IS CRIMINAL LAW UNLAWFUL?

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ABSTRACT

A legal theorist reading contemporary criminal justice scholarship is confronted with a troubling sense of dissonance. Foundational to modern accounts of the concept of law are rules, and the chief modality of law's operation in ordinary peoples' lives is said to be in enforcing those (primary) rules. Normative theories by philosophers of law typically deploy this rule-oriented character as a key virtue of legal systems, whether in Fullerian theories of the moral value of law itself in terms of its facilitation of autonomous self-application by individuals of the rules that apply to them, or in theories of the rule of law according to which one of the key criteria of good legal systems is that they only coerce individuals pursuant to rules.

Yet, criminal justice scholars have known for decades that rule-enforcement is at best incidental to vast swathes of criminal justice. Even before the advent of "broken windows" policing, a large portion of police work was focused on coercively organizing public space, with minimal regard to the rules of substantive law. Scholars of misdemeanor adjudication—the judicial destination of the arrests that result from this mode of policing—have described a process in which the ultimate disposition of defendants is unconnected to any serious effort to determine whether some law has been violated. This lawlessness of criminal justice is exacerbated by, and itself exacerbates, America's underlying system of race and class

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hierarchy. In short, instead of a system of law enforcement, American criminal justice is a key exemplar of what critical race scholars have called "structural racism," in which individual and organizational incentives reproduce racially unjust outcomes even in the absence of individual racial malice.

Legal philosophers must reconcile their theories with reality by confronting the fact that a sector of American "law" with immense practical significance does not, in fact, constitute an application of law (for conceptual theorists) or the rule of law (for normative theorists) at all.

In this context, some lessons may be drawn from an analogous juridical context. A handful of scholars have suggested that the system of criminal justice is more administrative than legal. Moreover, advocates and scholars have long articulated severe critiques of the federal administrative state on rule of law grounds. Thus, the discourse around the administrative state can serve as a model for how legal theorists should confront the criminal justice state.

While some scholars appear to have supposed that the notion of legality simply does not apply to the administrative state, others have propounded radical challenges to that state which have reflected a willingness to sacrifice other important interests in the pursuit of legal fidelity. Results such as the recent Supreme Court decision in West Virginia v. E.P.A. *have suggested that even the pursuit of existential policy goals like combatting climate change must give way to the concept of legality underneath challenges to the administrative state. If such challenges are any model to follow, then rule of law advocates and scholars must at least consider similar radical challenges to the criminal justice system, such as police abolition, to be on the table.*

Put differently, everything that critics of U.S. administrative law such as Justice Neil Gorsuch say is wrong with the administrative state is also wrong with the carceral state, but more so. In addition to falling further short of rule of law standards, the lion's share of U.S. criminal law as actually practiced on the ground is also targeted against the most vulnerable, violent, and racist to boot. The basic virtue of consistency requires those critics to endorse a root-and-branch reconstitution of American criminal justice.

INTRODUCTION

The rule of law in the United States is—unfortunately—an elite discourse.[1] Much of the energy of scholars, advocates, and policymakers in the area focuses on the economic interests of property holders, rather than those who are actually subject to arbitrary state power.[2] This is reflected in the disproportionate attention that rule of law critics of the federal administrative state pay to industrial regulation in the form of agencies like the EPA and SEC rather than the intensely arbitrary and coercive immigration apparatus; it is also reflected in the long history not only of neglect of the Black role in American rule of law development but even the deployment of rule of law ideas as a cudgel against Black movements to demand the protection of the law.[3]

This Article offers American criminal justice as another major blind spot in the rule of law discourse. Rule of law scholars, as well as more general legal theorists who advance rule of law-focused accounts of the moral value of law itself (such as Lon Fuller[4] and Jeremy Waldron[5]), have traditionally placed substantial weight on a model of the relationship between people and the law which we could call the *model of rule-following*.[6] On the model of rule-following, the law states rules in advance of conduct which are taken to provide or identify reasons for individuals to act in accordance with them (at least under favorable normative circumstances, i.e., if those laws are enacted by a liberal-democratic legislature, comply with basic human rights, etc.), and the state only engages in coercion if rules are not followed.[7] The model of rule-following is frequently offered as a core

1. By this, I mean that it is primarily conducted by elites and in the interests of elites—powerful government officials, companies, and social and cultural elites (including law professors).

2. *See* Paul Gowder, *The Dangers to the American Rule of Law Will Outlast the Next Election*, 2020 CARDOZO L. REV. DE NOVO 126, 144–45 (2020).

3. *See, e.g.*, PAUL GOWDER, THE RULE OF LAW IN THE UNITED STATES: AN UNFINISHED PROJECT OF BLACK LIBERATION 22–25, 28, 32–34 (2021) (discussing the rule of law idea of the protection of private property rights at the American founding and its abuse to protect slavery); Paul Gowder, *Review of Cass Sunstein and Adrian Vermeule, Law and Leviathan: Redeeming the Administrative State*, 31 L. & POL. BOOK REV. 12, 16, 19, 21 (2021) (criticizing rule of law and administrative law scholars for ignoring immigration in favor of ill-grounded critique of industrial regulation).

4. *See* LON L. FULLER, THE MORALITY OF LAW 162 (revised ed. 1969).

5. *See* JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 52 (2012).

6. *See infra* Part I.

7. *See infra* Part I.

criterion of the moral value of the rule of law, insofar as it permits individuals to exercise their autonomous reasoning capacity to decide how to respond to the commands given by the law and minimizes the infringement of the law on an individual's freedom of choice.[8]

However, at least since the 1960s, many critical criminal law scholars have identified that the United States criminal justice system doesn't actually work that way.[9] Rather, American criminal justice functions primarily as a system of discretionary supervision of mass populations (and particularly mass populations subordinated by race and class).[10] The conflict between supervision (sometimes under the term "order") and legality has been well known to criminologists and sociologists for decades; for example, perhaps the most prominent work of sociology of policing, Jerome Skolnick's *Justice Without Trial*, frames its inquiry by asking on the very first page whether police are "principally an agency of social control" or "an institution falling under the hegemony of the legal system, with a basic commitment to the rule of law."[11]

This Article does not purport to evaluate or contribute to the criminal justice argument, as I am not a criminal justice scholar. Rather, I merely identify the criminal justice scholarship in my capacity as an outsider, and bring it into conversation with the rule of law (primarily) and conceptual jurisprudence (secondarily) literature, which have mysteriously proceeded largely as if the sociology of criminal justice does not exist. Thus, it asks: suppose the supervision/management account of criminal justice is true? How should rule of law scholars and advocates, as well as scholars in conceptual jurisprudence respond? Such scholars have three options. They may modify their accounts of the rule of law, and in some cases of law itself, to adapt to the discrepancy between theory and criminal

8. *See infra* Part I.
9. *See infra* Part II.A.
10. *See infra* Part II.
11. *See* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 1 (1966). Alice Ristroph has suggested that the dominant contemporary mode of understanding criminal law in law schools is more aspirational than actual, and was created in the same mid-twentieth century period as part of an effort to promote both scholarly respectability for the field and actual reforms in its practice. Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1635 (2020). Of particular importance for the present Article, Ristroph identifies that the constraints of "legality" associated with the rule of law, such as the principle *nulla poena sine lege* and a functioning void for vagueness doctrine, are in fact "imagined" rather than actual constraints on actors in the criminal justice system. *Id.* at 1653–58.

justice reality. They may develop an account of criminal justice's nonlegal character and with it an alternative normative and conceptual theory of the principles underneath its actual operation. Or they may condemn criminal justice *tout court*.[12] However, this Article focuses on the last two of those options, as the first would abandon the distinctive moral idea of the rule of law in its prohibition on arbitrary power.[13]

The analysis in this Article primarily focuses on police, as the street-level face of criminal justice which—by necessity—has the highest volume of contact with (and hence of supervision of) ordinary people, as well as the broadest literature within criminal justice. However, the analysis is meant to extend to the criminal justice system as a whole, and it draws on literatures surrounding prosecutors and (primarily misdemeanor) criminal courts as well.[14]

Parts I and II set up the scholarly background for this Article.[15] Part I describes the model of rule-following and identifies its connection with accounts of the moral value of the rule of law.[16] Part II reviews the criminal justice literature on the supervisory function of criminal justice and further argues that this function is inextricable from the vesting of widespread discretion in actors in the criminal justice system. As widespread discretion is a traditional red flag in rule of law discourse, Part II delves with some depth into the ways in which American criminal justice instantiates such discretion, and the

12. This approach derives from the general methodological standpoint I have defended in Paul Gowder, *Institutional Values, or How to Say What Democracy Is*, 30 SW. PHIL. REV. 235 (2014), which argues that concepts like the rule of law must cohere with at least aspirational, if not actual, accounts of the real-world states taken to exemplify them. *See also* Paul Gowder, *The Rule of Law and Equality*, 32 LAW AND PHIL. 565, 568–73 (2013) (elaborating on the same argument).

13. *See infra* Part I.

14. "By necessity" because an individual cannot come into involuntary contact with the other elements of criminal justice, such as prosecutors and courts, without first being apprehended by some police officer. Felony policing and adjudication may not be supervisory to the same extent. However, as discussed *infra* at Part II, the aspects of criminal justice which scholars have identified as predominantly supervisory occupy a massive and immensely socially significant proportion of American criminal justice interactions. *See, e.g.*, Alexandra Natapoff, *Misdemeanors*, 85 S. CALIF. L. REV. 71, 77–78 (2012) (describing vast scope of misdemeanor system). Accordingly, the disjunction between such an important part of criminal justice and legal theory is notable and important even if that disjuncture does not extend to the entirety of American criminal justice.

15. *See infra* Part I; *infra* Part II.

16. *See infra* Part I.

inconsistency of such discretion with dominant accounts of the rule of law.[17]

Part III argues that supervisory criminal justice is substantially worse, from the rule of law standpoint, than the more familiar concerns of rule of law scholars and advocates like the administrative state.[18] This Part introduces the egalitarian theory of the rule of law from my prior work, which identifies the moral value of the rule of law with its capacity to contribute to legal, social, and political equality.[19] It argues that criminal justice is distinctive, relative to administration, because of its focus on race/class subordinated communities.[20] It further offers an informal theoretical model suggesting that this focus is built into existing patterns of American segregation: because of segregation, residents of privileged communities have an incentive to demand the supervisory policing of residents of subordinated communities; residents of subordinated communities lack the capacity to defend themselves from such policing; and police in subordinated communities have strong incentives to choose strategies of aggressive supervision and swift violent escalation of conflicts.[21] Importantly, these incentives are rational and do not depend on individual police officers holding racist or other pernicious views—policing under segregation is, on the informal model, an example of what critical race theorists call "structural racism."[22]

Part III contextualizes its informal model in an account of arbitrary power borrowed, implicitly, from Posner and Vermeule's defense of American executive power, according to which power becomes objectionably arbitrary when it is inadequately constrained

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17. *See, e.g.*, ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 120 (1982) (stating rule of law "excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government").

18. *See infra* Part III.

19. *See, e.g.*, PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD (2016) (defending an egalitarian theory of rule of law); Gowder, *The Rule of Law and Equality, supra* note 12 (same).

20. *See infra* Part III.

21. *See infra* Part III.

22. *See, e.g.*, Daria Roithmayr, *Them That Has, Gets*, 27 MISS. C. L. REV. 373, 374–75 (2008) (giving structural account of persistent residential segregation in terms of feedback loops). *See generally* john a. powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 793 (2008) (describing concept of structural racism in critical race theory) (professor powell chooses to render his name in lowercase).

by legal, social, economic, or political constraints.[23] More familiar rule of law objections to things like federal economic regulation do not pose the danger of arbitrary power, because the objects of state action in those domains have substantial social and political resources with which to defend themselves.[24] However, because the supervisory functions of American criminal justice are concentrated in domains in which the objects of such supervision largely lack social, economic, or political power (again, particularly among those who occupy subordinated positions in racial and class hierarchies), the danger of the inadequate legal controls over criminal justice power is that this power can be wholly arbitrary.[25] Thus, from the rule of law perspective, racial and class subordination serves two functions in supervisory criminal justice: first, it permits supervisory criminal justice in the first place by disabling political opposition to the lack of legal constraints on criminal justice officials (the collective function of subordination); second, it exacerbates the vulnerability of individual targets of discretionary authority to that authority by disabling them from deploying alternate sources of social power to protect themselves (the individual function of subordination).[26]

This Article concludes by offering both rule of law scholars and those in conceptual jurisprudence the choice described above.[27] Reality does not match their theories, therefore either their theories need to be abandoned or modified, or sustained critique needs to be made of reality.[28] Two options are presented. The first is to task legal theorists with developing accounts of the nature and normative considerations surrounding the project of order-maintenance—accounts that treat the use of state coercion for the sake of order on its

23. *See infra* Part III. Posner and Vermeule argue that the United States President does not have unconstrained power because, even though the law does not constrain the President, democratic politics does. *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 12–15, 208–10 (2010). I do not endorse their positive claims about the existence of democratic constraints on the President, but instead borrow their higher-level idea that other kinds of constraint can substitute for legal control.

24. *See infra* Part III; Gowder, *supra* note 3, at 39–43 (arguing that rule of law critics of administrative law should focus on agencies like the Departments of Justice and Homeland Security that directly inflict violence on vulnerable individuals, as opposed to regulatory agencies governing the behavior of industrial firms that are perfectly capable of defending themselves in the social, economic, and political spheres).

25. *See infra* Part III.

26. *See infra* Part III.

27. *See infra* Part III.

28. *See infra* Part III.

own terms, recognize the value in such activities (to the extent there is any), and develop theories of how those values can be achieved without the built-in race and class inequality of the current system or the conferring of arbitrary power on individuals.

The second option is that legal theorists with a model of rules/rule of law orientation should shift their critical focus away from problems like the administrative state and toward problems of criminal justice. It is striking that in the administrative law domain, critics of the federal administrative state appear to have adopted a radical kind of *fiat justitia ruat caelum* approach to the rule of law challenges of the field, according to which pragmatic tradeoffs between effective government and legal fidelity are ruled out.[29] Thus, the importance of achieving ends like the regulation of the financial sector, the control of pollution, or even the slowing of a deadly pandemic do not seem to have moral weight to critics of administrative law against the alleged legal failures of that field. By contrast, critics of the lawlessness of criminal justice who are drawn to radical movements like prison and police abolition are criticized for failing to attend to the costs and tradeoffs involved.[30] It is concluded that if rule of law critics of the administrative state are to be consistent in their radicalism, then ideas like police and prison abolition must at least be on the table.[31]

I. THE MODEL OF RULE-FOLLOWING

This Part describes a basic premise of much conceptual as well as normative work on the legal mode of regulating behavior, which I call "the model of rule-following." On it, the law characteristically controls behavior by setting out discrete and more-or-less determinate rules in advance, which individuals are asked to apply to their own conduct; the law does not license coercion to interfere with individuals' behavior except insofar as they choose to disobey the rules. It is this model which, subsequent Parts will claim, is embarrassed by contemporary American criminal justice.

One challenging feature of the philosophical literature on the law is a certain slippage between the conceptual and the normative.[32] This

29. *See infra* Conclusion.

30. *See generally* Stephen Rushin & Roger Michalski, *Police Funding*, 72 FLA. L. REV. 277 (2021).

31. *See infra* Conclusion.

32. This, of course, has been a central issue within the classic debates surrounding legal positivism of the 20th century, such as the Hart-Fuller and Hart-Dworkin debates. *See, e.g.*, Nicola Lacey, *Philosophy, Political Morality, and*

Part describes a core feature of many conceptual accounts of what law is, as well as a feature of many descriptions of a normative value, "the rule of law," understood as a property that the law can have to a greater or lesser extent.[33]

For present purposes, however, it is not necessary to cleanly distinguish between the normative and conceptual. We may simply observe that there is something like a model of how the law regulates behavior, which depends on rule-following in the way noted above. Depending on whether one takes this model to be more conceptual or more normative, the response that one might offer to observing that a given category of government behavior is not compatible with the model of rule-following might be to (a) deny that the behavior in question constitutes an instance of the application of law (as opposed to some other mode of behavioral regulation), or it might be to (b) accept that the behavior in question constitutes an instance of the application of law, but criticize it for doing so in a normatively unacceptable way, that is, by failing to comport with the rule of law. One might also do something in between—one might say, for example, that the observed government behavior is morally blamable because it is insufficiently lawlike, where the resemblance to a conception of the nature of law is put to service as a ground of normative critique. This Article is agnostic as to how precisely such a claim ought to be framed.

Regardless of whether the model of rule-following is taken as an element of a normative account of the rule of law, a conceptual account of law itself, or something in between, however, there is a second option available to a scholar who observes an inconsistency between a substantial amount of government behavior and the model.

History: Explaining the Enduring Resonance of the Hart-Fuller Debate, 83 N.Y.U. L. REV. 1059, 1059–60 (2008) (discussing Hart-Fuller debate with attention to the ambiguous role of morality as well as social science in Hart's conceptual theory). It has also been prominent in some important contemporary efforts to reimagine the task of conceptual jurisprudence; I find recent contributions by Scott Hershovitz and Lewis Kornhauser to be most helpful in clarifying ways that the concept of law could have normative meaning without falling into the traps associated with the 20th century debates. *See, e.g.*, Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1160 (2015); Lewis A. Kornhauser, *Law as an Achievement of Governance*, 47 J. LEGAL PHIL. 1, 1 (2022).

33. As I have argued elsewhere, "a continuum, not a binary." *See* GOWDER, *supra* note 19, at 26.

That is to alter the model. For there is an empirical aspect to both our theories of what law is and our theories of the value of the rule of law.[34]

This Article's Conclusion will more fully consider the options available to a scholar who subscribes to something like the model of rule-following, either as a normative or a conceptual matter, and accepts this Article's argument about the dissonance between American criminal justice and that model.[35] I now proceed to more fully explicate that model.

