activity warranting an arrest. By contrast, 1 in 7.9 whites stopped was arrested. *See* ELIOT SPITZER, THE NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL viii-ix (1999) (based on stops reported in 1998 and 1999).

[132] As the Court put it in *Illinois v. Wardlow*, "*Terry* accepts the risk that officers may stop innocent people." 528 U.S. 119, 126 (2000).

recourse, as in *Oliveira*,[133] there might be an action alleging a violation of civil rights under 42 U.S.C. §1983. And in the rarer case where discriminatory intent is readily provable, there may even be an equal protection claim.[134] But, for the most part these cases are invisible, especially in jurisdictions that do not collect stop and frisk data.[135]

The *Terry* decision also has a large impact on the racialization of space. The Warren Court explicitly recognized that stop and frisk practices, which the police had preemptively engaged in for years,[136] were not race-neutral and were likely to have a disproportionate impact on disadvantaged groups.[137] Indeed, both Terry and his co-defendant were black,[138] though the *Terry* opinion omits this fact. The Court implicitly acknowledged that as a consequence of its decision, this disproportionate impact on disadvantaged groups would continue.

Nearly three decades after *Terry*, the Court further tipped the scale against minorities when it sanctioned pretext stops in *Whren v. United States*, ruling that the subjective motivation of an officer in singling out a particular individual is irrelevant under the Fourth Amendment so long as the stop itself is supportable by reasonable suspicion or probable cause.[139] In so holding, the Court essentially sanctioned the police practice of singling out individuals for pretextual traffic stops in the hope of discovering contraband, a practice that was repeated in the recent case of *Illinois v. Caballes*.[140] This practice—known to some as driving while black or driving while brown—disproportionately impacts law-abiding minorities.[141] This effect is

---

[133] Oliveira v. Mayer, 23 F.3d 642 (2d Cir. 1994)

[134] These equal protection issues are particularly troubling since the Supreme Court requires a plaintiff to first prove discriminatory intent and effect to establish an equal protection violation. *See, e.g.*, Wayle v. United States, 470 U.S. 598, 608 (1989). This requirement, however, ignores the fact that state action is often the result of implicit biases. To further complicate matters, the Supreme Court has held that a defendant cannot obtain discovery to establish an equal protection violation unless he can first make a strong preliminary showing of bias. *See* United States v. Armstrong, 517 U.S. 456, 465 (1996). For a critique of *Armstrong*'s intent-based test, see Angela Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998).

[135] *See* Albert J. Meehan & Michael C. Ponder, *Race and Place: The Ecology of Racial Profiling of African American Motorists*, 19 JUSTICE Q. 399, 405, 425 (2002) (observing that a significant portion of traffic stops and field interrogations are never documented).

[136] John Q. Barrett, *Deciding The Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749, 758 (1998).

[137] Terry v. Ohio, 392 U.S. 1, 14 n.11 (1968) (noting the impact "stops and frisks" would continue to have on minorities).

[138] *See* Louis Stokes, *Representing John W. Terry*, 72 ST. JOHN'S L. REV. 727, 729 (1998).

[139] 517 U.S. 806, 811-13 (1996). The Court expressly left open the possibility that such discriminatory conduct might be actionable under the Equal Protection Clause. *Id.* This possibility, however, amounts to an empty gesture given the hurdles the Court has erected to frustrate equal protection claims.

[140] 543 U.S. 405 (2005). Officers ostensibly pulled over Caballes, a Hispanic male, for driving 71 mph in a 65 mph speed zone, and used the traffic stop as an opportunity to conduct a canine sniff of the vehicle. The Court held that the canine sniff did not require reasonable suspicion. *Id.* at 409.

[141] *See* Capers, *Crime, Legitimacy, and Testilying*, *supra* note 90.

not limited to driving. The collateral consequences of *Terry* and its progeny is that they permit the disproportionate targeting of minorities in cars,[142] on buses,[143] on planes,[144] on foot, even in shopping malls.[145] As Tracey Maclin has put it, it has done nothing less than impact minorities' freedom of locomotion.[146]

How *Terry* and *Whren* have contributed to the racialization of space, however, is not well known. The usual concern is that minorities are disproportionately targeted for stops, and that these stops are often conducted in minority neighborhoods.[147] What is often obscured in this complaint is another type of stop that is perhaps more troubling, since it has the effect of reifying the notion that certain neighborhoods are white and other neighborhoods are not. Who is scrutinized, who is stopped, who is questioned, and who is frisked is too often based on "racial incongruity," —the presence of a minority in a predominantly non-minority neighborhood, or the presence

---

[142] *Id.*

[143] Bus sweeps are particularly popular. *See, e.g.*, United States v. Drayton, 536 U.S. 194 (2002); Florida v. Bostick, 501 U.S. 429 (1991). Consider the recently reported story of Tunde Clement, a black man who was traveling from New York City to Albany, and was carrying a backpack, which alone may have been enough to pique the interest of plainclothes officers. According to news reports, the officers "cornered Clement and began peppering him with questions." Brendan J. Lyons, *Harsh, Unwarranted Tactics?: Outcry over Sheriff's Department Search Methods*, TIMES UNION (Albany, N.Y.), March 2, 2008, at A1.