A. The Concept of Law (Moralized or Otherwise)

In his 2009 *Tanner Lectures*, leading rule of law scholar Jeremy Waldron offered a description of the function and moral value of the law that can stand as a central version of the model of rule-following.[36] In his first lecture, Waldron offers an account of the moral value of dignity as representing the idea of universal high rank.[37] In the second lecture, Waldron explicates Lon Fuller's theory of law's moral value through the notion (borrowed from Hart and Sacks) of self-application, and argues that self-application is a way that law protects the dignity of all.[38]

Here's how Waldron describes self-application:

> Self-application is an important feature of the way legal systems operate. They work by using, rather than short-circuiting, the agency of ordinary human individuals. They count on people's capacities for practical understanding, self-control, self-monitoring, and the modulation of their own behavior in regard to norms that they can grasp and understand. All this makes ruling by law quite different from (say) herding cows with a cattle prod or directing a flock of sheep with a dog. It is quite different too from eliciting a reflex recoil with a scream of command. A pervasive emphasis on self-application is, in my view, definitive of law, distinguishing it sharply from systems of rule that work primarily by manipulating, terrorizing, or galvanizing behavior.[39]

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34. On the conceptual account, Hart's claim that jurisprudence is part sociology is canonical. *See* Kornhauser, *supra* note 22, at 1–2, 14–18 (discussing Hart's claim that the concept of law is partly sociological). For the rule of law, I have elsewhere defended the proposition that our accounts of the rule of law must be responsive to real-world observations of rule of law states. *See* Gowder, *Institutional Values, or How to Say What Democracy Is*, *supra* note 12, at 12; GOWDER, *supra* note 19, at 9; Gowder, *The Rule of Law and Equality*, *supra* note 12, at 568–73.

35. *See infra* Conclusion.

36. *See* WALDRON, *supra* note 5, at 33.

37. *See id.*

38. *See id.* at 51–53.

39. *See id.* at 52.

Waldron connects this to the idea of dignity as universal high rank by associating high rank with self-management, as opposed to management by others.

> But self-command is more than just *setting one's stance*, as it were. It is also a matter of people fine-tuning their behavior effectively and gracefully in response to the legitimate demands that may be made upon them, controlling external behavior—monitoring it and modulating it in accordance with one's understanding of a norm. This one might imagine as a quintessentially aristocratic virtue, a form of self-command distinguished from the behavior of those who need to be driven by threats or the lash, or by forms of habituation that depend upon threats and the lash. But if it is an aristocratic virtue, it is one that law now expects to find in all sectors of the population.[40]

Observe how Waldron combines what we might think of as traditional values of freedom and equality in the quoted passage.[41] The value of freedom seems to reside in the notion that people aren't being bullied about, that in some important sense the law makes it possible for them to make their own decisions, to reason about the law and decide to obey it (although the law, of course, still has some teeth to back up the reasoning process).[42] It does not do, for example, some kind of creepy behaviorist conditioning to them. Nor does it operate through other non-rational means, by, for example, training people to cower in fear and obey one-off commands (Waldron's "threats and the lash").[43] While force is involved as a backstop, I understand Waldron to be arguing that the law expects people to obey primarily because of the reason the law represents.[44]

As for equality, Waldron's emphasis on "all sectors of the population" illustrates the key point: in contrast to aristocratic or oligarchic societies where elites are expected to obey the law because of its reason-giving power and lower classes are pushed around, all

40. *See id.* at 53.
41. *See id.*
42. *See id.*
43. *See id.*
44. Talk of what the law "expects" should probably be taken in a constructive sense as what we would interpret the actions of a rational agent speaking in the voice of the law to offer, as in Paul Gowder, *Equal Law in an Unequal World*, 99 IOWA L. REV. 1021, 1040–45 (2014). The tradition of voicing the law in this sense goes at least back to Plato's *Crito*. See, for example, my rationalistic interpretation of the argument of the Laws in Crito in Paul Gowder, *What the Laws Demand of Socrates—and of Us*, 98 THE MONIST 360, 362–67 (2015).

individuals, even the lowest, are trusted to apply the law to themselves in Waldron's society of dignity-respecting law.[45]

This connection between reason-giving and equality in the law, incidentally, can be discovered as far back as Plato.[46] In his *Laws*, Plato suggests that a law should begin with a prelude stating the reasons for its enactment, and he defends this principle by drawing an analogy between the different practices of a doctor for slaves, who just orders their patients about, and a doctor for free people, who "both learns himself from the sufferers and imparts instruction to them, so far as possible; and he gives no prescription until he has gained the patient's consent, and only then, while securing the patient's continued docility by means of persuasion."[47]

One key objection to this line of argument is that all law is ultimately backed by the threat of violence.[48] It might be worried that the presence of such threats crowd out the capacity for law to genuinely respect human autonomy and reasoning capacity. But Waldron has a response to that:

> Law looks wherever possible to voluntary compliance, which of course is not the same as saying we are never coerced, but which does leave room for the distinctively human trait of applying norms to one's own behavior. This is not a trick; it involves a genuinely respectful mode of coercion.
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> Max Weber is famous for observing that, although "the use of physical force is neither the sole, nor even the most usual, method of administration," still its threat "and in the case of need its actual use… is always the last resort when others have failed." But it would be wrong to infer from this that law uses any means necessary to get its way. The use of torture, for example, is now banned by all legal systems. Elsewhere I have argued that modern law observes this ban as emblematic of its commitment to a more general nonbrutality principle: "Law is not brutal in its operation; . . . it does not rule through abject fear and terror, or by breaking the will of those whom it confronts. If law is forceful or coercive, it gets its way by methods which respect rather than mutilate the dignity and agency of those who are its subjects." I think this general aspiration is now fully internalized in our modern concept of law. The law may force people to do things or go places they would not otherwise do or go to. But even when this happens, they are

45. *See id.*

46. *See* PLATO, LAWS 4.179e–4.723d (R.G. Bury trans., Harv. Univ. Press 1967).

47. *See id.*

48. The most famous expression of this point is probably Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

> not herded like cattle, broken like horses, beaten like dumb animals, or reduced to a quivering mass of "bestial desperate terror."[49]

I read Waldron to be drawing a distinction between two ways that law might have to resort to force. If force is the primary option for law, then it rules by fear—the assumption is that whenever force is not immediately threatened, the law won't be obeyed, for people are not willing to obey the law except under immediate threat. The practical implications of such a system include, for example, continual monitoring—if law will be obeyed only under immediate threat of force, then that threat must be omnipresent and highly credible in the lives of those who are asked to obey. Another practical implication, which Waldron alludes to with "broken like horses," is that the continual threat of force has psychological and relational effects on the ruled—it tends to reduce them to obsequiousness and subordination, just because of the way that omnipresent force terrorizes those over whom it is held.[50] This closely resembles the psychological goal of chattel slavery, which resorted to "slave-breakers" like Covey (famous for Frederick Douglass's daring to fight back against him) as well as legal distortions meant to communicate to the enslaved that there was no protection against the violence of the master.[51] The example of slave law suggests that some kinds of things that claim to be law can be more or less oriented around violence as opposed to autonomous compliance; at a minimum, Waldon's argument suggests that contemporary liberal democratic systems of law are closer to the autonomy-respecting end of the spectrum than other readily apparent modes of governance. In particular, the notion that modern law "leave[s] room" for self-application suggests a kind of system of priorities in the reasons that law gives: while force is on the menu, it remains offstage in the day-to-day lives of those under

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49. *See* Waldron, *supra* note 5, at 63–64; *see also* Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200, 205–08 (2012) (explicating Lon Fuller's idea that the law's self-applying character responds to the dignitary interests of those living under it).

50. *See id.*

51. On the slave breaker, see FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 242 (1857); on the communicative goal of slave law, see, for example, *State v. Mann*, 13 N.C. 263, 267 (1829) (enslaved person as victim of battery) ("We cannot allow the right of the master to be brought into discussion in the Courts of Justice. The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God."); for a discussion of the way that servile work arrangements can induce psychological servility, see DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS 184–86 (2010).

contemporary law (contrasting in that sense with something like slave law), and consequently contemporary law at least permits (even if it does not require) people to reason about their behavior without having to take force into account. Something like slave law, by contrast, foregrounds the violence and prioritizes rule by fear.[52]

Waldron's version of the model of rule-following is self-consciously drawn from Lon Fuller.[53] Fuller himself articulated similar ideas in a passage in *The Morality of Law* titled *The View of Man Implicit in Legal Morality*.[54] In that section, Fuller contrasts the law's recognition of "man's dignity as a responsible agent" and "powers of self-determination" to the behavioral conditioning of B.F. Skinner.[55] The law is an "enterprise of subjecting human conduct to the governance of rules" and that entails "a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults."[56] For Fuller, this is connected to our practices of praising and blaming: if humans are not capable of following rules, with some degree of free will, then it makes it more difficult for us to say that they have done something wrong when they violate those rules.[57]

Evan Fox-Decent explains the Fullerian approach in terms of yet another contrast with a non-legal mode of governance, namely, "managerial direction."[58] Distinctive of managers is that they take relatively minute control of the details of the behavior of the managed, "go[ing] much further than law in defining the ends to be pursued (ends the subordinate may not share) as well as the specific means of achieving them."[59] This incorporates two distinct moral ideas. First, the notion that behavioral micromanagement—go here, press this button, jump this high—fails to treat people as autonomous reasoners. Second is the democratic notion implicit in the reference to ends in the quotation above—that at least in more or less democratic societies, a subject of law also has the capacity to engage in collective reasoning

52. *See* Waldon, *supra* note 5, at 63–64.
53. *See id.* at 51.
54. *See* FULLER, *supra* note 4, at 162.
55. *See id.* at 162–64.
56. *See id.* at 162.
57. *See id.* at 167.
58. *See* Evan Fox-Decent, *Is the Rule of Law Really Indifferent to Human Rights?*, 27 LAW & PHIL. 533, 553 (2008).
59. *See id.*

with those who determine the rules.[60] To my mind, there is a democratic dimension to Waldron's account as well: the most plausible reason that an aristocrat might apply the law to themselves is because they have a stake in society as a whole, one that gives them reasons of solidarity to pursue the shared ends represented by the law.[61]

Nor is the model of rule-following limited to explicitly moralized conceptions of law like the Fullerian school.[62] Hart too connected the notion of law to rule-following rather than order giving.[63] He begins *The Concept of Law* by registering his disagreement with Austin's conception of law as the command of the sovereign, noting in the first instance that law typically operates by general commands which are addressed to the population at large, rather than individuals—that is, (primary) rules.[64] When secondary rules enter the picture, those too are general, and bear little resemblance to commands given by one determinate person to another.[65] Moreover, Hart's argument implicitly depends on the capacity of those rules to recruit the reasoning capacity of the individuals subject to them, for they permit the adoption of an internal point of view which does not merely reason "I should do X because otherwise the state will hit me," but also makes available ideas like "obligation" which treat the rules as reason-giving independent of their punitive capacity.[66]

It is important to identify what the rule-following model does not entail. By offering the rule-following model as the dominant view of how the law relates to individuals, I do not mean to suggest that legal theorists think that legal decision makers (particularly judges) must mechanically apply rules instead of doing justice in an individual case. Frederick Schauer, for example, argued against a rigid conception of the law that rules out such individualized justice.[67] But even under

60. Moreover, the processes of enforcement and adjudication may leave open some capacity for the exercise of shared reason in the form of arguing about the rules and their applicability to one's conduct.

61. I may be illicitly reading that into Waldron by way of Plato. *See* Gowder, *supra* note 44, at 367–68 (interpreting the argument of the Laws in Plato's *Crito* along those lines).

62. *See* FULLER, *supra* note 4, at 162.

63. *See* H.L.A. HART, THE CONCEPT OF LAW 8 (2d ed., 1994).

64. *See id.* at 20–22.

65. *See id.* at 79.

66. *See id.* at 84–91.

67. *See* Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 656–57 (1991).

what Schauer calls "presumptive positivism," rules will exist—there will just be some possibility of permissible variation from them.[68] By contrast, I read Waldron to be drawing a contrast between a society governed by rule and one governed by command, in which there are no rules (at least for some people) but only orders by their betters.

B. The Rule of Law

The rule of law is a moral ideal governing legal systems and, more broadly, arrangements of state or state-like power.[69] Scholars, commentators, and jurists in liberal-democratic systems generally agree on the value of the rule of law, but tend to disagree on the meaning of the ideal and what it requires, to the point that some scholars have described it as an "essentially contested concept."[70] Prominent areas of disagreement include, for example, the question of whether a state must have laws that treat all persons equally, and whether the rule of law requires that private persons obey the law.[71]

Notwithstanding this widespread disagreement, however, there is a broad area of overlap among mainstream conceptions of the rule of law, which we might describe as the *minimal core* of the concept. The minimal core captures the classic expression "a rule of law, not of men" by requiring that that state power not be arbitrarily used.[72] While I will more carefully fill out the notion of arbitrariness later on in this Article, for present purposes we can use the term loosely to mean a use of power that responds to someone's mere will rather than the

68. *See id.* at 677.

69. *See* Gowder, *The Rule of Law and Equality*, *supra* note 12, 569–70 (explaining relationship between the rule of law and state power); *see also* Joseph Raz, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 225 (1979) (comparing the rule of law as evaluative principle for legal systems to sharpness as evaluative principle for knives).

70. *See, e.g.*, Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (In Florida)?*, 21 L. & PHIL. 137, 137 (2002); BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 91–113 (2004); Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 1 (1997).

71. *See, e.g.*, Raz, *supra* note 69, at 215–16. Regarding the rule of law requiring private persons to obey the law, see the discussion in Paul Gowder, *Resisting the Rule of Men*, 62 SAINT LOUIS UNIV. L. J. 333 (2018).

72. Gowder, *supra* note 19, at 8 (describing idea of arbitrary use of power); Gowder, *supra* note 71, at 334 (explaining idea of rule of men as contrast to rule of law).

commands of law.[73] Arbitrary power can be used to help one's personal friends and smite one's personal enemies, while power regulated by the rule of law is constrained to ensure that it only used for public purposes, where those purposes are disclosed in the form of preexisting legal rules.[74]

The minimal core of the rule of law is set against government officials who regulate the behavior of private persons by one-off commands: "go there," "stop that," "hop on one foot," "give me your wallet."[75] It is also set against legally unauthorized official violence—the opposite of a rule of law state, on every conception, is a state where government officials are free to arrest or beat up private persons just because the victim crossed someone powerful or the police simply wanted to arrest or beat them up.[76] The two basic elements of the minimal core go together: government officials who issue arbitrary commands can only expect those commands to be obeyed if they're backed up with force. For that reason, classical rule of law scholars, such as Albert Dicey, merge them into the claim that no person may be punished unless they have violated the law, and hence, that they might not be coerced into doing things not required by the law:

> It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.[77]

In the Anglo-American tradition, perhaps the most classic example of arbitrary power comes from the Five Knights' case (also known as Darnel's case) in Stuart England.[78] The Five Knights case was the habeas corpus case of, as the name expresses, five knights who had been jailed for refusing to pay the "forced loans" (i.e.,

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73. See *infra* Subsection III.C.6 for further elaboration on the notion of "arbitrary power."

74. *See* Gowder, *supra* note 19, at 12–13 (describing idea of role separation within core of the rule of law).

75. *See* Gowder, *supra* note 71, at 334 (describing incompatibility of such one-off commands with the rule of law).

76. *See* Gowder, *supra* note 19, at 13 (giving examples of Tonton Macoutes and KGB systems of terror as quintessential violations of rule of law).

77. *See* Dicey, *supra* note 17, at 120.

78. *See* T.B. HOWELL, COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, WITH NOTES AND OTHER ILLUSTRATIONS 57 (1816).

expropriations, illegal taxes) demanded by King Charles I to support his military adventures.[79] The Court of King's Bench rejected the writ, with Lord Chief Justice Hyde declaring, in relevant part:

> [t]hat, if no cause of the commitment be expressed, it is to be presumed to be for matter of state, which we cannot take notice of; you see we find none, no, not one, that hath been delivered by bail in the like cases, but by the hand of the King or his direction. [80]

In other words, that the King had the unconstrained power to order anyone thrown in prison and beyond the reach of the courts at will. This case was one of the major provocations that led to the Petition of Right, and, ultimately, the English Civil War and the removal of Charles I's head—a proceeding in which Parliament had charged that Charles had exceeded his "limited power to govern by and according to the laws of the land, and not otherwise" and claimed "an unlimited and tyrannical power to rule according to his will."[81] We may take Charles I's use of power in the Five Knights' case as the quintessential violation of the minimal core of the rule of law—just ordering someone put in jail on nothing more than executive say-so.

The heart of the reason for the prohibition on arbitrary power makes reference to the underlying moral goals of the rule of law. Various scholars have argued that the rule of law responds to the moral importance either of individual freedom[82] or of equal status.[83] On either account, however, arbitrary commands backed up by government coercion are impermissible. A state in which officials can roam around telling people what to do just on their say-so and beating them up if they disobey is one in which ordinary people lack the

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79. *See Darnel's Case*, BRITANNICA (Feb. 17, 2016), www.britannica.com/event/Darnels-case [https://perma.cc/TW3D-FQFH].

80. *See* HOWELL, *supra* note 78, at 57.

81. *See id*. at 222–23 ("against the tenor of the said statutes [Magna Carta], and other the good laws and statutes of your realm… divers of your subjects have of late been imprisoned, without any cause shewed ; and when for their deliverance they were brought before your justices, by your majesty's Writs of Habeas Corpus… no cause was certified, but that they were detained by your majesty's special command… without being charged with any thing to which they might make answer according to the law."); J.W. WILLIS-BUND, A SELECTION OF CASES FROM THE STATE TRIALS, VOLUME I, TRIALS FOR TREASON (1327–1660), at 573–74 (1879). On the details of the Five Knights case and its historical role, see Gowder, *supra* note 19, at 134; J. A. Guy, *The Origins of the Petition of Right Reconsidered*, 25 HIST. J. 289, 289 (1982); on its reflections in our own American constitutional heritage, see Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 143 (1952).

82. *See* Raz, *supra* note 69, at 220.

83. *See* Gowder, *The Rule of Law and Equality*, *supra* note 12.

capacity to plan out their lives or pursue complex goals requiring a secure sphere of personal autonomy, because official coercion is unpredictable;[84] it is also one in which those giving the orders stand in an insulting relationship of parent to child or boss to subordinate toward those on the receiving end, and in which those subject to arbitrary commands and arbitrary violence are given overwhelming reason to fearfully bow and scrape toward the ones who have that power.[85]

Even minimalist conceptions of that value tend to rest on the model of rules.[86] For example, Joseph Raz's well-known essay, "*The Rule of Law and its Virtue*," denies both that the rule of law has moral value independent of its feature in a well-functioning legal system (which itself may be moral or immoral in an all things considered sense depending on the ends attained by the substantive law—just as sharpness is a virtue of knives regardless of whether those knives are used to cook a gourmet meal or stab people) and that the rule of law requires that the rules be general in a strong sense.[87] Nonetheless, Raz endorses something much like Waldron's claim that one of the ends of the rule of law is to "respect human dignity" by permitting people to make long-term plans and not frustrating those plans—by going through the human capacity to reason (implicitly, about rules), "[i]t thus presupposes that they are rational autonomous creatures and attempts to affect their actions and habits by affecting their deliberations."[88]

The model of rules also features prominently in the canonical libertarian account of the value of the rule of law, that of Friedrich Hayek.[89] Hayek describes the rule-following character of the way that the law relates to individuals as a core element in the way that the rule of law preserves individual freedom, for it is those rules that establish what he calls a "recognized private sphere" in which a person is

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84. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (identifying predictability as requirement of rule of law); Raz, *supra* note 69, at 220 (identifying predictability as requirement of the rule of law).

85. *See* Gowder, *The Rule of Law and Equality*, *supra* note 12, at 587 (arguing that the rule of law captures value of being treated like an adult and an equal, rather than a child or a subordinate and describing incentives that lawless states give private citizens to behave obsequiously to those who hold state coercive power).

86. *See* Raz, *supra* note 69, at 225, 216.

87. *See id.*

88. *See id.* at 221–22.

89. *See* FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 207–08 (1960).

immune from official coercion.[90] Thus, Hayek nostalgically suggests that "[i]t used to be the boast of free men that, so long as they kept within the bounds of the known law, there was no need to ask anybody's permission or to obey anybody's orders."[91]

Hayek also echoes Fuller and Waldron in identifying the contrast between law and command-giving with a sphere of individual autonomy.[92] Laws are described as "abstract" and "general," and, because of this abstraction and generality, laws leave room for individuals to make their own decisions about how to comply while still carrying out their other ends:

> The important difference between the two concepts lies in the fact that, as we move from commands to laws, the source of the decision on what particular action is to be taken shifts progressively from the issuer of the command or law to the acting person. The ideal type of command determines uniquely the action to be performed and leaves those to whom it is addressed no chance to use their own knowledge or follow their own predilections. The action performed according to such commands serves exclusively the purposes of him who has issued it. The ideal type of law, on the other hand, provides merely additional information to be taken into account in the decision of the actor.[93]

Hayek goes on to elaborate that under a system of abstract rules, the lawmaker no longer sets an individual's ends; rather, the rules become something like tools for the individual who may work within them to serve their own ends.[94] Such rules facilitate autonomous decision by helping to render the world predictable—by "tell[ing] him what possible consequences of his actions he must take into account or what he will be held responsible for."[95]

In criminal law theory, the model of rule-following also finds expression in the classical principle of *nulla poena sine lege*—no punishment without law—reflecting the idea that there must be a violation of some preexisting rule before the state can inflict punishment.[96] This principle has been taken to require notice of the

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90. *See id.*; *see also* NIGEL SIMMONDS, LAW AS A MORAL IDEA 100–04 (2007) (arguing that the rule of law is valuable because it creates "zones of optional conduct where the state will not interfere"); *id.* at 141–42 (arguing that rule of law creates "domains of liberty that are independent of the will of anyone").

91. *See* HAYEK, *supra* note 89, at 208.

92. *See id.* at 149–50.

93. *See id.*

94. *See id.* at 152.

95. *See id.* at 157.

96. *See generally* Francis A. Allen, *The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the Nulla Poena Principle*, 29 ARIZ. L. REV. 385 (1987) (describing nulla poena principle and applications).

rules in advance of criminal punishment, and, on some accounts, the principle that criminal statutes must be strictly interpreted in favor of defendants.[97]

Having carried out this brief romp through legal philosophy, we can safely state a very broadly accepted version of the model of rule-following. On this model, the law primarily or exclusively regulates behavior by offering people rules, laid down in advance, to follow. With perhaps the exception of dire emergencies, the state neither punishes people other than for failing to obey a rule nor coerces them to carry out behavior not required by some rule.

While not all scholars would accept that the model of rule-following is morally important, many do, and the general basis of that moral importance can be summarized as "respect for autonomy."[98] By "respect for autonomy," I mean that on the model of rule-following the law both (a) facilitates peoples' practical autonomy by permitting them to live their lives in security from interference by the state except within the wide boundaries of the rules; *and* (b) expresses their dignity as people with autonomy in the Kantian sense, that is, as people capable both of setting their own ends and responding to reasons rather than people to be bullied about by force or fraud in the service of someone else's ends.[99]

II. Criminal Justice as Supervision

As a rule of law theorist who has found himself in the disillusioning experience of—in the course of attempting to evaluate the state of the rule of law in the United States—reading criminal justice scholarship, I could best summarize a central thrust of much of that scholarship as follows: much of what goes by the name "criminal justice" or "law enforcement" in the United States does not consist in the investigation and adjudication of violations of rules laid down in statute either for the purpose of directly punishing those violations or for deterring them.[100] Rather—and this is particularly true since the

97. *See id.* at 386, 397–404.

98. *Cf.* Gowder, *supra* note 19, at 74–77 (describing notion of respect for autonomy as unifying libertarian account of rule of law as serving interests in freedom with egalitarian account of rule of law as serving interests in equality).

99. *See generally* Immanuel Kant, Groundwork of the Metaphysics of Morals 37–39 (Mary J. Gregor trans., 1998) (characterizing human reason as end in itself, identifying manipulation by false promises as morally impermissible because undermining autonomous reason of manipulated).

100. An evaluation which ultimately became Gowder, *supra* note 3.

advent of order maintenance or so-called "broken windows" policing, and in race/class subordinated communities—criminal justice often consists in a much closer supervision of individuals' lives for the purposes of social control rather than rule enforcement.[101]

A more granular version of the same idea: criminal laws provide unclear guidance and technically prohibit a vast array of ordinary behavior.[102] Police give a wide variety of commands to individuals on the street which do not merely amount to instructing people to comply with discrete rules of criminal law (except for those rules which are so vague or broad that they could justify any command) but which police may nonetheless enforce through a variety of sources of open-ended discretion which permit them to coerce individuals practically at will.[103] Hence, the correspondence between an individual's compliance with some rule and the use of police coercion against them is weak at best.[104]

Once someone has been arrested for the sort of petty crimes that characterize the formal legal authorization to engage in supervisory policing, the practical incentives on defendants make it almost impossible for them to genuinely seek a judicial ruling on whether they have in fact violated a rule.[105] For most misdemeanor defendants,

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101. By "social control" I mean the general shaping of behavior, particularly the behavior of subordinated groups, toward an incompletely articulated dominant-group conception of appropriate social relations.

102. *See generally* Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967) (describing overcriminalization).

103. *See, e.g.*, U.S. DEP'T OF JUST. CIV. RTS. DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 29 (2016) https://www.justice.gov/opa/file/883366/download [https://perma.cc/8Z3D-79UK] (describing use of "highly discretionary offenses" by Baltimore police to "clear corners").

104. To be clear: I do not make this claim about *all* policing, or *all* criminal justice more broadly. In particular, the argument of this Article is not meant to pertain to major felonies such as murder, rape, and kidnapping, nor to serious white collar crimes (except insofar as the latter are used as a tool to create broader corporate regimes of supervision, *see* discussion *infra* Part III). It is, however, meant to pertain to many or most misdemeanors, which represent a huge proportion of real-world criminal justice. *See* Natapoff, *supra* note 14, at 1320–21 (estimating misdemeanors as representing on the order of 80% of the criminal justice system). Also, while American criminal justice may be effective at deterring the major felonies, see, for example, Jonathan Klick & Alexander Tabarrok, *Using Terror Alert Levels to Estimate the Effect of Police on Crime*, 48 J.L. AND ECON. 267 (2005), it is not very effective at punishing them, see Shima Baradaran Baughman, *How Effective Are Police? The Problem of Clearance Rates and Criminal Accountability*, 72 ALA. L. REV. 47, 55 (2020) (estimating from police clearance data that large percentages of burglaries, rapes, and murders go unpunished).

105. *See* Natapoff, *supra* note 14, at 1328.

their having violated the rule for which they were nominally arrested or the presence or absence of evidence for the alleged rule violation has at most limited bearing on the disposition of that arrest.[106] Instead, that disposition is determined largely by their own resilience to the burdens of the criminal justice system (such as detention), their prior record of interactions with that system, and the caseload burdens and policy decisions of personnel within that system.[107] This amounts to what Issa Kohler-Hausmann has characterized as a managerial approach in which the adjudicative process is instead converted to a system of extended supervision over defendants' choices.[108]

While scholars such as Kohler-Hausmann have expressed a kind of neutrality as to whether the managerial (or, as I prefer, supervisory) function of criminal justice is intentional, others have connected the system to broader trends of social control.[109] For example, Jonathan Simon has offered a kind of panoptic view of criminal justice in terms of parallel states—a "legal state" in which legislatures and courts define rules and aim to follow the principles of due process and natural justice in applying them to persons, and a "carceral state" in which police and prisons operate a system of social control targeted at "abnormality," and focused on nonwhites and the working class.[110] On Simon's account, the failure of the Warren Court's criminal justice revolution is attributable to a lack of interest of actors in the carceral state in individualized application of rules:

> Among its many flaws as a method for countering the normalization of race in the carceral state, constitutional criminal procedure was premised primarily on the power of the legal state to incentivize reform in the carceral state. In particular, the penalty of excluding evidence collected in violation of the Fourth Amendment presumes the carceral state either cares about

106. *See id.*

107. *See id.* at 1344–47.

108. *See* ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 2 (2018).

109. *See id.* at 140. I prefer "supervisory" rather than "managerial" because management to me carries a more open-ended connotation, while supervision is primarily about order giving. In principle, a good manager could operate by rules and dignity-respecting assessments, while the connotation of a "supervisor" captures the closer and more domineering role which the criminal justice system takes over individuals' lives.

110. *See* Jonathan Simon, *Racing Abnormality, Normalizing Race: The Origins of America's Peculiar Carceral State and its Prospects for Democratic Transformation Today*, 111 NW. UNIV. L. REV. 1625 (2017); *see also* Jamelia Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637 (2021) (analyzing the norm-defining—and biased against subordinated groups—use of the concept of "disorder" in the criminal law).

> individual legal outcomes in the courts or can be made to do so by prosecutorial influence. Everything we have discussed about the power of the carceral state—-its focus on racialized notions of abnormality, and the role of prosecutors as translators between the legal state and the carceral state—suggests why this is unlikely. The focus of the carceral state is on abnormality not crime; it exercises permanent surveillance and control, not a single game of guilt or innocence.[111]

There's a sense, in Simon's account, in which the concept of crime as rule-violation is still in the picture: the concept of abnormality he describes appears, as I read it, to be substantially instantiated in a propensity to commit crimes.[112] But the mechanisms of "crime" control are neither individualized nor retrospective: the goal is not to punish crime or deter it with the threat of punishment but to maintain control over communities of abnormal citizens.[113]

Simon's analysis requires particular note because of his discussion of the role of discretion in preserving the racial character of the system. Discussing *McCleskey v. Kemp*, a case in which the Supreme Court refused to accept strong statistical evidence of racially disparate application of the death penalty,[114] Simon explains that, "Any step toward recognizing disparate patterns of treatment as a constitutional problem would, according to this view, compromise the essential discretion of local actors in the carceral and legal states; discretion is necessary to allow abnormality, rather than crime, to be the subject of the punitive power."[115] Bernard Harcourt makes a similar point in his critique of broken windows policing. In his words:

> The text [of the essay initiating the broken windows policing movement] seems to privilege regularity, but, in fact, it is irregularity that undergirds the analysis, because it is precisely the application of universal rules that most clearly undermines the order-maintenance function. The rigidity of rules, even rules that may be perfectly appropriate in individual cases, deprives police officers of needed flexibility. […] In effect, regularity on

111. *See* Simon, *supra* note 110, at 1642.

112. *See id.* at 1633 (noting that an abnormal person "may be a law violator, or they may not be (yet)").

113. *See id.* at 1634–35 (contrasting traditional "retribution and deterrence" goals of criminal law with social control oriented "rehabilitation and incapacitation" goals); *id.* at 1635–36 (noting that early forms of carceral state were oriented toward shaping "working class communities" into sources of labor and became oriented toward the "defense of whiteness" in the United States); *id.* at 1639 n.61 (describing role of scientific racism in representing Black Americans as "a threat to urban security" which justified "segregation and exclusion").

114. *See* McCleskey v. Kemp, 481 U.S. 279, 280 (1987).

115. *See* Simon, *supra* note 110, at 1644.

> the street rests on irregularity in police practice - mixed, of course, with the regularity of the persons targeted.[116]

The "regularity of the persons targeted" refers to a point made earlier on in Harcourt's article, that broken windows policing represents the disorderly in a personalized fashion, as those who occupy particular (disreputable) social roles—that is, rather than those who have engaged in specific law-violating behavior.[117] I take Simon to be pointing out the same phenomenon, but in the carceral state writ large. And as Harcourt identifies, the character of the disorderly subject is in part created by the carceral system's response to alleged disorder.[118]

Markus Dubber closes the loop between the system of policing and the failure of the model of rules. He describes the conception of the person assumed by the functioning of the "police state"—his version of Simon's "carceral state"—as follows:

> The incompatibility of law and police is, at bottom, the incompatibility of autonomy and heteronomy. Autonomy and heteronomy are incompatible only if the distinction between governor/subject and governed/object has been abandoned. If, however, there are objects of governance who lack the capacity for autonomy and therefore are regarded as mere objects, rather than also as potential subjects, of state power, the tension between autonomy and heteronomy can be managed as it had been for millennia, through the logic of the relationship between householder and household, between governor and governed, according to entirely discretionary prudential maxims of good governance.[119]

Dubber also connects the importance of the category "law" as a subspecies of "regulation" (i.e., as one way of carrying out governance) to the rise of liberalism, with its emphasis on the notion of citizens as self-governing.[120] If Dubber is right (and I think he is, as his account nicely coheres with the longstanding connection between the rule of law ideal and liberal negative liberty), the kind of supervisory power associated with the police/carceral state ultimately

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116. *See* Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 344–45 (1998).

117. *See id.* at 343, 345.

118. *See id.* at 352–65.

119. *See* Markus D. Dubber, *Criminal Process in the Dual Penal State: A Comparative-Historical Analysis*, *in* THE OXFORD HANDBOOK OF CRIMINAL PROCESS 3, 9 (Darryl K. Brown, Jenia I. Turner & Bettina Weisser eds., 2019).

120. *See* Markus D. Dubber, *Regulatory and Legal Aspects of Penality*, *in* LAW AS PUNISHMENT/LAW AS REGULATION 19, 36–37 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2011).

rests on a kind of exception to liberalism in which a distinction is drawn between those in whose name the criminal justice process acts and those on whom it acts.[121] The latter are not represented as having the kind of autonomous relationship to the law which the model of rules presupposes; it is that implicit assumption of heteronomy which licenses supervision.[122]

Drawing on Simon, Dubber and Harcourt, I offer the following as a sketch of a kind of self-reinforcing system of criminal justice supervision, which the rest of this Article will flesh out in more detail:

(1) Racial and class subordination provides the political foundation for the use of criminal justice institutions as a tool of social control, insofar as they (a) permit non-subordinated groups to understand subordinated groups as dangerous and hence requiring active management by the state; and (b) permit non-subordinated groups to understand themselves as relatively immune from the tender mercies of the carceral state.

(2) Social control requires discretion for essentially the reasons given by Hayek in his critique of the welfare state:[123] the carceral state cannot leave those subject to control with an expansive degree of individual freedom, because its actors understand those subject to the carceral state as people who will abuse their freedom (either to commit crimes or to fail to be appropriately pliant and productive laborers). Accordingly, the carceral state must exercise close control over their lives—control sufficiently close that it cannot be expressed in a preexisting set of rules for them to follow but must instead be operationalized as empowered officials supervising their lives in discretionary form. But, as Simon explains in the passage quoted above, the discretion of officials to control subordinate classes necessarily entails a

121. *See generally* GOWDER, *supra* note 19, at 62–74 (reviewing standard arguments for relationship between rule of law and liberal liberty).