> He was quickly handcuffed and falsely arrested. He was taken to a station to be strip-searched and then to a hospital, where doctors forcibly sedated him with a cocktail of powerful drugs, including one that clouded his memory of the incident.
>
> A camera was inserted in his rectum, he was forced to vomit and his blood and urine were tested for drugs and alcohol. Scans of his digestive system were performed using X-ray machines, according to hospital records obtained by the *Times Union*.
>
> The search, conducted without a warrant, came up empty.

Id. After ten hours in custody, Clement was given an appearance ticket for resisting arrest and was released. The resisting arrest charge was later dismissed. *Id.* That the New York Court of Appeals had rebuked the sheriff's department for its methods five years earlier was apparently of little consequence. The stories heard by local defense lawyers are equally disturbing: "[E]very black man who came through the bus station was being literally grabbed and dragged into the men's room and searched. . . . Occasionally, of course, they would get lucky and find some drugs. But the vast, overwhelming majority of black men searched were clean." *Id.*

[144] A report released by the U.S. General Accounting Office found that black women traveling internationally were nine times more likely than white women to be subjected to x-rays or strip searches by U.S. Customs officials, even though they were less than half as likely to be carrying contraband. *See Black Women Searched More, Study Finds*, N.Y. TIMES, Apr. 10, 2000, at A17.

[145] *See* Darlene J. Conley, *Adding Color to a Black and White Picture: Using Qualitative Data to Explain Disproportionality in the Juvenile Justice System,* 31 J. RES. CRIME & DELINQ. 135, 142 (1994) (describing the targeting of minority youth at suburban shopping malls).

[146] Maclin, *supra* note 120.

[147] *See, e.g.*, Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 FORDHAM URB. L.J. 621 (1993); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994).

of a non-minority in a predominantly minority neighborhood.[148] As two sociologists studying race and place have observed: "For the police, race is strongly tied to their conception of place. Officers know which communities are whiter, blacker (or more minority), or some combination of the two and where in their own community racial, ethnic, and class composition differ. . . . [Who is stopped] is inextricably tied not only to race, but to officers' conception[s] of place, of what *should* typically occur in an area and *who belongs*, as well as *where they belong*."[149] Such "commonsense geography" informs their decisions about whom to deem "out of place," which in turn send expressive messages about who belongs and who does not.

For example, a study of New York's stop and frisk data revealed that in the thirteen precincts with the lowest minority population, 30% of the persons stopped were black, more than ten times their percentage of the overall population of those precincts.[150] The numbers were also stark for Hispanics[151] and for whites in predominantly minority neighborhoods.[152] Eliot

---

[148] Although some courts have held that racial incongruity cannot be a factor in establishing reasonable suspicion, *see, e.g.*, State v. Barber, 823 P.2d 1068 (Wash. 1992), other courts have held that consideration of racial incongruity may be a factor, so long as there are additional factors which, in the totality of the circumstances, support an inference of reasonable suspicion. *See, e.g.*, United States v. Weaver, 966 F.2d 391 (8th Cir. 1992). What these and other cases illustrate, however, is that whether consideration of "racial incongruity" is judicially sanctioned or not, officers in fact do use racial incongruity in determining whom to stop and whom to target for "consensual" encounters. *See* State v. Ruiz, 504 P.2d 1307 (Ariz. Ct. App. 1973) (holding that it was reasonable for police to stop a Mexican because it was unusual to see Mexicans in the area except for the purpose of buying drugs); People v. Bower, 597 P.2d 115, 117 (Cal. 1979) (noting that police stopped a white man because he was with a group of black men in a predominantly black neighborhood); Phillips v. State, 781 So.2d 477, 479 (Fla. Dist. Ct. App. 2001) (stating that the suspect was stopped "because he was a black man walking in a predominantly white neighborhood"); LaFontaine v. State, 749 So.2d 558, 560 (Fla. Dist. Ct. App. 2000) (reporting that a white female was stopped after she was observed speaking to two black men in a predominantly black neighborhood); State v. Wilson, 775 So.2d 1051, 1052 (La. 2000) (finding that a police officer stopped a white man in a predominantly black neighborhood on the assumption that the white man could only have been purchasing drugs); State v. Vingle, 802 So.2d 887, 888 (La. Ct. App. 2001) (stating that police stopped a white woman because she had parked in a predominantly black neighborhood "with no apparent car trouble"); People v. Tinsley, 369 N.Y.S.2d 142, 143-44 (N.Y. App. Div. 1975) (Stevens, P.J., dissenting), *rev'd*, 355 N.E.2d 302 (N.Y. 1976) (reporting that police stopped several black men after observing them stop in several stores on a commercial strip in Manhattan, sometimes inquiring about items for sale); People v. Estrialgo, 233 N.Y.S.2d 558, 561 (N.Y. Sup. Ct. 1962) (noting that a Hispanic man was stopped because he was carrying a suitcase in a predominantly white neighborhood in the middle of the afternoon); State v. Gleason, 851 P.2d 731, 732 (Wash. Ct. App. 1993) (stating that officers stopped a white man because of his presence in a predominantly Hispanic housing complex); State v. Cobbs, No. 2007AP501-CR, 2008 WL 185545, at *1 (Wis. Ct. App. Jan. 23, 2008) (explaining that the case arose because three black men were seen at a gas station in a predominantly white community, causing a police officer to follow two of the men and conduct a traffic stop upon observing one of them throw a cigarette out the window).