122. *See* discussion *infra* Subsection II.A.4 (reviewing police accounts of order-maintenance policing which are frequently focused on behavior represented as beyond the control of actor and which lack evident concern with leaving room for voluntary obedience to law).

123. *See* TAMANAHA, *supra* note 70, at 68 (explaining Hayek's objection to distributive justice and the welfare state: that achieving redistribution would require "particularistic"—that is, discretionary—decisions by officials rather than governance by general rules). Notably, the actual welfare state is also a well-recognized site for the merger of criminal justice and supervision. *See* KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 1 (2011).

lack of control over those officials by the law or the political community as a whole. In particular if statistical properties of their actions can be used to show unlawful discrimination, then those officials themselves will have to be regulated by rules sufficiently binding to cause their behavior to generate non-racially biased aggregate statistics. Moreover, because abnormality is a raced concept, efforts by the carceral state to control abnormality necessarily generate racial disparities.

(3) But those disparities also reinforce the racial character of the carceral state by exacerbating the political distortions noted in (1) above, including by creating the illusion of "evidence" of the criminal and disorderly propensities of subordinated groups and by reinforcing the physical and social isolation of subordinated groups, and hence the self-perceived immunity of non-subordinated groups from the harms inflicted by the carceral state.

This summary, while it draws heavily on Simon, Dubber, and Harcourt, is not wedded to their views. In particular, Simon expresses some optimism that the present-day racial justice movements have made enough headway against the carceral state to hold out the prospects for a shift toward the power of the legal state.[124] But if the carceral state has the self-reinforcing character which I just described, then this is grounds for pessimism about the prospects for breaking that equilibrium.

The remainder of this Part will draw on criminal justice scholarship to fill out more of the details of the discretionary and supervisory aspects of skeleton framework articulated above. The object, I repeat here, is not to say anything particularly new about criminal justice, but rather to illustrate the depth of its contrast with the model of rule-following, with the aim of bringing that contrast directly to legal theory in Part III, which will also fill out the identity-based portions of the framework with a discussion of the role of class/race segregation in it. This Part begins with policing, the most pervasive part of the criminal justice process, before considering prosecutors and courts toward the end.

124. *See* Simon, *supra* note 110, at 1644–49.

A. Supervisory Policing

According to a naive view of American policing, the chief functions of police are what we might think of as *primary criminal enforcement*: that is, investigating crimes, arresting suspects, and patrolling to deter muggings and the like.[125] Yet, the accounts of those who interact with police are replete with reference to a style of policing that might be more accurately described as "supervision," but which its victims describe as "harassment" or "hassling."[126] This sense of being pervasively supervised, of being subject to police interference for activities as ordinary as walking down the street, is endemic in Black and Brown communities.[127]

Scholars who specialize in criminology or the sociology of criminal justice have noted the supervisory character of police for decades.[128] For example, in 1967, sociologist Allan Silver described the social function of policing as follows, "[a] policed society is unique in that central power exercises potentially violent supervision over the population by bureaucratic means widely diffused throughout civil society in small and discretionary operations that are capable of rapid concentration."[129]

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125. *See, e.g.*, Dhammika Dharmapala et al., *Punitive Police? Agency Costs, Law Enforcement, and Criminal Procedure*, 45 J. LEGAL STUD. 105, 105 (2016) (modeling problem of controlling police as principal-agent problem that aims to optimize the amount of "punishment of, wrongdoers," and modeling choices about the regulation of searches and arrests as choices about the degree of uncertainty about lawbreaking required for punishment); Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 92–93 (2016) (claiming that the purpose of suspicionless police searches is to "seek to ferret out or deter undetected wrongdoing"). *See generally* Monica C Bell, *Anti-Segregation Policing*, 95 N.Y.U.L. REV. 650, 655–56 (2020) (criticizing legal scholars and policymakers for myopic attention to crime-control role of police).

126. *See, e.g.*, Vesla Weaver et al., *Withdrawing and Drawing In: Political Discourse in Policed Communities*, 5 J. RACE, ETHNICITY & POL. 604 (2020); Gwen Prowse et al., *The State From Below: Distorted Responsiveness in Policed Communities*, 56 URB. AFF. REV. 1423 (2019); Rod K. Brunson, *"Police Don't Like Black People": African-American Young Men's Accumulated Police Experiences*, 6 CRIMINOLOGY & PUB. POL'Y 71 (2007).

127. *See, e.g.*, Andrew Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2257–63 (2002) (collecting accounts of pervasive, disrespectful, police supervision and interference).

128. *See, e.g.*, Allan Silver, *The Demand for Order in Civil Society: A Review of Some Themes in the History of Urban Crime, Police, and Riot*, *in* THE POLICE: SIX SOCIOLOGICAL ESSAYS 1, 8 (David J. Bourda ed., 1967).

129. *See id.*

In the same year, sociologist Egon Bittner provided ethnographic evidence from a particularly subordinated community—the homeless—supporting a theoretical distinction between two functions of the police: classical law enforcement (catching criminals) and "keeping the peace," understood as a form of open-ended authority to manage the community.[130] In "skid row," the task of police is described as "containment" and "the prevailing method of carrying out the task is to assign patrolmen to the area on a fairly permanent basis and allow them to work out their own way of running things."[131] While the police officer is in some sense still aiming at controlling "predation" (which we may interpret as "crime"), "he gives the consideration of strict culpability a subordinate status among grounds for remedial sanction."[132] The interaction between police and persons on skid row is shaped by the fact that the officer "is entitled to obedience" and has "access to areas of life ordinarily defined as private and subject to coercive control only under special circumstances."[133] Bittner also identifies that the purpose of the law under such circumstances is not to provide the reason for arrests, but merely to provide an excuse for arrests determined for other (social control) reasons, and that law which "sanction[s] relatively common forms of behavior" (more on this below) will serve such a purpose.[134] Contemporary ethnographic research replicating Bittner's work on skid row confirmed the supervisory character of policing of the homeless, although with the claim that the goal of supervision had shifted from pure exclusion to a combination of exclusion and social rehabilitation, such as by channeling the homeless into rigorous shelter and training programs.[135] Nonetheless, criminal law is still used as a tool for such rehabilitation, for example, by deploying "quality-of-life" laws to overcome "shelter resistance" and force the homeless into those services.[136]

Moving beyond the special case of homelessness policing, a 1970 study found that patrol officers spent almost as much time on

130. *See* Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOCIO. REV. 699, 699 (1967).

131. *See id.* at 704.

132. *See id.* at 707.

133. *See id.* at 708.

134. *See id.* at 710.

135. *See* Forrest Stuart, *From 'Rabble Management' to 'Recovery Management': Policing Homelessness in Marginal Urban Space*, 51 URB. STUD. 1909, 1909 (2014).

136. *See id.* at 1917–21.

"social services" as they did on "crimes against property," and, given that "suspicious persons" calls were counted as crimes against property, the rate of supervisory encounters even in 1970 was probably even higher than that.[137] A 1982 literature review concluded that "in general, crime is involved in a minority of the calls police are assigned to handle,"[138] with the remainder of their (non-patrolling) time spent on "disorder," "service," or "traffic."[139] In the post-broken windows era, a 2001 study found that beat officers spent an average of under an hour and a half on crime per shift, and a similar amount on a hodge-podge of activities like "Traffic enforcement," "Order maintenance," "Service," "Ordinance enforcement" (which, for reasons discussed below, is likely to be order-maintenance too), and "Problem-focused."[140] Another study from 1997 found that patrol officers spent between five and eighteen percent of their time on "traditional crime-related activities."[141] It is notable, however, that these estimates ought to be taken with a grain of salt, partly because of the different roles of police involved (e.g., "community policing" versus beat patrols, in several studies), partly because of the difficulties with sources of data (e.g., officer logs versus observational reports), and partly because of the subjectivity of classification of activities into different categories.[142]

In the 1970s and 1980s, scholars, such as Sidney Haring, were articulating a Marxist analysis of the police as "provid[ing] a measure of discipline and control over the working class that permits a wider measure of exploitation through the labor process—that is, more work with less resistance."[143] On this theory, police with badges and guns

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137. *See* John A. Webster, *Police Task and Time Study*, 61 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 94, 95–98 (1970).

138. *See* Gordon P. Whitaker, *What Is Patrol Work*, 4 POLICE STUD.: INT'L REV. POLICE DEV. 13, 17 (1982).

139. *See id.* at 20. Generally in these studies, patrolling appears to occupy the most time. *See, e.g.*, *id.* at 16.

140. *See* Brad W. Smith et al., *Community Policing and the Work Routines of Street-Level Officers*, 26 CRIM. JUST. REV. 17, 26 (2001). I am combining "Crime incidents," "Administrative (crime related)," and "Investigative" to get this less than an hour-and-a-half figure.

141. *See* James Frank et al., *The Content of Community Policing: A Comparison of the Daily Activities of Community and "Beat" Officers*, 20 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 716, 725 (1997).

142. *See, e.g.*, Whitaker, *supra* note 138, at 14–17 (describing difficulties in data sources and classification).

143. *See* SIDNEY L. HARRING, POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICAN CITIES, 1865-1915, 13 (2d ed. 2017).

are a substitute for other forms of social control of workers,[144] and the role of law is not to constrain the police but to "legitimate" them in the eyes of the public by fitting their control function into the forms and institutions of the legal system.[145]

Contemporary theorists have agreed with the supervision/management account of policing.[146] In the words of sociologist Alex S. Vitale, "the police exist primarily as a system for managing and even producing inequality by suppressing social movements and tightly managing the behaviors of poor and nonwhite people: those on the losing end of economic and political arrangements."[147] Likewise, criminal law theorist Niraj Sekhon has gone so far as to equate the police to Carl Schmitt's sovereign, writing that police "are 'street sovereigns' whose power derives from law but cannot be contained by it. Police have the power to derogate from law as necessity requires, and it is the police themselves who usually have final say as to what constitutes a necessity."[148] Moreover, this is to some extent their institutional role: "crime control" was an after-the-fact rationalization for their longstanding activities and does not match their day-to-day conduct.[149]

There may be more than a mere linguistic connection between the notion of "police" as a wing of the executive charged with enforcing the law and the description of the general authority of states as the "police power." Markus Dubber has given a historical survey of the notion of "police," one which recognizes that the police power involved "essential vagueness" and "discretion" to "do whatever needed to be done."[150] This form of governance, which was descended from that of heads of households as well as sovereigns, showed up in the United States as the "police power," about which Dubber suggests:

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144. *See id.* at 14–15; *see also* Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 CRIMINOLOGY 449, 467–70 (1992) (describing system of criminal justice as a form of labor discipline aimed at an "underclass" which does not "shar[e] a common normative universe with the communities of the middle classes—especially those values and expectations derived from the labor market").

145. *See* HARRING, *supra* note 143, at 17.

146. *See, e.g.*, ALEX S. VITALE, THE END OF POLICING 34 (2017).

147. *See id.*

148. *See* Nirej Sekhon, *Police and the Limit of Law*, 119 COLUM. L. REV. 1711, 1711 (2019).

149. *See id*. at 1733, 1735.

150. *See* Markus Dirk Dubber, *"The Power to Govern Men and Things": Patriarchal Origins of the Police Power in American Law*, 52 BUFF. L. REV. 1227, 1320 (2004).

> Its undefinability derives from the father's virtually unlimited discretion not only to discipline, but to do what was required for the welfare of the household. The ahumanity of its object derives from the essential sameness of all components of the household, animate and inanimate, as tools in the householder's hands. That essentially sameness, however, also implies the essential difference between the householder and his household, and therefore the hierarchical aspect of American police power, along with its fundamental amorality. The power to police seeks efficiency, not legitimacy. The patriarch's concern for the welfare of his household is the police power's concern for the welfare of the state, a concern that expresses itself positively and negatively, in the correction of inferior members of the state household as well as in its protection against threats.[151]

On this story, the evident tension between the unfreedom of being policed and the freedom of the American revolution is reconciled by identifying the American citizens as just those—white male property holders—who were suited for full political participation, and thus had the capacity to police others: their own households, slaves, and the like; this is essentially the republican theory of freedom interpreted as a settler concept.[152] According to Dubber, this conception of police evolved into the personnel of the "police" *qua* members of the executive branch, as the police *qua* power was seen as "needed 'to provide for the execution of the laws that is necessary for the preservation of justice, peace, and internal tranquility'" and ultimately "the remaining branch of government, the executive, assumed important policing functions as well, so much so that it institutionalized a growing part of itself under that very name, as 'police departments' and 'police officers' appeared in city after city."[153]

While this connection between the police power in historical context and the people called police may appear thin, there are other substantive connections.[154] In particular, much of the practical power of today's police is rooted in open-ended legislation to control matters such as "vagrancy," "loitering," and "disorderly conduct"; this was

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151. *See id.* at 1327–28.

152. *See id.* at 1329–31; *see also* GOWDER, *supra* note 19, at 19–20 (describing settler republicanism in the context of property and slavery). *See generally* AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM (2010) (offering account of American ideology rooted in settler republicanism).

153. *See* Dubber, *supra* note 150, at 1284 (quoting GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 432 (2d ed. 1998)).

154. *See id.* at 1304–07 (discussing Adam Smith's notion of police as encompassing both "public security" qua prevention of violent crime, as well as "cleanliness," as of the streets). Dubber also identifies a tradition of running together crime control policing and more general household management. *See id.*

also a key emphasis of the Blackstonian concept from which Dubber traces the American version of police power.[155] To my mind, Dubber's and Sekhon's accounts cohere nicely: Dubber describes how the notion of "police power" coalesced from a kind of household management function of sovereignty, and Sekhon describes how this same conception of sovereignty animates how the people called "police" operate on the ground.[156]

Harring identifies that well before broken windows policing, the "disorderly [conduct]" charge was used to regulate working class behavior, albeit in conjunction with more concrete laws relating to liquor sales.[157] The next sub-part delves deeper into the notion of "disorderly conduct" and the legal regime surrounding it—the legislative sources of police discretion.[158]

1. *The Sources of Police Supervisory Discretion*

To make the discussion more concrete, it may help to consider the facts leading up to the police killing of Michael Brown as our first case of the legislative sources of police discretion.[159] Brown's killer, Darren Wilson, recounted the initial facts of the encounter to the Department of Justice as follows:

> According to Wilson, he was traveling westbound on Canfield Drive, having just finished another call, when he saw Brown and Witness 101 walking single file in the middle of the street on the yellow line. Wilson had never before met either Brown or Witness 101. Wilson approached Witness 101 first and told him to use the sidewalk because there had been cars trying to pass them. When pressed by federal prosecutors, Wilson denied using profane language, explaining that he was on his way to meet his fiancée for lunch, and did not want to antagonize the two subjects. Witness 101

155. *See* discussion *infra* Subsection II.A.1; Dubber, *supra* note 150, at 1307–13.

156. *See also* Nick Cheesman, *Law and Order as Asymmetrical Opposite to the Rule of Law*, 6 HAGUE J. ON RULE L. 96, 108–11 (2014) (reviewing further literature on the relationship between the notion of "police" and that of "order," contrasting notion of "order" as discretionary and administrative system of interferences in individual choices to "rule of law" understood as prohibition on arbitrary power).

157. *See* HARRING, *supra* note 143, at 172.

158. *See infra* Subsection II.A.1.

159. *See* U.S. DEP'T OF JUST., REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 12–13 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf [https://perma.cc/BJV7-RZ8U] [hereinafter FERGUSON REPORT].

> responded to Wilson that he was almost to his destination, and Wilson replied, "What's wrong with the sidewalk?" Wilson stated that Brown unexpectedly responded, "Fuck what you have to say." As Wilson drove past Brown, he saw cigarillos in Brown's hand, which alerted him to a radio dispatch of a "stealing in progress" that he heard a few minutes prior while finishing his last call. Wilson then checked his rearview mirror, and realized that Witness 101 matched the description of the other subject on the radio dispatch.[160]

Brown's initial meeting with Wilson, as described in the introduction to this Article, is notable for the fact that it began with a command: get out of the road.[161] That command was evidently aimed at organizing public space for the convenience of others (the "cars trying to pass") and in service of an overall normative order of appropriate behavior.[162] Brown and his friend, "Witness 101," clearly saw this order as inappropriate, or at least unnecessary, judging by their response ("Fuck what you have to say"), and the dispute over the legitimacy of the command sparked the entire encounter.[163]

As it so happens, Ferguson at the time had an ordinance which prohibited walking in the road where sidewalks are available, although this ordinance was repealed in 2016.[164] However, judging by the reference to "cars trying to pass them," even today Wilson's order would be theoretically justifiable under the city of Ferguson's "loitering" ordinance, which provides:

> A person commits the offense of loitering if he obstructs or encumbers the passage of persons or vehicles upon, through or into any street, street corner, depot, building entrance or other public place and then refuses to move on when requested to do so by any police officer of the city.[165]

That statute seems to give a police officer almost complete discretion to determine what activities constitute obstruction or an encumbrance.[166] In our automobile-oriented culture, we may find it intuitive that a pedestrian ought not to walk down the middle of a road

160. *See* id.
161. *See id.* at 12.
162. *See id.*
163. *See id.* at 12–13.
164. *See* FERGUSON, MO., CODE OF ORDINANCES § 44-344 (Dec. 7, 2015); discussion GOWDER, *supra* note 3, at 116 n.18 (providing further information about tracking down historic versions of the Ferguson municipal code).
165. *See* FERGUSON REPORT, *supra* note 159, at 12; FERGUSON, MO., CODE OF ORDINANCES § 29-89 (2022).
166. *See* FERGUSON, MO., CODE OF ORDINANCES § 29-89.

also used by automobiles.[167] But such a statute on its face would also authorize a police officer to order someone to "move on" on the sidewalk if, for example, they were walking too slowly and hence "encumbering" the passage of their fellow pedestrians.[168] Nor is this mere speculation.[169] One researcher actually observed such laws being used this way on Los Angeles's "Skid Row."[170] Ostensibly for the purpose of identifying users of illegal drugs, police as a matter of policy would target those who were physically unable to move through space quickly, including wheelchair users.[171]

Laws similar to Ferguson's, prohibiting loitering, vagrancy, disorderly conduct, and other quality-of-life crimes characteristically leave police the capacity to regulate an immense array of otherwise innocent conduct.[172] For another example, consider Wisconsin's disorderly conduct statute, "Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor."[173]

Again, we must note the use of open-ended terms, such as "otherwise disorderly conduct," "boisterous" conduct, or a "disturbance."[174] Such terms can easily be read to apply to a broad range of conduct. Perhaps unsurprisingly, that conduct tends to be biased with reference to preexisting systems of social hierarchy: as

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167. *See generally* Gregory H. Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. REV. 498 (2020) (arguing that automobile-oriented nature of American law was a policy choice which could have been different). It should also be noted that Ferguson, like many cities which suffer from disinvestment or misinvestment in municipal infrastructure, has inadequate sidewalks—according to one urbanist commentator, for example, Brown and "Witness 101" would have had to walk in single file in order to fit on the sidewalk where they were stopped. *See* Charles Marohn, *Stroad Nation*, STRONG TOWNS (Aug. 25, 2014), https://www.strongtowns.org/journal/2014/8/25/stroad-nation.html [htpps://perma.cc/99JN-KUXK]; *see also* Aubrey Byron, *In Much of Ferguson, Walking in the Street Remains the Only Option*, STRONG TOWNS (Feb. 20, 2018), https://www.strongtowns.org/journal/2018/2/19/ferguson-sidewalks-mike-brown-decline [https://perma.cc/74BJ-J27X].