[149] Meehan & Ponder, *supra* note 135, at 402 (emphasis in original).

[150] *See* Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 FORDHAM URB. L. J. 457, 477 (2000) (using stop and frisk data for 1998).

[151] Hispanics comprised 23.4% of the persons stopped. This was more than three times their overall population in these precincts. *Id.*

Spitzer, the former Attorney General of New York, reached a similar conclusion.[153] These statistics suggest that for many police officers, "race serves as a marker of where people belong, and racial incongruity as a marker of suspicion."[154]

A recent study of police queries and stops in a predominantly white suburban community bordering a predominantly African American community is particularly revealing. The study found that as African American motorists drove from the border area to the farthest sectors of the white community, their chances of being the subject of a police license plate query increased dramatically. In the two largest pockets of wealthier white neighborhoods, black drivers had query rates that were 325% and 383% greater than those of the general driver population.[155] African American drivers were also three times more likely to be stopped in these areas than in the border area between the black and white communities.[156] This increased surveillance was not justified by hit rates. In fact, the African American drivers in these areas were the *least likely* to have legal problems, notwithstanding the fact that they were subject to the *highest level* of query surveillance.[157]

Moreover, stop and frisk data tell only a fraction of the story. This is because following the Supreme Court's decisions in *United States v. Mendenhall*[158] and *Florida v. Bostick*,[159] a "stop" is not a "stop" within the meaning of the Fourth Amendment absent a show of force or other circumstances that would lead a reasonable person to believe he or she was not free to leave.[160] Rather, such stops are deemed "consensual encounters."[161] An officer need not even have reasonable suspicion to initiate an encounter. An officer accosting an individual and asking that individual a series of questions—*Where are you going? Do you live nearby? Are you visiting someone here?*—would likely be categorized as an encounter, not a stop within the meaning of the Fourth Amendment. In the context of New York's 2006 Stop and Frisk data, the 508,540 stop and frisk reports tell us virtually nothing of the number of individuals who were questioned during supposedly "consensual encounters," as these encounters would not generate such reports.

---

[152] *See* Andrew Gelman, Jeffrey Fagan, & Alex Kiss, *An Analysis of the NYPD's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 103 J. AM. STAT. ASS'N 813, 822 (2007), *available at* http://www.stat.columbia.edu/~gelman/research/published/frisk9.pdf (observing high stop rates for whites in several precincts in the Bronx).

[153] *See* SPITZER, *supra* note 131, at viii ("In precincts in which blacks and Hispanics each represent less than 10% of the total population, individuals identified as belonging to these racial groups nevertheless accounted for more than half of the total "stops" during the covered period.").

[154] Fagan & Davies, *supra* note 150, at 477-78.

[155] Meehan & Ponder, *supra* note 135, at 417.

[156] *Id.*

[157] *Id.* at 420.

[158] 446 U.S. 544 (1980).

[159] 501 U.S. 429 (1991).

[160] *See Mendenhall*, 446 U.S. at 554.

[161] *See Bostick*, 501 U.S. at 434.

In summary, law-abiding minorities in predominantly white communities face disproportionate stops by and encounters with the police,[162] and law-abiding whites in minority communities face disproportionate stops by and encounters with the police.[163] The officers in effect function as de facto border control, deciding who is scrutinized, stopped, questioned, or frisked. The "suspect" explains his presence and is let go. If the stop involves a show of force or a frisk, an officer might complete a stop and frisk form, but nothing more. If the stop is considered to be merely an encounter there is not even that. The suspect, sensing that he may have been singled out at least in part because of race, may feel humiliation,[164] even rage,[165] but is unlikely to seek legal recourse.[166] The incident becomes an uncomfortable anecdote shared with other minorities,[167] and stories are exchanged, almost therapeutically, about "being black [or Hispanic, or Asian] in this country"[168] or about the "law as microaggression."[169] But even microaggression fails to tell the whole story. Such stops, coming from the state, suggest a public discounting of worth, an asterisk on our protestations of equality,[170] a caveat to our rhetoric about applying strict scrutiny to the state's use of racial distinctions.[171] These stops are a dressing down, a public shaming, the very stigmatic harm that the Court has often, but not often enough, found troub-

---

[162] *See generally* Michael A. Fletcher, *Driven to Extremes: Black Men Take Steps to Avoid Police Stops*, WASH. POST., March 29, 1996, at A1 (reporting the frequent stops of black professionals).

[163] *See generally* RONALD WEITZER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA 88 (2006) (noting the trend that whites feel profiled in predominantly minority neighborhoods).

[164] William J. Stuntz, Terry's *Impossibility*, 72 ST. JOHN's L. REV. 1213, 1218 (1998) (summarizing the dignitary harms and public shame law-abiding citizens often feel when they are singled out as "suspect" by the police, especially when the perception is that race is a factor).

[165] *See generally* ELIAS COSE, THE RAGE OF A PRIVILEGED CLASS 5 (1993) (describing "the soul-destroying slights at the heart of black middle class discontent"); *see also* GLEN LOURY, THE ANATOMY OF RACIAL INEQUALITY (2002) (discussing social costs).