168. *See* FERGUSON, MO., CODE OF ORDINANCES § 29-89.

169. *See* Forrest Stuart, *Becoming "Copwise": Policing, Culture, and the Collateral Consequences of Street-Level Criminalization*, 50 L. & SOC'Y REV. 279, 289–90 (2016).

170. *See id.*

171. *See id*.

172. *See, e.g.*, FERGUSON, MO., CODE OF ORDINANCES § 29-89.

173. *See* WIS. STAT. § 947.01(1).

174. *See id.*

Professor Jamelia Morgan has explained, the concept of "disorderly conduct" rests on background assumptions about what kind of behavior constitutes "order," where those assumptions vary across cultural background—and, in a hierarchical social system, the conceptions of order and disorder likely to be applied are those of superordinated social groups—wealthy, abled, heterosexual, and white men.[175]

On occasion, such ordinances are struck down by the courts. For example, the Supreme Court has repeatedly struck down vague "loitering," "vagrancy," and similar laws as in violation of the Due Process Clause.[176] However, it is unclear that such rulings can protect citizens, when they are wielded as Darren Wilson wielded them, to wit, as the excuse to give commands such as "move on" or "get off the street."[177] In principle, those ordinances could also be narrowed by the courts, but in practice, so few people charged with such an offense have practical access to the courts; thus, the judicial interpretation of such statutes is probably not a factor in either police or citizen decision-making.[178] This is confirmed, for example, by a 2016 Department of Justice investigation of the Baltimore Police Department, which reported that loitering and similar statutes were regularly used to disperse persons lawfully out on the street notwithstanding well-established precedent holding that such laws could not be used that way in the absence of notice about some actual unlawful conduct.[179]

While we often use the term "vagueness" to describe the problem with those laws, arguably they aren't vague on their face, for each of these statutes is so broad as to effectively criminalize presence in a public space, or at least criminalize presence in a public space following the command of a police officer to leave, where police can issue that command for no reason at all (loitering statutes); or to criminalize presence in a public space while engaging in any conduct that a police officer considers rude, obnoxious, or annoying

175. *See* Morgan, *supra* note 110; *see also* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1486–87 (2016) (describing "attribution of disorder to African-Americans").

176. *See, e.g.*, Chicago v. Morales, 527 U.S. 41 (1999); Papachristou v. Jacksonville, 405 U.S. 156 (1972); Kolender v. Lawson, 461 U.S. 352 (1983).

177. *See generally* FERGUSON REPORT, *supra* note 159 (describing the abuse of discretionary police authority in Ferguson).

178. *See* Natapoff, *supra* note 14, at 1328.

179. *See* U.S. DEP'T OF JUST., CIV. RTS. DIV., *supra* note 103, at 36–39.

(disorderly conduct statutes).[180] Arguably, notice is the *sine qua non* of due process vagueness scrutiny.[181] In other words, interpreted cynically, many loitering laws provide notice of what behavior is illegal. It's just that the behavior in question amounts, in practical terms, to disobeying any command of a police officer whatsoever in public space.[182]

Such laws thus generate the troubling perception that a badge entitles one to just issue whatever commands one wants. A second category of unfortunate laws that further encourage such a perception are those which specifically criminalize disobedience to police orders, largely regardless of the content of the underlying order.[183] Although many of those statutes specify that the police order must be "lawful," an ordinary citizen is almost certain to lack the resources to determine which orders are "lawful" or not in the heat of the moment, and police seem to interpret "lawful" to mean "whatever they deem necessary."[184] Criminal law scholar Orin Kerr expresses the problem clearly:

> The even bigger problem is knowing when an order is "lawful." An order is lawful if forcing compliance would not violate any law. But a citizen is in no position to assess that. Even if the police pulled over the world's greatest legal expert, the citizen *still* couldn't know what orders are lawful because the laws often hinge on facts the citizen can't know.
>
> Here's an example. Imagine an officer walks up to you and tells you to put your hands behind your back so he can handcuff you. To do that lawfully, the officer needs at least reasonable suspicion that you are engaged in a crime and pose a threat to him and maybe probable cause that you have committed a crime. But you can't know how much cause the officer has. Maybe the officer has no cause and is flagrantly violating your constitutional rights. Or maybe ten nuns have just sworn under oath that you robbed a bank in broad daylight that morning. You're innocent, as it was a

180. *See generally* Coates v. Cincinnati, 402 U.S. 611 (1971).

181. *See generally* Theodore J. Boutrous Jr. & Blaine H. Evanson, *The Enduring and Universal Principal of Fair Notice*, 86 S. CAL. L. REV. 193, 195–96, 201–02 (2013).

182. *See generally* Kiel Brennan-Marquez, *Extremely Broad Laws*, 61 ARIZ. L. REV. 641 (2019) (explaining that overbroad criminal laws are consistent with people having notice of the behavior covered, but nonetheless provide excessive enforcement discretion).

183. *See, e.g.*, OR. REV. STAT. ANN. § 162.247 (West 2022) (criminalizing refusal to obey police officer); CAL. VEH. CODE § 2800 (West 2023) (criminalizing refusal to obey police officer).

184. *See* Orin Kerr, *Sandra Bland and The "Lawful Order" Problem*, WASH. POST (July 23, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/23/sandra-bland-and-the-lawful-order-problem/ [https://perma.cc/3XKH-6EM7].

> case of mistaken identity. But the officer doesn't know that. And as the citizen, you can't tell which is which.[185]

Yet, as Eric Miller reminds us, declining to obey police is also sometimes the only way that a private citizen may be able to sustain a legal challenge to their conduct, particularly in Fourth and Fifth Amendment contexts when complying with police demands is often seen as a wavier of the underlying rights.[186] Consider the dilemma of a citizen confronted by a police officer on the street who is "asking" for permission to search their backpack. The citizen doesn't know whether or not the law permits that search—does a backpack count as part of a *Terry* stop? Does the cop have an articulable reasonable suspicion? If the citizen says "yes," then they will be deemed to have consented to the search. But if they say "no," it might turn out that the cop wasn't asking at all, they were ordering, and now their "resistance" has led (for reasons described in the next Part) to escalating aggression. Realistically, the citizen has no choice but to obey.

The Department of Justice's Civil Rights Division's report on the Baltimore Police Department catalogued a number of offenses falling either into the vague or the overbroad category, and capable of being used as open-ended excuses for police supervision on pain of arrest.[187] In the words of the DOJ's Civil Rights Division investigators, citizens are frequently arrested for "discretionary misdemeanor offenses like disorderly conduct, resisting arrest, loitering, trespassing, and failure to obey."[188] In another listing of such discretionary charges, the DOJ noted that "BPD arrested approximately 6,500 people for disorderly conduct, 4,000 for failing to obey a police officer, 6,500 for trespassing,[189] 1,000 for 'hindering' or impeding, 3,200 for

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185. *See id.*

186. *See* Eric Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 UNIV. CHI. LEGAL F. 295, 296, 302–03 (2016).

187. *See* U.S. DEP'T OF JUST., CIV. RTS. DIV., *supra* note 103, 36–38, 116.

188. *See id.* at 24. It is particularly striking to me that "resisting arrest" is understood as "discretionary"—suggesting that it was the impression of the Civil Rights Division that police could manufacture a scenario of "resistance" like they could "loitering." *See id.*

189. *See id.* at 26. The reader may not think that "trespassing" is either vague or overbroad. However, there is a well-established record of police abusing trespass charges to conduct discretionary arrests in race/class subordinated communities, particularly in public housing projects, in which persons on the property, even for perfectly innocent purposes like visiting friends, are characterized as trespassers. *See, e.g.*, Jeffrey Fagan et al., *Race and Selective Enforcement in Public Housing*, 9 J. EMPIRICAL LEGAL STUD. 697, 697 (2012) (providing empirical evidence for abuse of

'interference,' 760 for being 'rogue and vagabond,' and 650 for playing cards or dice."[190] *Rogue and vagabond!* As amusing as the archaic label of "Rogue and Vagabond" sounds, that last charge actually has a greater significance: It appears to be the description under which 16th century England and 18th century Virginia justified the whipping and incarceration of the unemployed, as noted in Dubber's description of the history of the police power.[191] In those seemingly bizarre 760 arrests, we can thus see a direct connection to a centuries-old use of policing as class-based social control rather than as rule enforcement.

Another category of laws that seem to authorize limitless police control over private citizens' lives are neither vague nor overbroad, but are sufficiently trivial that either they are so radically inconsistent with social norms that countless people violate them all the time, with no reason to believe that they're doing anything wrong, or criminalize behavior that is socially frowned upon, but so minor that nobody would rationally expect the criminal law to concern itself with it. Many scholars have characterized such regulation of the minute details of many areas of public behavior as "overcriminalization."[192] As Egon Bittner noted over half a century ago, laws that punish common behavior can easily be put to use pretextually, i.e., to license arrest or the threat of arrest as the basis for supervision.[193]

I offer as just one example the laws that regulate conduct on the New York City subway.[194] Subway riders are subject to a wide range of penalties, from merely being kicked off the train,[195] to a civil ticket

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trespass laws in predominantly Black and Latino projects in New York). In Baltimore, the DOJ report found evidence of similar practices, including a "template" handed out by a shift commander to use in reporting public housing trespass arrests which recited what the DOJ characterized as a "facially unconstitutional" reason for arresting someone for trespassing (not having a "valid reason" for presence) and pre-filled-in a description of the subject as a "black male." *See* U.S DEP'T OF JUST., CIV. RTS. DIV., *supra* note 103, at 37–38.

190. *See* U.S. DEP'T OF JUST., CIV. RTS. DIV., *supra* note 103, at 26.

191. *See* Dubber, *supra* note 150, at 111–12 (quoting Arthur P. Scott, Police in Colonial Virginia (1930)); *cf.* HARRING, *supra* note 143, at 13–15 (giving account of policing as control of labor); Feeley & Simon, *supra* note 144, at 467–70 (giving account of jails as control of unemployable underclass).

192. *See, e.g.*, Kadish, *supra* note 102, at 157; Douglas N. Husak, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3 (2008); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716–17 (2005).

193. *See* Bittner, *supra* note 130, at 710.

194. *See* N.Y. COMP. CODES R. & REGS. tit. 21, § 1050 (2021).

195. *See* § 1050.11.

and a hundred dollar fine,[196] all the way up to arrest and ten days imprisonment,[197] for an extensive array of offenses including, *inter alia*: "occupy[ing] more than one seat on a station, platform or conveyance when to do so would interfere or tend to interfere with the operation of the transit system or the comfort of other passengers";[198] "plac[ing] their foot on a seat on a station, platform or conveyance";[199] "lie[ing] on the floor, platform, stairway, landing or conveyance";[200] "otherwise interfer[ing] with or imped[ing] the movement of passengers or personnel of the authority or the MTA in a station or on a stairway, elevator, escalator, platform or conveyance";[201] "perform[ing] any act which interferes with or may tend to interfere with the provision of transit service, obstructs or may tend to obstruct the flow of traffic on facilities or conveyances, or interferes with or may tend to interfere with the safe and efficient operation of the facilities or conveyances of the authority";[202] "engag[ing] in any . . . noncommercial activities that are not directly related to the use of a facility or conveyance for transportation";[203] or, of course, failing to "comply with all lawful orders and directives of any police officer or any employee of the authority or the MTA acting within the scope of their employment."[204] Of course, some of those prohibitions could easily fall into the "vague" or "overbroad" categories—failing to comply with lawful orders should be familiar by now, and the bizarre prohibition on non-transit-related "noncommercial activities," if taken seriously, could make a criminal out of someone who dared to knit a scarf while waiting for the train to arrive.[205] But some are quintessentially trivial. In 2011, 1,600 people were arrested in New York City for sitting improperly on a subway seat.[206]

196. *See* § 1050.10.
197. *See id.*
198. *See* § 1050.7(j)(1).
199. *See* § 1050.7(j)(2).
200. *See* § 1050.7(j)(3).
201. *See* § 1050.7(j)(4).
202. *See* § 1050.6(a).
203. *See* § 1050.6(c).
204. *See* § 1050.6(d)(1).
205. *See* § 1050.6. It's hard not to suspect that the noncommercial activities prohibition was directed at stifling free speech, such as political and religious advocacy. *Cf.* Board of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 US 569, 570–71, 577 (1987) (striking down airport ordinance prohibiting "First Amendment activities" as violating—you guessed it—the First Amendment).
206. *See* Joseph Goldstein & Christine Haughney, *Relax, If You Want, But Don't Put Your Feet Up*, N.Y. TIMES (Jan. 6, 2012), https://

No doubt, improper sitting on a subway can be rude—nobody wants to see someone's filthy feet on the chair next to them, and "manspreading" is an obnoxious assertion of patriarchal privilege.[207] But arrest and a potential penalty of ten days imprisonment for such impoliteness seems unreasonable at best.[208] In Harcourt's terms, "it bears the mark of sovereign excess."[209] It also seems unworkable because of the sheer frequency of the behavior, that is, unless the police are not actually arresting people because they committed that offense, but for some other reason, such as the failure to obey some order which was not otherwise authorized by law.[210] Indeed, the New York City Police Department specifically cited order-maintenance justifications for this sort of arrest.[211]

For example, some of those arrested rather than ticketed in New York for improper sitting were apparently so arrested because they didn't have identification on them.[212] In other words, because the State of New York chose to criminalize rudeness, the New York City Police were empowered to demand identification from people, notwithstanding Fourth Amendment doctrine suggesting that the police lack the authority to demand identification from ordinary people on the street without suspicion of a crime.[213] The otherwise unconstitutional demand for identification became constitutional because the subway riders were suspected of the "crime" of impolite sitting.[214]

As Kim Forde-Mazrui has concisely explained, such specific rules can confer just as much discretion on police officers as vague ones, to the extent they identify such a wide variety of behavior as

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www.nytimes.com/2012/01/07/nyregion/minor-offense-on-ny-subway-can-bring-ticket-or-handcuffs.html [https://perma.cc/9ZMC-3ERN].

207. *See* Emma A Jane, *"Dude ... Stop the Spread": Antagonism, Agonism, and #manspreading on Social Media*, 20 INT'L J. CULTURAL STUD. 459, 459–60 (2017) (explaining that "manspreading" refers to "men who sit with their legs in a wide v-shape filling two or three single seats on public transport," and that it is seen by activists as "a blatant example of the sorts of 'everyday' sexism suffered by women as a result of men's inflated sense of entitlement").

208. *See* § 1050.10.

209. *See* Harcourt, *supra* note 116, at 362.

210. *See* Goldstein & Haughney, *supra* note 206.

211. *See id.*; *see also* § 1050.7(j). On order-maintenance policing policies see *infra* at Subsection II.A.4.

212. *See* Goldstein & Haughney, *supra* note 206.

213. *See* Brown v. Texas, 443 U.S. 47, 49, 52 (1979); *see also* Hiibel v. Sixth Jud. Dist. Ct. of Nev., 542 U.S. 177, 180, 185–86, 189 (2004).

214. *See generally Brown*, 443 U.S. at 52 (discussing the constitutionality of identify requirements).

potentially sanctionable so as to give an officer the capacity to punish anyone they want.[215] The New York City subway laws, like the traffic laws that Forde-Mazrui discusses, seem to combine vagueness and excessive specificity to serve precisely that function. Consider, for example, that if we take the prohibition on occupying multiple seats seriously, that law amounts to prohibiting persons above a certain size, or wearing winter coats, from sitting on the train.[216]

Running the variety of laws together, it seems likely that the police have the capacity to issue commands to almost anyone on the subway, for (a) a large number of people will be violating some law, and hence will have reason to fear that the police will single them out for enforcement of some minor violation to retaliate for disobedience; and (b) even those who are not violating some law will have their disobedience to random police orders chilled by the possibility that they might be mistaken about whether they're running afoul of one of the endless subway manners criminal statutes.