[166] As one judge has noted: "The real harm done [when police stop and question individuals using race to justify suspicion] is not fully apparent because we usually do not hear of the cases of the innocent people who are stopped by the police." United States v. Prandy-Binett, 995 F.2d 1069, 1075 (D.C. Cir. 1993) (Edwards, J., dissenting).

[167] Gates, *supra* note 24, at 58 ("Blacks—in particular, black men—swap their experiences of police encounters like war stories, and there are few who don't have more than one story to tell."); *see also* David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 265-67 (1999) (describing anecdotal evidence of racial profiling).

[168] Epstein, *supra* note 113 (quoting Edward Lawson).

[169] I borrow this term from Peggy Davis. *See* Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989).

[170] Indeed, as several scholars have pointed out, the targeting of African Americans in particular is reminiscent of the slave patrols that demanded "passes" from blacks found in public spaces. *See, e.g.*, SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 5 (2001); ANDY TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURES, 1789-1868 107 (2006).

[171] KENNEDY, *supra* note 21, at 148-49.

ling.[172] They are something akin to the status punishment that the Court, in its better moments, has found unconstitutional.[173] Spaces thought to be "public" such as streets, parks, sidewalks, and shopping districts turn out not to be entirely public, but rather color-coded.

In between these often officially invisible police-citizen encounters and stops, on the one hand, and the decision not to seek legal recourse, on the other hand, is often another decision that has consequences for race and space. That decision might be to think twice before visiting a friend or a colleague in a neighborhood that is comprised predominantly of another race,[174] or to not risk being exposed to state violence,[175] or to rule out moving to certain neighborhoods that lack an already existing minority (or non-minority) presence.[176] That decision might be to play it safe by not crossing racialized borders and to not risk being deemed "out of place."

B. Race, Place, and What We Police

What we police—what we deem criminal—contributes to the maintenance of racialized borders. Consider *Kolender v. Lawson* again, which exemplifies the point where criminal procedure and criminal law intersect to racialize space. Even after the Supreme Court struck down the ordinance because it failed "to describe with sufficient particularity" how to satisfy a request for identification,[177] California was able to amend the ordinance and Lawson was stopped again. This suggests that a host of laws, including stop-and-identify laws[178] and those prohibiting vagrancy, disorderly conduct,

---

[172] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493-95 (1954) (abandoning the Court's "separate but equal" precedent, in part because of stigmatic harm, and observing that the segregation of blacks in schools "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

[173] *See* Robinson v. California, 370 U.S. 660 (1962) (finding a statute that made it an offense to "be addicted to the use of narcotics" amounted to a status punishment in violation of the Eighth Amendment).

[174] *Cf.* KENNEDY, *supra* note 21, at 153 ("Racially selective policing will help to dissuade blacks from venturing into neighborhoods where they are viewed as being 'out of place,' 'not belonging.'").

[175] What is often left out in discussions about the disproportionate targeting of minorities is the threat of violence that this targeting entails. The law's force, after all, comes from its threat of lawful violence. *See, e.g.*, JONATHAN SIMON, GOVERNING THROUGH CRIME 14 (2007) (observing that "all legal authority ultimately rests on the threat of lawful violence with the criminal law").

[176] Contrary to popular belief, one study found that the reason middle-class blacks often choose to live in predominantly minority neighborhoods is not because of the desire to be among other blacks. Rather, blacks typically explain their decision to live in minority neighborhoods in terms of the difficulties they expect to encounter in predominantly white communities. *See* Reynolds Farley, Elaine L. Fielding & Maria Krysan, *The Residential Preferences of Blacks and Whites: A Four-Metropolis Analysis*, 8 HOUSING POL'Y DEBATE 763, 766 (1997); *see also* James, *supra* note 13, at 426.

[177] Kolender v. Lawson, 461 U.S. 352, 361 (1982).

[178] Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177 (2004) (holding that a Nevada statute that made it an offense for a person stopped by police to refuse to identify himself did not violate the Fourth Amendment).

or loitering,[179] still permit the disproportionate targeting of minorities in non-minority neighborhoods and the targeting of non-minorities in minority neighborhoods. They provide part of the justification for an encounter or a stop. If *Terry* permits a stop based on reasonable suspicion that *any* "criminal activity may be afoot,"[180] the existence of a relatively "loose" or "order-maintenance" offense like loitering makes the jobs of officers easier, and at the same time makes life for those who can be deemed "out of place" harder. For example, an officer need not be able to articulate reasonable suspicion that an individual is about to engage in a burglary; suspicion that she may be loitering is enough.[181]

Another set of laws facilitates the disproportionate targeting of minorities and others deemed out of place: traffic laws. Traffic codes allow officers to affirmatively subject, or decline to subject, people to traffic enforcement procedures.[182] If all motorists are traveling above the speed limit, the officer is free, under the Fourth Amendment at least, to choose which individuals to stop and ticket, to order out of a vehicle,[183] even whom to arrest.[184] When faced with racial incongruity, an officer need not wait until she has reasonable suspicion that, for example, a drug crime or crime of violence was committed to justify a stop. Rather, that officer can base a stop on any number of traffic violations that we commit every day.[185] Again, the study of policing in bordering black and white communities is revealing, finding that the farther minorities traveled from the minority community into a predominantly white community, the more likely they were to be surveilled and stopped for committing a traffic violation. Recall that computer checks were run on minority drivers in predominantly white areas at rates that were 325% and 383% greater than their number in the driver population.

---

[179] City of Chicago v. Morales, 527 U.S. 41 (1999). Although the Court struck down Chicago's gang-loitering ordinance on the ground that the statute failed "to give the ordinary citizen adequate notice of what is forbidden and what is permitted" and provided to police officers "absolute discretion to determine what activities constitute loitering," the Court made clear that it was not invalidating all anti-loitering legislation. *Id.* at 64.

[180] Terry v. Ohio, 392 U.S. 1, 30 (1967).

[181] Approximately 10% of all documented stops during the period of the study were based on suspicion of "quality of life" or other misdemeanor-level offenses. *See* SPITZER, *supra* note 131, at 58.

[182] Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1503 (2007).

[183] Pennsylvania v. Mimms, 434 U.S. 106 (1977). The Court held that officers have an automatic right under *Terry* to order a driver out of a car. *Id.* at 109. As Justice Stevens recognized in his dissent, there is likely a correlation between race and whether a motorist is ordered out of a vehicle following a traffic stop. *Id.* at 122 (Stevens, J., dissenting). At least one study supports this assumption. *See* Patrick McGreevy, *Question of Race Profiling Unanswered*, L.A. TIMES, July 12, 2006, at B3.

[184] In *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), the Court held that the Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense. The offense at issue in the case was a misdemeanor seat belt violation.

[185] As David Harris puts it, "no driver can avoid violating *some* traffic law during a short drive, even with the most careful attention." David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Stops*, 87 J. CRIM. & CRIMINOLOGY 544, 545 (1997).

And ten years after the Court's decision in *Kolender*, Lawson was stopped again while traveling through a predominantly white neighborhood, this time for driving "too slowly."

C. Race, Place, and the Way We Live Now

As things stand now, how we police and what we police are likely to encourage segregation, not integration. One study of a white middle class community, a black middle class community, and a poor black community found that the black middle class community enjoyed strong citizen-police relations similar to the white middle class community, except when they ventured outside their black middle class sanctuary.[186]

Instead of building polyglot communities of togetherness,[187] mutual interests, the cross-fertilization of ideas,[188] and the possibility of shared norms, instead of building interest in the collective good, instead of cosmopolitanism,[189] instead of the "being together of strangers,"[190] how and what we police reinforces walls of "us" versus "them," insularity, provincialism, and an "ecology of fear."[191] A minority individual who is considering where to live may balance the benefits of a predominantly white neighborhood, such as better schools, less crime, better services, and greater access to social capital, against the costs associated with the risks of suspicion cast on him by the police. Will he be ordered to freeze and raise his hands as he attempts to enter his own house? Will officers, with either the best or worst intentions, casually stop him just to ask a few questions? Will they frisk him?

---

[186] *See* Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 LAW & SOC'Y REV. 129 (2000).

[187] I am not the first to advocate such a vision of city life. Gerald Frug argues that the primary city function ought to be the cultivation and reproduction of the city's traditional form of human association:

> Cities—and I mean all cities, including suburbs—ought to teach people how to interact with unfamiliar strangers, how to deal with their terror of the black poor or of whomever else they imagine as "the mob," how . . . "to join with other persons without the compulsion to know them as persons."

FRUG, *supra* note 3, at 140 (internal citation omitted).

[188] In *Grutter v. Bollinger*, 539 U.S. 306 (2002), the Court invoked similar values when it found student body diversity to be a compelling state interest that justified the use of race in university admissions. Citing the law school's claim of a compelling interest and the many amici briefs, Justice O'Connor noted that diversity "promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races. . . . [Diversity also] promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Id.* at 330 (internal quotations omitted).

[189] I use the term "cosmopolitanism" in the way Kwame Anthony Appiah does, which involves a recognition of the value of different human lives, in part because of their difference. *See* KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS xv (2006).

[190] IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 237-38 (1990).

[191] *See* MIKE DAVIS, ECOLOGY OF FEAR: LOS ANGELES AND THE IMAGINATION OF DISASTER 387-91 (1998).

Will any of this happen as his neighbors are watching from their windows? Or will it just be obvious that police cars slow down when they pass him on the street? Can he go for a run in the morning without drawing suspicion? What kind of police interaction can he expect his children to have, especially his son, who is or will one day be a black teenager? What will it mean to live in a neighborhood where the message that state actors convey, again and again, is one of not belonging there?[192]

The concern of this Article is that many minorities considering non-minority neighborhoods will be risk averse. They will play it safe by choosing neighborhoods that are predominantly minority, such as the middle-class minority enclaves that Sheryll Cashin has written about,[193] and where they will be less likely to face a hostile police. Likewise, whites considering minority neighborhoods, including transition neighborhoods where real estate values are expected to rise, will engage in a similar balancing of factors and reach the same conclusion. They too will play it safe and stay in place. The result is that some neighborhoods will stay white, while other neighborhoods will remain non-white, and too few neighborhoods will be mixed. This persistent residential segregation has consequences for social capital, cross-racial understanding, the proliferation of non-mainstream norms, and our democratic project itself.