An example of how such laws are used appears in the Department of Justice's Baltimore report:

> A different BPD sergeant posted on Facebook that when he supervises officers in the Northeast District, he encourages them to "clear corners," a term many officers understand to mean stopping pedestrians who are standing on city sidewalks to question and then disperse them by threatening arrest for minor offenses like loitering and trespassing. The sergeant wrote, "I used to say at roll call in NE when I ran the shift: Do not treat criminals like citizens. Citizens want that corner cleared." Indeed, countless interviews with community members and officers describe "corner clearing" scenarios, in which BPD officers stop, question, disperse, or arrest individuals in public areas based on minimal or no suspicion of highly discretionary offenses.[217]

Notable in this brief passage is the discretion conferred by "quality of life" ordinances, which is used to provide a threat which is the basis of commands that the police officer would not otherwise be

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215. *See* Kim Forde-Mazrui, *Ruling out the Rule of Law*, 60 VAND. L. REV. 1497, 1517 (2007).

216. Nor is this hypothetical: at least since the 1980s, passengers in New York have complained that the seats on local transit are too narrow for them. *See* Christine Haughney, *Transit Agencies Face the New Calculus of Broader Backsides*, N.Y. TIMES (Jan. 15, 2012), https://www.nytimes.com/2012/01/16/nyregion/transit-agencies-in-new-york-area-consider-wider-seats.html [https://perma.cc/5E43-K4PA].

217. *See* U.S. DEP'T OF JUST., CIV. RTS. DIV., *supra* note 103, at 29; *see also id.* at 41 (recounting policy of using discretionary arrests for corner clearing); *id.* at 116–18 (describing incidents of officers using such laws to punish individuals for talking back to them).

able to issue.[218] As a result of these powers, the police gained the capacity to determine who would be allowed on the streets.[219] Moreover, that power was used on the basis of a distinction between "citizens" and "criminals," but one in which the classification of a person as one of the "criminals" had nothing to do with any evidence that they had committed a crime—it seems to be more like a representation of social hierarchy than any beliefs about rule violation.[220] It's also striking that "criminals" are contrasted to "citizens," suggesting that those who are the targets of corner-clearing are not understood as full members of the political community.[221] In Part III below, I will suggest that this contrast is no accident: that the targets of such policing strategies are vulnerable to them in virtue, in part, of their relative lack of political power.[222]

It is worth highlighting the contrast between the sort of discretion apparent in these kinds of laws and the subject of some classic discussions of police discretion from the 1960s. During that time period, scholars such as Kenneth Culp Davis and Sanford Kadish produced important discussions of the contrast between a formal norm of universal enforcement and the practical reality according to which police could not apprehend every criminal, because, for example, of resource constraints, or because the law was written more broadly than the legislature intended to permit prosecutors to avoid problems of proof.[223] These sorts of discretion seem distinct from the sorts of discretion conferred by laws like the prohibition of disorderly conduct or of putting one's feet up on subway seats, in virtue of the fact that the purposes for the exercise in the cases considered by Davis and Kadish were still recognizably related to rule-enforcement.[224] A commercial bookmaker who is arrested under a law prohibiting all gambling, while the host of the friendly neighborhood poker game

218. *See id.* at 22–23.

219. *See id.*

220. *See generally id.* Precisely as Simon and Harcourt said. *See* Simon, *supra* note 110, at 1644; *see also* Harcourt, *supra* note 116, at 345.

221. *See* Simon, *supra* note 110, at 1633.

222. *See infra* Part III.

223. *See* Kenneth Culp Davis, *Police Discretion*, 44 UNIV. CHI. L. REV., 255, 255–56, 258 (1977); *see also* Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 907–08 (1962). For problems of proof, see, for example, *id.* at 909–10, which gives examples of gambling laws purporting to criminalize all gambling while intended only to reach commercial gambling, for the purpose, as I read Kadish, of allowing prosecutors to convict commercial gamblers without having to prove commercial intent.

224. *See* Kadish, *supra* note 223, at 909–10.

goes unarrested, still broke a relatively discrete rule providing a fairly specific (and presumably uncommon) set of circumstances licensing an arrest.[225] The same goes for pretextual convictions, such as that of Al Capone for tax evasion rather than what we might think of as his "real" crimes:[226] the tax evasion laws still substantially constrain police discretion insofar as we aren't all committing income tax evasion all the time, and so most of us can feel secure that we are able to avoid punishment for this crime.

That being said, there is an important connection between the two forms of discretion. The capacity of police to choose to not arrest every putative lawbreaker is necessary in order to permit the use of arrest as a threat to create supervisory power for two reasons. First is that formally speaking, a threat must be capable of being withheld in order to be efficacious as a threat. Telling a person on the street to "move on" or they will be arrested for loitering is meaningless if the police officer is already under a genuine obligation to arrest the person for loitering.[227] Second, bulk arrest for such open-ended law—every person with their feet up on the subway, or worse, anyone whose behavior arguably falls within the ambit of laws against "loitering" or "disorderly conduct"—would generate so many arrests that (a) it would either overwhelm the prosecutorial system or rely on some higher upstream discretion, such as with prosecutors bulk-refusing charges; and (b) would, by punishing the socially, economically, and politically powerful, doubtless generate intense political opposition.[228]

2. *Reducing the Ex Post Costs of Supervisory Policing*

Another way to confer discretion on police to engage in supervision is by weakening the law's control over their behavior after the fact. To the extent individual police are more insulated from civil liability or other sanctions for using coercion (such as arrest under discretionary misdemeanors or the direct application of violence) to

225. *See id.*

226. *See* Gabriel S. Mendlow, *Divine Justice and the Library of Babel: Or, Was Al Capone Really Punished for Tax Evasion*, 16 OHIO ST. J. CRIM. L. 181, 191 (2018).

227. Even if the legislature has written or the courts have interpreted a loitering law such that a person will only be "guilty" of loitering if they fail to move on when so ordered, the loitering law just becomes a law against disobeying the police, which still does not meaningfully constrain police discretion.

228. *See* HAYEK, *supra* note 89, at 155 (discussing generality and requiring lawmakers to apply the law to themselves); Gowder, *supra* note 71, at 343 (discussing the likely consequences of universal enforcement of such laws).

enforce their commands, the broader the scope of command-giving in which they may engage.[229]

Police enjoy such *ex post* discretion thanks to institutional features of policing organizations and overarching law that shields individual police officers from responsibility for their actions.[230] A prominent example is the qualified immunity doctrine, which shields police officers from civil liability for a broad array of unconstitutional conduct so long as the unconstitutionality of that conduct is not "clearly established"—"clearly established" is interpreted so narrowly that it effectively requires controlling authority with identical facts in order to establish that even conduct that utterly shocks the conscience is unconstitutional.[231]

Also prominent are indemnification policies which ensure that, even if police officers are held individually liable for their aggression, their jurisdictions will bail them out with tax dollars.[232] Another important institutional feature of existing police departments that lowers the *ex post* cost of aggression is the strength of police unions, which have secured contracts conferring on police broad protections against departmental disciplinary consequences for their aggression.[233]

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229. *See generally* John Guzman, *Five Times Police Used Qualified Immunity to get Away with Misconduct and Violence*, NAACP LEGAL DEF. FUND, https://www.naacpldf.org/qi-police-misconduct/ [https://perma.cc/9QGB-8ECY] (last visited Sept. 29, 2023).

230. *See* Carbado, *supra* note 175, at 1519.

231. *See generally id.* (explaining consequences of qualified immunity doctrine); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015) (same); Leonard C. Feldman, *Police Violence and the Legal Temporalities of Immunity*, 20 THEORY & EVENT 329, 340 (2017) (same). For some recent egregious examples, see, for example, Jessop v. City of Fresno, 936 F.3d 937, 942 (9th Cir. 2019) (granting qualified immunity to police accused of stealing property seized pursuant to search warrant); Corbitt v. Vickers, 929 F.3d 1304, 1318–19 (11th Cir. 2019) (granting qualified immunity to police accused of entering an innocent third party's yard in pursuit of suspect and then, when the suspect had been captured and handcuffed, officers nonetheless shot repeatedly at plaintiff's pet dog without any obvious reason to do so, missed, and hit plaintiff's child).

232. *See* Carbado, *supra* note 175, at 1522–23.

233. *See generally* Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 750–758 (2017) (describing impediments to control of police misconduct imposed by police unions).

3. *Why Engage in Supervisory Policing? Incentives and Policies*

The places in which police find themselves and the tasks assigned to them give them strong reasons to engage in supervision rather than rule enforcement. The police are used to respond to a number of non-criminal circumstances, where their role cannot be to penalize crimes—for there is no particular reason to expect criminal conduct in these settings—but merely to throw their weight around as a source of coercive authority.

Oddly, this too is illustrated by the very beginning of the encounter that led to the killing of Michael Brown. Darren Wilson met Brown when he was on the way back from a "sick infant call," which had ultimately resulted in an EMT transporting a baby to the hospital.[234] Uninterrogated in that report is why the police were dispatched to a request for medical assistance for a sick baby, a problem which has nothing to do with catching criminals.[235] Nor is this practice unique to Ferguson.[236]

The insertion of police in non law-enforcement settings raises a kind of impedance mismatch between the core competency of police in coercive solutions to problems and the model of rule-following, which requires the state refrain from coercive solutions to problems in the absence of some specific legal authority. There is reason to believe that inserting police into non-criminal contexts increases the use of

234. *See* FERGUSON REPORT, *supra* note 159, at 22.

235. In light of the infamous revenue-raising function of the Ferguson police—see generally Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 558–59 (2017) (describing revenue-generation, predatory, functions of Ferguson police); Bernadette Atuahene, *Predatory Cities*, 108 CAL. L. REV. 107, 175 (2020) (describing revenue-generation, predatory, functions of Ferguson police); GOWDER, *supra* note 19, at 193–94 (describing revenue-generation, predatory, functions of Ferguson police); Gowder, *supra* note 71, at 341 (describing revenue-generation, predatory, functions of Ferguson police). It is impossible to resist the suspicion that he was so dispatched in order to find an opportunity to cite and expropriate the parents, for example, for violating some "residency permit" requirement.

236. *See generally* Candice Bernd, *Community Groups Work to Provide Emergency Medical Alternatives, Separate From Police*, *in* WHO DO YOU SERVE, WHO DO YOU PROTECT?: POLICE VIOLENCE AND RESISTANCE IN THE UNITED STATES 151, 151–55 (Maya Schenwar et al. eds., 2016) (recounting EMT experiences struggling with police to retain medical control over response to medical emergencies in Texas). Indeed, the Department of Justice investigated Ferguson's police department and uncovered "many instances in which FPD officers arrested individuals who sought to care for loved ones who had been hurt." *See* FERGUSON REPORT, *supra* note 159, at 81.

such unauthorized state coercion. Thus, Shabnam Javdani suggests that when police are inserted into schools, "most [school police officers] do not receive specialized training about schools, juvenile law, or adolescent development," "the law enforcement role contradicts the responsibilities of the educator and mentor roles," and school police "can use legal tools (including arrest) to respond to violations of school discipline even if these violations do not constitute criminal acts."[237]

The role of police in schools has increased since the 1990s.[238] Surveys of police departments and school principals suggest that school police can be called upon to engage in a broad array of non-law-enforcement activities, including "[w]rite disciplinary reports," "[a]dvise staff on problem solving," "[a]dvise staff on student behavior modification," "[a]dvise staff on student rule enforcement," and "[c]haperone field trips."[239] There is some empirical evidence that suggests that school resource officers tend to lead schools to use coercive force in response to student behavioral problems.[240]

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237. *See* Shabnam Javdani, *Policing Education: An Empirical Review of the Challenges and Impact of the Work of School Police Officers*, 63 AM. J. CMTY. PSYCH. 253, 260 (2019).

238. *See* Julie Kiernan Coon & Lawrence F. Travis III, *The Role of Police in Public Schools: A Comparison of Principal and Police Reports of Activities in Schools*, 13 POLICE PRAC. & RSCH. 15, 16–17 (2012).

239. *See id.* at 22–23.

240. *See* Chongmin Na & Denise C. Gottfredson, *Police Officers in Schools: Effects on School Crime and the Processing of Offending Behaviors*, 30 JUST. Q. 619, 622 (2013) (showing an association between having added school resource officers and a higher law enforcement referral rate of "non-serious violent crime" (i.e., fights), although their presence did not increase the harshness of discipline overall). Another study did not find an overall increase in arrests in schools with police but *did* find an increase in arrests for disorderly conduct—one of the classic open-ended charges that is so well suited to being used, not to enforce the law, but to back up arbitrary police commands. *See* Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 285 (2009). An empirical study in North Carolina found that school resource officers are associated with an increase both in serious disciplinary sanctions (like suspensions) as well as "referrals" (complaints) to police, particularly for misdemeanor-level offenses, and those consequences are racially biased in predictable ways: Black and Latino students suffer more severe punishment, although the presence of officers does seem to deter violent crime. Lucy C. Sorensen et al., *Making Schools Safer and/or Escalating Disciplinary Response: A Study of Police Officers in North Carolina Schools*, 43 EDUC. EVALUATION & POL'Y ANALYSIS 495, 507–11 (2021); *see also* Joseph M. McKenna & Shawna R. White, *Examining the Use of Police in Schools: How Roles may Impact Responses to Student Misconduct*, 43 AM. J. CRIM. JUST. 448, 451–53 (2018) (providing literature review).

Another prominent example is the use of police to respond to mental health crises. Scholars have noted that as a consequence of the "de-institutionalization" of the mentally ill and the under-funding of social services, police have been under increasing burdens to manage mental health incidents and have resorted to increased use of arrest as the only viable tool available to them to achieve an orderly resolution to challenges presented by mentally ill persons.[241]

Finally, a third major example is the use of police in response to the problems associated with homelessness.[242] Again, the impedance mismatch between the service needs of the homeless and the coercive toolkit of police tends to lead police to arrest the homeless as the only strategy they have for dealing with the problem of their "disorderly" presence in public spaces.[243] Police also use the powers given by discretionary offenses to directly manage what are deemed to be the poor individual choices of homeless persons, thus exercising particularly domineering control over their lives.[244] In one recent study, fully 28% of homeless persons sampled had been arrested for "disorderly conduct or public drunkenness," and 6% for "loitering."[245] The problem of homelessness can also expand the supervisory power of the police by leading legislatures to write new anti-homeless laws that prohibit ordinary, harmless behavior, such as sitting in public.[246] Not coincidentally, a number of the subway arrests for impolite sitting that the New York Times discovered were made by the police department's "homeless outreach unit," illustrating how these laws are also misused to criminalize those subject to the social work role of the police.[247]

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241. *See* Jennifer D. Wood & Amy C. Watson, *Improving Police Interventions During Mental Health-Related Encounters: Past, Present and Future*, 27 POLICING & SOC. 289, 291 (2017). Similar observations have been made in Canada. *See* G. K. Shapiro et al., *Co-Responding Police-Mental Health Programs: A Review*, 42 ADMIN. POL'Y MENTAL HEALTH 606, 607 (2015).

242. *See, e.g.*, Maria Foscarinis et al., *Out of Site - Out of Mind: The Continuing Trend toward the Criminalization of Homelessness*, 6 GEO. J. ON POVERTY L. & POL'Y 145, 145 (1999).

243. *See id. See generally* KATHERINE BECKETT & STEVEN HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICAN (2010).

244. *See* Stuart, *supra* note 135, at 1911.

245. *See* Jennifer Reingle Gonzalez et al., *Criminal Justice System Involvement Among Homeless Adults*, 43 AM. J. CRIM. JUST. 158, 158, 163 (2018).

246. *See* Tony Robinson, *No Right to Rest: Police Enforcement Patterns and Quality of Life Consequences of the Criminalization of Homelessness*, 55 URB. AFF. REV. 41, 42 (2017).

247. *See* Goldstein & Haughney, *supra* note 206.

4. *Descriptions of Supervisory Policing from the Police Perspective*

Probably the most famous and influential articulation of the goals and methods of supervisory policing comes from George Kelling and James Wilson's *Broken Windows* article in the 1982 Atlantic Monthly.[248] In recent decades, such a model of policing has become official policy in many departments, and has also gone by the names "order-maintenance policing" and "quality of life policing."[249] A close reading of portions of the Kelling and Wilson article will thus be particularly useful in coming to an understanding of the practical role of supervision, rather than rule-enforcement, in modern policing. Consider the following excerpt:

> But how can a neighborhood be "safer" when the crime rate has not gone down–in fact, may have gone up? Finding the answer requires first that we understand what most often frightens people in public places. Many citizens, of course, are primarily frightened by crime, especially crime involving a sudden, violent attack by a stranger. This risk is very real, in Newark as in many large cities. But we tend to overlook another source of fear–the fear of being bothered by disorderly people. Not violent people, nor, necessarily, criminals, but disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed.
>
> What foot-patrol officers did was to elevate, to the extent they could, the level of public order in these neighborhoods. Though the neighborhoods were predominantly black and the foot patrolmen were mostly white, this

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248. *See* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC (Mar. 1982), https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/ [https://perma.cc/VN2L-ZB5B]. For identification of this article as the genesis of broken windows policing, see Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 778 (1999); Katherine Beckett, *The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing*, 10 HARV. L. & POL'Y REV. 77, 82 (2016). For the propagation of this model from New York to other jurisdictions, see Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SO. JUST. 156, 167–68 (2001). For discussion of its broader social influence and acceptance in the 1990s, see Harcourt, *supra* note 116, at 292–95. William Bratton, the police commissioner under Guiliani, openly admitted that Kelling and Wilson's article provided the framework for his model of policing. *See* WILLIAM J. BRATTON, BROKEN WINDOWS AND QUALITY-OF-LIFE POLICING IN NEW YORK CITY 1 (New York City Police Department, 2015), http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/qol.pdf [https://perma.cc/E3SV-73AU].