IV. Changing Policing

In the preceding parts, I have made the case for why the continuance of residential segregation along race lines is troubling, and a very real barrier to our democratic ideals. In addition, I have demonstrated that how we police, and what we police, both contribute to perpetuating segregation along race lines. After all, when the police patrol neighborhoods and use racial incongruity as a factor for initiating an encounter or a stop and frisk, it sends the expressive message that neighborhoods have a color. This in turn means that certain individuals belong, and others are by default cast as aliens, intruders, suspect. The task then is to find a way of policing that allows officers to do their job, reducing crime, and yet at the same time does not have the unintended consequence of discouraging or inhibiting integration.

Forty years after the Court decided *Terry v. Ohio*, I am not advocating a reconsideration of the reasonable suspicion doctrine—even though, on a certain level, *Terry* can be read as supporting the proposition that racial incon-

---

[192] The recent case of *Fitzpatrick v. City of Hobart*, No. 2:03-CV-359 PS., 2007 WL 1560281 (N.D. Ind. May 25, 2007), illustrates this concern. The plaintiffs, a black family, alleged that they were harassed by the local police department when they moved into a predominantly white neighborhood. *Id.* at *1. For starters, on the day they moved in, a police car stopped at the property and demanded identification. *Id.* at *2. The police claimed that they had received a complaint of trespassing. *Id.* The following day, a squad car pulled up to several family members and said the police department would "be watching" the family. *Id.*

[193] Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for a Metropolitan America*, 86 Cornell L. Rev. 729 (2001).

gruity and race should *never* be a factor in articulating reasonable suspicion.[194] Nor am I suggesting that, almost thirty years after *United States v. Mendenhall*,[195] the Court revisit its much criticized "free to leave" test in which stops, with a sleight of hand, are deemed *not* stops. Much as I believe the "free to leave" test is flawed, it would be naïve to believe this Supreme Court would revisit the test. Moreover, as a former prosecutor, I am not confident that a modification of either doctrine would, by itself, do much to override the implicit biases officers, and indeed all of us, have.

There is also a more fundamental reason that I am not proposing changes to either doctrine. The primary remedy for a violation of the Fourth Amendment is the exclusion of evidence.[196] Given that my concern here is law abiders who are deemed suspect because of racial incongruity, this remedy is an empty one. After all, these are the individuals who are not arrested. In New York City, these are the 9 out of 10 individuals who are stopped and frisked, but not even issued a summons. They are the ones who, after being let go, may have second thoughts about *where* they go.

My proposal is simple because it does not propose changing Fourth Amendment jurisprudence, or even the substantive laws that provide the bases for many encounters and stops. William Stuntz has suggested that the primary focus of the Fourth Amendment should not be privacy, as it is currently understood, but rather dignitary interests.[197] Scott Sundby has argued that the animating principle behind the Fourth Amendment should be the idea of reciprocal government-citizen trust.[198] Sherry Colb, on the other hand, suggests that the Fourth Amendment should be read as having two purposes: to protect the right of privacy, and to protect the right to be free from unreasonable government targeting.[199] But none of these principles get at the core problem with our Fourth Amendment jurisprudence. The very fact that our Fourth Amendment jurisprudence has a disproportionate effect on law-abiding minorities is evidence of a flaw. That our jurisprudence has

---

[194] After all, the stop at the heart of *Terry* was likely predicated on racial incongruity. The arresting officer could not say what initially attracted his attention to Terry and his companion—whom he described as two Negroes—other than to say that he "just didn't like 'em.'" *See* Louis Stokes, *supra* note 138, at 730 (quoting Detective Martin McFadden). However, it is likely that what caught his attention, at least in part, was the fact that Terry and his companion were in a commercial district far from the areas of Cleveland where most blacks resided. *See* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment,* 74 N.Y.U. L. REV. 956, 966 (1999). That Terry's race was never mentioned arguably supports the contention that the Warren Court was sanctioning a reasonable suspicion test in which suspicion must be established based on circumstances *other than* racial incongruity or race, at least outside the context of where there has been a racial description of a perpetrator.

[195] 446 U.S. 544 (1980).

[196] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 58 (4th ed. 2006).

[197] William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1020 (1995).

[198] Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?,* 94 COLUM. L. REV. 1751, 1754 (1994).

[199] Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1464 (1996).

resulted in the disproportionate targeting of law-abiding minorities—a result clearly inconsistent with our democratic ideals of equal citizenship—is a first warning about our Fourth Amendment jurisprudence. Something is amiss.

I would suggest the solution is the equality principle embodied in the Fourteenth Amendment. "The right of the people" is how the Fourth Amendment begins and "the right of the people" is what it seeks to protect. The Fourth Amendment, then, should be read as a protection of what it means to be "of the people," a limitation upon the ability of government to infringe upon the right to equal citizenship, equal worth, and equal autonomy in conducting searches and seizures. To be clear, I am not suggesting that the Fourth Amendment should be read as including causes of action based on the denial of equal protection, or as incorporating equal protection jurisprudence. What I am suggesting is that Fourth Amendment jurisprudence be guided by a commitment to equal citizenship.