249. *See generally* Roberts, *supra* note 248, at 776, 778, 815.

> "order-maintenance" function of the police was performed to the general satisfaction of both parties.
>
> The people on the street were primarily black; the officer who walked the street was white. The people were made up of "regulars" and "strangers." Regulars included both "decent folk" and some drunks and derelicts who were always there but who "knew their place." Strangers were, well, strangers, and viewed suspiciously, sometimes apprehensively. The officer–call him Kelly–knew who the regulars were, and they knew him. As he saw his job, he was to keep an eye on strangers, and make certain that the disreputable regulars observed some informal but widely understood rules. Drunks and addicts could sit on the stoops, but could not lie down. People could drink on side streets, but not at the main intersection. Bottles had to be in paper bags. Talking to, bothering, or begging from people waiting at the bus stop was strictly forbidden. If a dispute erupted between a businessman and a customer, the businessman was assumed to be right, especially if the customer was a stranger. If a stranger loitered, Kelly would ask him if he had any means of support and what his business was; if he gave unsatisfactory answers, he was sent on his way. Persons who broke the informal rules, especially those who bothered people waiting at bus stops, were arrested for vagrancy. Noisy teenagers were told to keep quiet.
>
> These rules were defined and enforced in collaboration with the "regulars" on the street. Another neighborhood might have different rules, but these, everybody understood, were the rules for this neighborhood. If someone violated them, the regulars not only turned to Kelly for help but also ridiculed the violator. Sometimes what Kelly did could be described as "enforcing the law," but just as often it involved taking informal or extralegal steps to help protect what the neighborhood had decided was the appropriate level of public order. Some of the things he did probably would not withstand a legal challenge.[250]

For present purposes, a number of elements of that description of broken windows policing are particularly important. First, the authors openly contrast "crime" with "disorder" and claim that a successful police department regulates both.[251] Second, they identify that white officers regulate the details of Black civilians' lives not by law but by "informal rules," enforced by vagrancy laws.[252] To the extent such enforcement can be described as enforcing rules, they are not enforcing rules of *law*—in particular, such rules are, as I read the quoted passage, not published anywhere, and are likely not known to people other than the "regulars"; many of them are nongeneral in that their application depends on the status of an individual rather than that individual's conduct (such as that customers always lose disputes with

250. *See* Kelling & Wilson, *supra* note 248.
251. *See id.*
252. *See id.*

business owners); their contents (to the extent determinate) are not determined by anything resembling a legislative process; and there is no adjudicative method of resolving disagreements about their application, beyond the diktat of a police officer who, if resisted, brings the person who loses their on-the-ground "adjudication" before a court under a charge wholly unrelated to the rule they supposedly violated.[253] With respect to that last point, later in the same article, Kelling and Wilson explain that:

> charges as 'suspicious person' or 'vagrancy' or 'public drunkenness'– charges with scarcely any legal meaning… exist not because society wants judges to punish vagrants or drunks but because it wants an officer to have the legal tools to remove undesirable persons from a neighborhood when informal efforts to preserve order in the streets have failed.[254]

Perhaps most striking is that Kelling and Wilson openly describe the police action as "extralegal" and behavior that "probably would not withstand a legal challenge."[255] As it turns out, empirical evidence about the implementation of broken-windows policing in New York suggests that Kelling and Wilson were right about that aspect of their theory: broken-windows policing generated a substantial increase in the number of arrests rejected by prosecutors—effectively subjecting New Yorkers, disproportionately New Yorkers of color, to legally unjustifiable arrests.[256]

Three years after Kelling and Wilson's *Broken Windows* article, a sociologist named Albert Reiss published a report for the Department of Justice on policing in Oakland.[257] This report amalgamated a diverse category of behavior—some likely illegal, and others either not illegal, illegal only under highly open-ended law, or

253. *See id.*; Richard A. Posner, *Law and Modernization*, 2004 PRECEDENTE 178, 180 (2004), http://www.icesi.edu.co/revistas/index.php/precedente/article/view/1410 [https://perma.cc/J66P-V8A7] (describing principle of application of law "without regard to persons" as "a cornerstone of law in all civilized societies").

254. *See* Kelling & Wilson, *supra* note 248.

255. *See id.*

256. *See* Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 475–82 (2001).

257. *See* ALBERT J. REISS, JR., POLICING A CITY'S CENTRAL DISTRICT: THE OAKLAND STORY, at iii (1985). While this report is not as famously influential as Kelling and Wilson's article, it seems to me important partly because it purports to describe actual practice at the time in a major urban police department, and partly because it was issued under the imprimatur of the Department of Justice, complete with a glowing foreword by the director of the National Institute of Justice.

even potentially constitutionally protected—under the category of "soft crime."[258] For example, drug dealing made the list,[259] as did attempted petty theft from "coin slots" (presumably vending machines).[260] Those seem pretty crime-ey. But also on the list are approaching another person and saying "I've got money, honey,"[261] "bothering people like me" when done by "a black man,"[262] "peek[ing] for a while into the bank lobby,"[263] "chronic loitering," where loitering is defined as "to be dilatory, to standabout or move slowly, to spend time in idleness, or to linger and lag behind,"[264] "the public display of what is morally offensive behavior in shop windows and marquees,"[265] and the mere presence in public of "the bizarre and outlandish" including "[m]entally ill persons out-of-touch with the world."[266] For the person who thinks that the job of the police is to prevent and punish discrete violations of the rules of criminal law, characterizing petty theft and dealing drugs as "crime" seems fairly easy, but inflicting police sanctions on the rest range from problematic—how likely is there to be a law against looking into windows or talking, albeit obnoxiously, to people on the street—to patently unconstitutional (shop window displays that offend some bypasser's sense of morality; bothersome Black men).[267] Reiss recognizes that not all of the behavior he describes "clearly violate[s] the law,"[268] but nonetheless lumps it all together under the category of "soft-crime" in a report describing the Oakland Police Department's strategy to address all of it.[269] This list of "soft-crimes" resembles a subset of what Dubber has called "the

258. *See id.* at 6–8. Note that my characterizations of the relative legality of the underlying behavior are based on my general evaluation of the likelihood of effective and constitutional criminalization, not research into the coverage of the Oakland and California codes circa 1985.

259. *See id.* at 8.

260. *See id.* at 7.

261. *See id.* at 6.

262. *See id.*

263. *See id.* at 7. The undersigned was once stopped in Ontario, Oregon, by the police for taking a walk around his neighborhood and allegedly "looking into cars."

264. *See id.* That description could apply to any of our behavior depending on how tired we happen to be at any given moment.

265. *See id.*

266. *See id.*; *see also* Morgan, *supra* note 110, at 1673−74 (explaining that disorderly conduct laws are often used to criminalize the public manifestation of mental illness).

267. *See* REISS, *supra* note 261, at 7.

268. *See id.* at 7–8.

269. *See id.* at 23.

typical hodgepodge of activities and objects, animate and inanimate, we've come to associate with police legislation," covering everything from begging and being "disorderly" to mental illness to substance abuse.[270] It also serves as a strong illustration of a point made in Harcourt's Foucauldian critique of broken windows policing, namely that it "breaks down and blends together the line between disorder and crime. Disorder becomes a degree of crime."[271]

Reiss also identifies that the Oakland police would use arrests for ordinary behavior which violates no social norm as a tool to punish behavior like "persistent loitering," which (implicitly) would not otherwise violate any law.[272] The discretion-conferring (because they criminalize ordinary social behavior) laws that Reiss identifies are "violating pedestrian crossings" and "spitting on the sidewalk."[273] He also recounts that even after a loitering statute was invalidated on void-for-vagueness grounds, the police could use other such discretion-conferring statutes for the same purpose, such as by mischaracterizing waving at cars to solicit prostitution as the offense of "directing traffic."[274]

Interestingly, Reiss seems to recognize that these policing strategies focus on subordinated groups.[275] In a telling passage, he observes that there may be objections based on "competing population and interest group claims for public territory," and that "these concerns are especially germane… where the deprived and underprivileged lay claims to territory and in their doing so, exacerbate the objectives of reducing crime and the fear of crime."[276] That passage is indicative of the unspoken premises of order-maintenance policing—that it is assumed that "the deprived or underprivileged" in public space necessarily creates "crime" or "the

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270. *See* Dubber, *supra* note 150, at 1337–38. That hodgepodge appears in Blackstone's era as a "mish-mash" which also includes numerous status offenses that target disreputable classes of people like "gypsies" and "scolds." *See id.* at 1295. So, evidently, does Reiss's classification of the mentally ill as seemingly inherently a form of soft crime. *See* Reiss, *supra* note 257, at 7–8.

271. *See* Harcourt, *supra* note 116, at 363.

272. *See* Reiss, *supra* note 257, at 30.

273. *See id.*

274. While soliciting prostitution is obviously a relatively discrete offense whose punishment is compatible with the model of rules, if signaling cars for that purpose can become "directing traffic," so can signaling cars for any other purpose. *See id.* at 32.

275. *See id.* at 19–20.

276. *See id.* (raising this point in the context of a discussion to objections about the use of private resources to assist police enforcement).

fear of crime"—and hence that the goal of such policing is to protect the privileged against the presence of the underprivileged.[277]

During the heyday of broken windows policing, Harcourt identified the implicit arrangement of legal subjects underlying the theory of its effectiveness: a presupposed social division between those persons and places represented as orderly, responsible, and law-abiding and those represented as disorderly, chaotic, and disobedient.[278] The personalization of disorder is salient in the literature on broken windows policing which Harcourt surveys: it's all about people who are characterized as drunks, aimless persons, and the like.[279] This represents perhaps the clearest distinction between the model of policing under order-maintenance policies and the model of rule-following: at bottom, order-maintenance policing is about who people *are* rather than what they *do*.[280] And because "[d]isorder becomes a degree of crime," when people, rather than their behavior, become sources of disorder, the ultimate logic of broken windows policing is that people themselves become crime, and appropriate targets for the supervision of the criminal justice system.[281]

B. Supervisory Prosecution and Adjudication

Policing is not the only element of contemporary criminal justice which operates less as a form of rule-enforcement and more as a form of supervision.[282] Sometimes, police supervision results in an actual arrest.[283] The previous Subsection describes the sources of those arrests: the "discretionary misdemeanors" such as disturbing the peace, loitering, vagrancy, disorderly conduct, or disobeying lawful orders.[284] And recent scholarship has revealed that the function of prosecutors and courts in the presence of such arrests also often serves a supervisory rather than a rule-enforcement role.[285] Of particular importance is the close examination of the operation of misdemeanor criminal adjudication in Issa Kohler-Hausmann's *Misdemeanorland*, on which this Part primarily focuses.[286]

277. *See id.* at 20.
278. *See* Harcourt, *supra* note 116, at 297.
279. *See id.* at 343.
280. *See id.*
281. *See id.* at 363.
282. *See* KOHLER-HAUSMANN, *supra* note 108, at 2.
283. *See supra* Subsection II.A.4.
284. *See supra* Subsection II.A.4.
285. *See, e.g.*, KOHLER-HAUSMANN, *supra* note 108.
286. *See id.* at 2.

Kohler-Hausmann uses mixed qualitative and quantitative empirical methods to study the processing of misdemeanor cases in New York City under broken windows policing.[287] In essence, she finds that as a consequence of the immense number of arrests sent into the system under broken windows policing, caseloads have risen to the point where anything resembling a misdemeanor system oriented primarily toward adjudicating guilt and innocence has become unsustainable; accordingly, the misdemeanor system slipped into a "managerial" model according to which the steps of the process are directed at identifying which people are governable and which are ungovernable and imposing increasing burdens on the latter.[288] As she describes it, this does not resemble a system of punishment for guilt—guilt is almost never determined in a meaningful sense.[289] Rather, it more closely resembles an effort to impose what James C. Scott in a different context called "legibility" on defendants—that is, to figure out what kind of defendant they are, with the aid of imposing greater

287. *See id.* at 2, 4.

288. For a summary of the managerial model, see *id.* at 76–85, 98. On caseload pressures as driving this movement, see *id.* at 109–40.

289. *See id.* at 124–33 (describing the volume of cases disposed of in arraignment process on essentially no factual information and with defendant choices to plea driven more by burdens of contesting case than by factual guilt); *id.* at 167 (quoting judge recounting defendants who take plea bargains "for a matter of convenience" in order to be released from jail); KOHLER-HAUSMANN, *supra* note 108, at 91–96 (providing quantitative empirical evidence that process-related predictors of misdemeanor conviction are more important during the broken windows period compared to before, and in misdemeanors compared to felonies; inferring from this that management rather than adjudication on the basis of factual guilt is driving outcomes to a greater extent in misdemeanor broken windows context); *see also* Natapoff, *supra* note 14, at 1322 (describing defendant's incentives similarly); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 71–72 (2005) (describing "typical guilty plea procedures in misdemeanor and low-level felony cases in the United States, in which the strength of evidence and applicable law in the cases are barely discussed between counsel"). Here we might read Kohler-Hausmann, Natapoff, McCoy, and similar scholars as offering a counter example in the form of the misdemeanor context to Gerald Lynch's argument that the plea bargaining process rests at the end of "an invisible, but elaborate and lengthy process of adjudication of the defendant's guilt" represented in the administrative efforts of police and prosecutors. *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2123, 2125 (2015) (accounting administratively of plea-bargaining that focuses on the "idealized" case of "white-collar criminal investigations involving well-financed defendants"). As I have argued earlier, this is precisely to be expected: it is well-resourced and powerful defendants who can actually make use of administrative processes to protect themselves. *See* Gowder, *supra* note 3, at 41.

restrictions on the lives of the more unruly ones.[290] In other words, the inquiry is about the character of the individual, not about whether they've actually broken a particular rule in a particular case.[291]

As an example of how this works, Kohler-Hausmann describes the process of "adjournment in contemplation of dismissal" (ACD), which she notes represented "23 to 30 percent" of misdemeanor cases.[292] A defendant whose case is disposed of via ACD is essentially told "stay out of trouble" for some defined period of time, after which the case is dismissed, and in many categories of cases (such as marijuana arrests during the study period), prosecutors "grant" these to defendants as a matter of rote.[293] However, an ACD is also taken as a trigger by prosecutors for more severe action if the defendant is seen again.[294] The catch—and the thing that makes this different from more familiar graduated penalties in criminal justice such as the more severe punishment of repeat offenders—is that someone with an ACD *hasn't actually been convicted of anything*: they've simply accepted an offer, often because the burdens of defending a case are so steep that accepting a dismissal, even under conditions, is much more practical in their lives.[295] Hence the plea-bargaining process labels defendants as criminals and progressively imposes greater levels of state sanction on them without regard to whether or not they have violated any rule.[296]

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290. *See* JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 2 (1998); KOHLER-HAUSMANN, *supra* note 108, at 145.

291. *See* KOHLER-HAUSMANN, *supra* note 108, at 145.

292. *See id.* at 147.

293. *See id.* at 147–49.

294. *See id.* at 83–84, 96–97, 163.

295. *See id.* at 126–30. ACDs can also lead to collateral consequences, such as the loss of employment opportunities because of an open criminal case. One interaction about those consequences which Kohler-Hausmann recounts seems particularly telling: on being asked to seal an ACD record to permit a defendant to apply for a government job, the judge agreed on the grounds, in part, that "he's going to pay taxes soon!" *See id.* at 152. To me, this illustrates both the social control function of the misdemeanor system—that promoting taxpaying employment is taken as a goal of the process—and also the patronizing attitude taken toward those caught up in that system.

296. The severity of sentences when plea bargains fail also is disconnected from at least the notion that punishment is meant to be proportional to rule violation. As Barkow explains "prosecutors are repeat players," who will develop reputations within plea bargaining, including reputations as to whether they carry out their threats to harshly punish defendants who take their cases to trial—such that a prosecutor who offers a sentence which they believe to be appropriate at plea bargaining has a strong incentive to demand a sentence that they believe to be *inappropriately* severe at trial.

Such ACDs seem sometimes to have been handed out for completely nonsensical charges.[297] For example, a disabled person was given an ACD rather than a dismissal for the "crime" of taking up two seats on the subway, notwithstanding that the law only "criminalized" such conduct if it obstructed someone else's effort to sit and the arrest was made at two in the morning when the train was almost certainly empty—in an evident effort to punish the defendant and/or bring him under control for having outstanding summonses for public drinking—obviously totally irrelevant to whether or not he was guilty of the "crime" for which he was actually before the court.[298]

From this, it's hard not to conclude that the decision as to the disposition of an individual is effectively left up to a police officer:[299] arrest a person once, and they get an ACD, almost by rote; arrest them twice, and they get a conviction for disorderly conduct, again almost by rote.[300] And on a community level, the density of policing in a neighborhood (and hence its race/class status) influences the likelihood of future police contact, and hence of "violating" the ACD.[301] Indeed, in view of the fact that Kohler-Hausmann describes the managerial model as a response to the constraints imposed by massive caseloads, which in turn were imposed by broken-windows policing, it's easy to think that the entire process is almost entirely

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See Rachel E. Barkow, *Criminal Law as Regulation*, 8 N.Y.U.J.L. & LIBERTY 316, 332 (2014).

297. *See* KOHLER-HAUSMANN, *supra* note 108, at 126.

298. *See* Goldstein & Haughney, *supra* note 206 (discussing the rude-sitting crimes); KOHLER-HAUSMANN, *supra* note 108, at 262–63.