Akhil Amar has persuasively argued that, because the Constitution is a single document designed to cohere, the Fourth Amendment should be read in light of principles espoused elsewhere in the Constitution, including the equality principle in the Fourteenth Amendment.[200] Had the Court taken this approach in *Terry*, it is conceivable that it would still have permitted stops based on the "chameleon-like"[201] concept of reasonable suspicion. It is possible that we would still have *Mendenhall* and *Whren*, *Terry*'s progeny, both of which have a disproportionate effect on minorities. However, perhaps the Court would have conceptualized reasonableness differently. Instead of permitting stops based solely on articulable suspicion that criminal activity is afoot and accepting that minorities would be disparately harmed, a more courageous Court might have stressed that articulable suspicion should and must be free of racial bias or discrimination. Had it delineated reasonable suspicion differently by just adding those few words, it might have extended the promise of equal citizenship—a promise this country began with the ratification of the Fourteenth Amendment, and that the Court evoked in *Brown v. Board of Education*—to how and what we police.[202]

Ultimately, my goal is to reframe and re-imagine our Fourth Amendment jurisprudence. For the here and now, however, my proposal is simpler and more practical—it is about changing police culture. In recent years, criminal law scholars have posited that we can reduce crime by changing

---

[200] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 805-10 (1994). *See also* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1266 (1992) (arguing that the rights reflected in the Bill of Rights were each subtly but importantly transformed by the Fourteenth Amendment).

[201] United States v. Sokolow, 490 U.S. 1, 13 (1988) (Marshall, J., dissenting).

[202] Applying an equality principle would lead to more egalitarian searches and seizures. As Amar has observed, the Court's decisions upholding random searches—in *United States v. Martinez-Fuerte*, 428 U.S. 542 (1976), and *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990)—are fair precisely because they are non-discriminatory. Amar, *Fourth Amendment First Principles*, *supra* note 200, at 809.

societal and community norms. We should not stop there, but also take steps to address police norms. As Barbara Armacost has observed, "[l]aw enforcement organizations have cultures—commonly held norms, social practices, expectations, and assumptions—that encourage or discourage certain values, goals, and behaviors."[203] But these norms can be changed through education and leadership.[204] Imagine the shift in thinking that might occur if a minority police captain advised recruits and officers that many of his family members live in predominantly white neighborhoods, and not to assume that the presence of a minority in a non-minority neighborhood makes him suspect. Imagine the shift in thinking if a white captain explained that he does not want to see any of his white friends being stopped when they are visiting friends in predominantly minority neighborhoods simply because they are racially incongruous.

We should also take steps to address the implicit biases of police officers because implicit biases do not inevitably result in biased conduct or biased decisions. "[E]ven when stereotypes and prejudices are automatically activated, whether or not they will bias behavior depends on how *aware* people are of the possibility of bias, how *motivated* they are to correct potential bias, and how much *control* they have over the specific behavior."[205] Part of this can be accomplished through data collection and training. Data collection about the race of individuals encountered or stopped and frisked can alert officers and the public to the existence of disproportionate targeting. Similarly, administering implicit biases tests to officers can alert them to their own biases. This is the awareness part. The correction part involves motivating officers to set aside inappropriate biases. One way of accomplishing this may be by randomly auditing officers' stop and frisk data.[206] Another way would be by including switching exercises as part of their training.[207] For example, officers learning about the reasonable sus-

---

[203] On the importance of attending to police culture in order to address police misconduct, *see* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004).

[204] While studies are far from conclusive, there is certainly evidence to suggest police norms can be modified through training and example. *See, e.g.*, JANET B.L. CHAN, CHANGING POLICE CULTURE: POLICING IN A MULTICULTURAL SOCIETY (1997); Jonathan Simon & Jerome H. Skolnick, *Federalism, the Exclusionary Rule, and the Police*, *in* POWER DIVIDED: ESSAYS ON THE THEORY AND PRACTICE OF FEDERALISM 75, 80 (Harry N. Scheiber & Malcolm M. Feeley eds., 1989).

[205] Dasgupta, *supra* note 20, at 157.

[206] Just as officers are subject to random drug tests, officers could be subject to random audits of their stop and frisk data. This would both send a message to officers that police departments are committed to eradicating inappropriate racial discrimination, and it would have the effect of motivating officers to employ race-free criteria in determining whether to engage in an encounter or stop.

[207] *See* I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1 (2008) (proposing and exploring the benefits of decision-makers engaging in a switching, or cross dressing, exercise). This idea builds upon Cynthia Lee's proposals for analyzing self-defense and provocation cases. *See* CYNTHIA LEE, MURDER AND THE REASONABLE MAN 12 (2003).

picion requirement should be encouraged to switch the racial identity of the suspect in various fact patterns. Would they then reach the same conclusion about reasonable suspicion, or about electing to conduct an encounter, if the subject were white instead of black, or Hispanic instead of white? Officers reaching the same decision would know that they are not being influenced by racial bias. Officers making a different decision, however, can then determine for themselves whether their different decision can be justified—that is, whether their consideration of race is appropriate or inappropriate. Based on this training, a clean-cut Hispanic male in casual clothing strolling through a predominantly white neighborhood will probably not warrant a stop or an encounter. By contrast, a Hispanic male in gang clothing peering into the window of parked cars in a predominantly white neighborhood should. Switched to white, the same result should be reached.

Increasing the diversity of police forces is also likely to impact how officers view race. Research has shown that when a person forms a new personal connection with a member of a previously devalued group, a preexisting negative implicit bias can be replaced by a positive implicit bias.[208] The presence of an out-group individual in a leadership position has also been shown to reduce negative implicit biases.[209] Unfortunately, police forces across the country continue to be disproportionately white and disproportionately male.[210] Police departments are far more diverse than they were a few decades ago, but as David Sklansky recently observed, "virtually all departments have a good ways to go."[211] The lack of minority representation is especially acute in the upper echelons of departments. As recently as 2001, only nine of the New York Police Department's 465 police captains were African American.[212] A more diverse police force, one with a "critical mass" of minorities, is likely to view their environs as more diverse and to recognize that black or brown against a backdrop of white does not equal reasonable suspicion.[213]

---

[208] *See, e.g.*, Andreas Olsson et al., *The Role of Social Groups in the Persistence of Learned Fear*, 309 SCI. 785, 786 (2005) (reporting correlation between interracial dating and decrease in negative implicit bias).

[209] *See, e.g.*, Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudices*, 6 PERSONALITY & SOC. PYSCHOL. REV. 242, 247 (2002) (finding that subjects' automatic stereotypes became weaker after subjects received a positive evaluation from a black supervisor).

[210] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 55 tbl.1.58 (showing ratio of minority officers to minority residents in large city police departments).

[211] David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1211 (2006).

[212] *See* C.J. Chivers, *For Black Officers, Diversity Has Its Limits*, N.Y. TIMES, Apr. 2, 2001, at A1. There are signs of change, of course. A recent class of police recruits in New York City was composed mostly of minorities, a first in New York. *See* Jennifer Lee, *In Police Class, Blue Comes in Many Colors*, N.Y. TIMES, July 8, 2005, at B1.

[213] This is consistent with research showing that "the experience of working together across lines of social division . . . though not untroubled by prejudice and hostility, tends to reduce prejudice and hostility." CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 84 (2003).

Of course, changing the way we police alone will not eradicate residential segregation. The police receive their cues from society, which is in my opinion one of the unexplored drawbacks of community policing. Ultimately, if equal citizenship is the goal, the hard work must be done by all of us: "local legislators, executives, the police command structure and citizens in their communities."[214] Starting with the police, our most visible state actors, we can make a difference in how neighborhoods are perceived. That is reason enough to take this proposal seriously.

V. Conclusion

When I began this Article, I was reminded of two stories. One was about Randall Kennedy. At a symposium I attended, Kennedy described the preventative measure he took when he moved to a predominantly white neighborhood. To preempt any suspicion from passing police, to avoid having a gun pointed at him or being told to freeze, he drove to the local precinct, introduced himself as a new resident, and inquired about volunteering his services, perhaps with a neighborhood watch organization. The other story dates back to when I was a federal prosecutor, and involves one of the questions put to a black applicant. The question was this: If an officer saw a white male approach a young black male in Union Square Park, would that constitute reasonable suspicion of a drug crime? The other interviewers in the room apparently shifted in their seats, in part because they clearly thought the answer was no while the person who asked the question clearly thought the answer was yes. But mostly, it was because his question suggested a type of litmus test to the black applicant, to see if the applicant could be "objective," "unbiased," and recognize black criminality. I found the question troubling for yet another reason. At the time, I lived two blocks from Union Square Park in a neighborhood that is predominantly white. I thought the interviewer's question could be describing me. I am black and my partner is white. If we were in the park, two blocks from where we lived, would we be deemed suspicious?

There are other stories that have informed my thinking about the link between policing, place, and race. Stories that inform the streets on which I walk in the evening, in which neighborhoods my partner and I choose to live. The consequences of how we police are real even to those of us who would never dream of committing a crime, even to those of us who are former prosecutors.

Regina Austin has written nostalgically about a time when the black community stood more clearly apart from the white community, both geographically and in terms of outlook, a time when "blacks were clearly distinguishable from whites and concern about the welfare of the poor was more

---

[214] Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. Rev. 785, 810 (1970).

natural than our hairdos," when the black community was "Home."[215] But I think for many of us dedicated to "mak[ing] America what America must become"[216]—fair, egalitarian, responsive to needs of all of its citizens, and truly democratic in all respects, including its policing—our vision of home is different. Home is neither black, nor white, nor any other color. As Toni Morrison put eloquently:

> I have never lived, nor has any of us, in a world in which race did not matter. Such a world, one free of racial hierarchy, is usually imagined or described as dreamscape—Edenesque, utopian, so remote are the possibilities of its achievement. From Martin Luther King's hopeful language, to Doris Lessing's four-gated city, to Jean Toomer's "American," the race-free world has been posited as ideal, millennial, a condition possible only if accompanied by the Messiah or situated in a protective preserve—a wilderness park. But . . . I prefer to think of a-world-in-which-race-does-*not*-matter as something other than a theme park, or a failed and always-failing dream, or as the father's house of many rooms. I am thinking of it as home.[217]

That is my vision of home, and country. The task that lies ahead is mapping a route there. This Article, hopefully, makes a start.

---

[215] Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1769-70 (1992).

[216] *See* JAMES BALDWIN, THE FIRE NEXT TIME 24 (1963) ("[G]reat men have done great things here, and will again, and we can make America what America must become.").

[217] Toni Morrison, *Home, in* THE HOUSE THAT RACE BUILT: BLACK AMERICANS, U.S. TERRAIN 3, 3 (Wahneema Lubiano ed., 1997).