299. Kohler-Hausmann, of course, only studied broken windows policing in New York City. One might question the generalizability of Kohler-Hausmann's observations, but given that New York is obviously the largest jurisdiction in the United States, and given that many other jurisdictions followed New York in adopting broken windows policies. *See* KOHLER-HAUSMANN, *supra* note 108, at 15–16. Her observations can fairly stand in for at least a sufficiently large sector of criminal adjudication to be meaningful as a counterexample to the model of rule-following.

300. *See id.* at 162–63 (describing how in the 57% of dispositions that occurred at arraignment, prosecutors would refuse to offer another ACD if there was presently an ACD on their "rap sheet"). The same is true as to prior convictions. *See id.* at 166 (quoting a public defender who advises her clients that "[d]is[orderly] con[duct] is what they offer innocent people with records"). It turns out that prosecutors value ACD records—again, records which specifically do not carry with them any information about guilt or innocence. As Kohler-Hausmann recounts, prosecutors have in several instances lobbied and negotiated for ACD records to remain available rather than be sealed so that they could use them in future prosecutorial decisions. *See id.* at 175–76.

301. *See id.* at 261.

attributable, at the root, to police discretion.[302] (This explains why this Article focuses almost entirely on police, and only discusses other stages in criminal justice in passing, as in this Subsection.)

Natapoff comes to the same conclusion from the other direction, noting that the dysfunctional misdemeanor adjudication process effectively delegates discretion back to police, since the courts can be trusted to rubber-stamp police conclusions.[303]

The upshot of such processes is worth quoting at length, for it serves as a summary of the managerial consequence of such police discretion:

> People achieve a suspect status over iterative encounters that rarely adjudicate specific allegations, and once that status is achieved, it tends to make it unbearably costly to invoke any formal mechanism to limit the state's ability to exert control or impose punishment by challenging a specific allegation. . . . People come to be classified as persistent rule breakers, and are thereby at risk for transitioning to a criminal conviction, by acquiring a set of marks that are proposed to defendants as conditional dismissals. However, these marks are reinterpreted at a later time—namely, a subsequent arrest—in a different light, as at least an indication of ungovernability, and at most as a signal equivalent to a guilty plea. Prosecutors' interpretations of these marks and their resultant charging decisions and plea offers are often determinative of the outcome of the case, since managerial misdemeanor courts also are functionally administrative

302. In addition to the references noted above, *see id.* at 238 (describing habit of channeling defendants to greater or lesser sanctions depending on their compliant performance with the misdemeanor process as a practical consequence of the need to find some heuristic for evaluating defendants in the absence of resources to actually figure out the facts of the huge number of cases before them). We might be tempted to also identify a large element of prosecutorial discretion. Certainly, the decisions of prosecutors have been identified in prominent scholarship as a key driver of American criminal justice pathology. *See, e.g.*, JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 6 (2017) (identifying prosecutors as root of problem of mass incarceration). However, the literature on prosecutorial power, in particular in relation to high caseloads, betrays some controversy. For example, McCoy argues that rather than prosecutorial power in plea bargaining being the result of high caseloads, high caseloads are the result of plea bargaining, insofar as it permits prosecutors, and thus the criminal justice system as a whole, to process more cases. *See* McCoy, *supra* note 289, at 78. This seems fairly plausible: policymakers can only create policies like broken windows policing if they can have some reasonable degree of confidence that they will be able to do something with the sheer number of human bodies expected to show up in the courts; moreover, prosecutors with political influence could be expected to impede criminal justice reforms that impose an unmanageable workload on them. *See generally* David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473 (2016) (arguing that we ought to be skeptical of many standard accounts of prosecutorial power).

303. *See* Natapoff, *supra* note 14, at 1317.

> systems, where trials are rarely viable routes to dispute legal issues or establish factual innocence.[304]

As Kohler-Hausmann repeatedly notes, almost all the targets of this kind of misdemeanor processing, and hence policing, are Black and Latino or "low-income men of color."[305]

III. RULE OF LAW CRITIQUES OF THE ADMINISTRATIVE STATE, APPLIED TO THE CRIMINAL JUSTICE STATE

This Part compares the critical literature on administrative law, typically offered from the standpoint of the rule of law, with the literature on criminal justice.[306] It argues that criminal justice comes out worse, from the perspective adopted by scholarly and judicial critics of administrative law.[307]

To some extent, this shouldn't be surprising, for there is a meaningful sense in which criminal justice is actually an administrative system—just one which is primarily targeted against the relatively powerless rather than the powerful.[308] Thus, Rachel Barkow has convincingly argued that many processes in criminal justice are effectively regulatory—administered by executive officials in the aid of broader policy goals and the solution of open-ended social problems.[309] But, criminal-law-as-regulation is driven not by careful cost-benefit tradeoffs, but by "stories," where those stories are structurally biased against those convicted of crime because of their relative lack of political power.[310] As a result, "the system lacks key controls and checking mechanisms that are present in other regulatory contexts."[311] Given that many scholars argue, with some force, that the controls in those "other regulatory contexts" (primarily federal industrial regulation) are insufficient, it should be easy to conclude that criminal justice is, from their perspective, even worse.[312] Yet, it is

304. *See* KOHLER-HAUSMANN, *supra* note 108, at 263.
305. *See id.* at 51–58, 79, 196, 243, 264, 266–67.
306. *See infra* Section III.A; Section III.B.
307. *See infra* Section III.C.
308. *See* Barkow, *supra* note 296, at 329.
309. *See id.*
310. *See id.* at 320–23, 328–29.
311. *See id.* at 329.
312. *See, e.g.*, Richard A. Epstein, *The Perilous Position of the Rule of Law and the Administrative State*, 36 HARV. J.L. & PUB. POL'Y 5, 7–8 (2013); Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 N.Y.U.J.L. & LIBERTY 491, 503–05 (2008); Richard A. Epstein, *Structural Protections for Individual Rights: The Indispensable Role of Article III — Or Even*

striking that such scholars have typically said little or nothing about criminal justice.[313]

This Part begins with the existing rule of law critique of administrative law, as well as such rule of law critiques of criminal justice—entirely focused on policing—as they exist.[314] It then elaborates on the tension between the supervisory model of criminal justice and the rule of law endorsement of the model of rule-following.[315]

A. The Rule of Law Critique of Administrative Law

Broadly speaking, there are four (significantly overlapping) variants of the rule of law critique of administrative law, which I shall call (a) the classical critique, (b) the separation of powers critique, (c) the judicial capture critique, and (d) the notice critique.

The classical critique, associated with scholars of prior generations such as Dicey and Hayek focuses on discretion.[316] This critique is in some respects obscure, and, I think, flawed insofar as it is possible to have administrative law without excessive discretion in executive officials.[317] However, most charitably interpreted, we can frame the classical critique as focused on the motivations of legislators

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Article I — Courts in the Administrative State, 26 GEO. MASON L. REV. 777, 809 (2019); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1234–35 (1994); Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 851–52 (2018); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 15–16 (2014).

313. *See, e.g.*, Epstein, *The Perilous Position of the Rule of Law and the Administrative State*, *supra* note 312, at 7–8; Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, *supra* note 312, at 503–05; Epstein, *Structural Protections for Individual Rights*, *supra* note 312, at 809; Lawson, *supra* note 312, at 1234–35, Calabresi & Lawson, *supra* note 312, at 851–52; HAMBURGER, *supra* note 312, at 15–16.

314. *See infra* Section III.A.

315. *See infra* Section III.A.

316. Dicey's discussion of administrative law is quite complex, but a good summary, which focuses on Dicey's demand that administrators be subject to full review in ordinary courts of law, is provided in John A. Rohr, *Dicey's Ghost and Administrative Law*, 34 ADMIN. & SOC'Y 8, 9–18 (2002). Regarding Hayek's discussion of discretion, see, for example, F.A. HAYEK, THE ROAD TO SERFDOM 78 (1944), arguing that economic planning requires administrative discretion and undermines rule of law.

317. *See, e.g.*, Gowder, *Equal Law in an Unequal World*, *supra* note 44, at 1074–76 (defending the possibility of operating a welfare system without excessive executive discretion).

who create administrative law—for Hayek in particular, the purpose of administrative law seems to have been to permit relatively granular control of the economy.[318] Such economic control, on this argument, necessitates extensive discretion vested in officials.[319] Richard Epstein has offered a variation of the Hayekian argument, where the perceived necessity of economic management has encouraged a replacement of "property rights" with "participation rights" in administrative decision-making over the use of resources, and thus the capacity for individual rights holders to be subject to the arbitrary will of their fellows.[320] He has also observed that the complexity of policy considerations such administrators must take into account makes their decisions "de facto" unreviewable by the courts, insofar as any consideration raised as an objection to a decision can be counterbalanced by some other consideration in its support.[321]

The separation of powers critique focuses on American constitutional doctrine, but where the origins and interpretation of that doctrine are influenced by rule of law considerations.[322] Those who offer the separation of powers critique attack the American administrative state from three directions. First, from the direction of legislative power, it is claimed that Congress lacks the authority to delegate legislative authority to the executive branch (the "nondelegation doctrine").[323] Second, from the direction of judicial

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318. *See, e.g.*, HAYEK, *supra* note 316, at 78, 82–83 (connecting economic planning to conferral of arbitrary power).

319. *See, e.g.*, TAMANAHA, *supra* note 70, at 68 (interpreting Hayek's argument against distributive justice via the welfare state in such terms.). In Hayek's case, I interpret this as a consequence of his more famous argument about markets and information—in order to make up for the informational deficiencies associated with interfering with the price system, officials need more capacity to adapt to new discoveries and short-term emergencies. *See generally* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945) (making this argument); *see also* Judith Shklar, *Political Theory and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY 1, 7-9 (Allan C. Hutchinson & Patrick Monahan eds., 1987) (interpreting Hayek's conception of the rule of law as directed at getting out of the way of market orderings).

320. *See* Epstein, *The Perilous Position of the Rule of Law and the Administrative State*, *supra* note 312, at 9–10.

321. *See* Epstein, *Why the Modern Administrative State is Inconsistent with the Rule of Law*, *supra* note 312, at 503–04.

322. The canonical articulation of this critique is probably Gary Lawson's. *See* Lawson, *supra* note 312. Another very influential version, which is more historically inflected and disclaims rule of law talk but nonetheless clearly draws on rule of law ideas, is Hamburger's. *See* HAMBURGER, *supra* note 312, at 7.

323. *See generally*, Lawson, *supra* note 312, at 1237–41 (describing "[t]he [d]eath of the [n]ondelegation [d]octrine"); Christopher DeMuth, *Can the*

power, it is claimed that rules of law such as the Chevron doctrine, which require courts to defer under some circumstances to agency interpretations of law within their domain, violate the principle that the courts are the interpreters of law.[324] Third, from the direction of the executive power, it is claimed that efforts to protect the independence of administrative officials, particularly policymakers and adjudicators insulated from direct Presidential control, violate the principle that the President must be able to supervise all activities of the executive branch.[325]

This critique has its founding-era touchstone in James Madison's statement that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[326] As Madison's invocation of "tyranny" suggests, the separation of powers critique can easily be interpreted in rule of law terms.[327] With respect to each of the three constitutional claims: The delegation of legislative authority to a branch under the control of a single individual arguably undermines the institutional barriers (of bicameralism and presentment) to excessively freedom-infringing, obscure, or swiftly changing law.[328] A president, whose institutional prerogatives focus on expediency, with control of the interpretation of statutes arguably can lead to faithless interpretation of those statutes as well as the removal of a key barrier for the use of government coercion (controlled by the executive) over private persons.[329] And the insulation of executive

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Administrative State be Tamed?, 8 J. LEGAL ANALYSIS 121, 128–33 (2016) (giving a history of the nondelegation doctrine from the perspective of a critic of the administrative state).

324. *See* Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 865–66 (1984) (establishing this doctrine); *see, e.g.*, Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1187–89 (2016) (criticizing *Chevron* on the basis of judicial role in interpretation and judgment).

325. *See, e.g.*, Lawson, *supra* note 312, at 1241–46 (describing "[t]he [d]eath of the [u]nitary [e]xecutive").

326. *See* THE FEDERALIST NO. 47, at 239 (James Madison) (Lawrence Goldman ed., 2008).

327. *See, e.g.*, DeMuth, *supra* note 323, at 171 ("American administrative law long ago discarded two previously canonical features of the rule of law—that the laws citizens live by are legislated by their elected representatives, and that disputes between citizens and government are judged by independent courts.").

328. *See, e.g.*, *id.* at 173 (criticizing administrative rulemaking for producing "too much law" because of lack of institutional constraints).

329. *See infra* text accompanying notes 338–345 (discussing executive "energy").

branch officials from executive control arguably also insulates the policy they implement from democratic accountability—not, perhaps, as directly related to the rule of law as much as the other two claims, but plausibly indirectly related insofar as one expects either that democratic accountability restrains the freedom of action (and hence the discretion to act lawlessly) of executive officials or one believes that the public values lawful behavior by their officials.

The judicial capture critique focuses attention on the system of administrative adjudication and the difficulty of achieving neutral adjudication within the executive branch. One version of this argument amounts to the allegation that administrative adjudicators appointed under a political agenda are unable to be neutral.[330] However, this argument seems fairly weak to me, as judges, too, are appointed under a political agenda—and as the current polarization around and within the U.S. Supreme Court shows quite clearly, that politicization has drastically compromised the capacity of the judiciary to generate neutral decisions.[331] Given that the only two obvious options available for adjudicating disputes arising out of the administrative state are within the executive branch and within the judiciary, I take it that critics of administrative adjudication would propose to replace executive branch adjudication with Article III adjudication. But given that both categories of adjudicator are non-neutral (or even partisan) it would require evidence that executive adjudicators are *less* neutral than Article III adjudicators to serve as a critique of a system that allocates adjudications to the former rather than the latter.

A version of the judicial capture argument that seems more plausible to me focuses on the simple fact that administrative adjudicators are under the power of the executive branch, and thus subject to direct and ongoing interference from political or policy motivated elected officials rather than the application of law.[332] In other words, the neutrality of a politically appointed adjudicator, whether in the judicial branch or in the executive branch, might be undermined at the time of the adjudicator's selection, insofar as their selection is motivated by perceptions about their political ideology.

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330. *See, e.g.*, Epstein, *The Perilous Position of the Rule of Law and the Administrative State*, *supra* note 312, at 15–16; Epstein, *Why the Modern Administrative State is Inconsistent with the Rule of Law*, *supra* note 312, at 492–93.

331. *See* Gowder, *supra* note 2, at 152–57. *See generally* JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME (2020) (describing theory of "constitutional rot" in which judicial and political polarization play a central role).

332. *See* Gowder, *supra* note 3, at 21–23.

But an executive branch adjudicator might *additionally* be subject to political influence due to their position in a bureaucratic hierarchy (for example because political officials have direct authority over them, and can fire them, transfer them, or cut their pay), while a judicial branch adjudicator might be insulated from that influence. For example, there is empirical evidence that immigration adjudicators' decisions more closely track the political views of the president in power when they make those decisions rather than the president who appointed them, strongly suggesting that they are inadequately insulated from political control.[333] Accordingly, critics of the administrative state have argued that administrative adjudication violates more fundamental principles of legality by subjecting persons to the deprivation of their legal rights in the absence of adjudication by a judge with life tenure and similar independence protections.[334]

Finally, the notice critique focuses on the way that statutes authorizing administrative rulemaking tend to be open-ended, and in conjunction with *Chevron* deference and related doctrines as well as the capacity of agencies to engage in rulemaking by interpretation, pose the risk of law that changes with inadequate notice as the political winds shift or under cases of expediency, making it impossible for people to plan their lives around stable rules.[335] Now-Justice Gorsuch articulated a version of this critique before he joined the Supreme Court in a critique of the Brand X doctrine, under which federal courts must overrule their own precedent to track shifting interpretations of law by administrative agencies:[336]

> Transferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions. Under *Chevron* the people aren't just charged with awareness of and the duty to conform their conduct to the fairest reading of the law that a detached magistrate can muster. Instead, they are charged with an awareness of *Chevron*; required to guess whether the statute will be declared "ambiguous" (courts often disagree on what qualifies); and required to guess (again) whether an agency's interpretation will be deemed "reasonable." Who can even attempt all that, at least without an army of perfumed lawyers and lobbyists? And, of course, that's not the end of it. Even if the people somehow manage to make it through this far

333. *See generally* Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L. J. 579, 579 (2020).

334. *See* Lawson & Calabresi, *supra* note 312, at 863–65.

335. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005); Guitierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring)

336. *See Nat'l Cable & Telecomm. Ass'n*, 545 U.S. at 982–83.

> unscathed, they must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail. Neither, too, will agencies always deign to announce their views in advance; often enough they seek to impose their "reasonable" new interpretations only retroactively in administrative adjudications.[337]

On their face, three of the four critiques of the federal administrative state apply directly to the supervisory model of criminal justice. The only one that does not is the separation of powers critique, only because that critique rests on the strong federal constitutional program of separation of powers which may, but need not be, shared by the state constitutions under which most criminal justice operates.[338] That argument applies indirectly, however, insofar as the same rule of law considerations animating federal separation of powers law also animate, at least normatively if not doctrinally, the separation of powers at state and local levels.[339] For example, Natapoff observes that in municipal criminal courts "sometimes the judge is the mayor," defying our standard norms of judicial independence—much like the process of executive-driven administrative adjudication.[340] Accordingly, Natapoff identifies the parallel between administrative adjudication within the federal executive branch and such municipal courts, and suggests that municipal criminal courts could learn from the innovations in judicial independence in administrative agencies.[341] Of course, many critics of administrative law argue that agencies have in fact failed to secure independent adjudications.[342] Similarly, one of the oft-mentioned ills of the system in Ferguson was the revolving door between prosecutors and judiciary, including entanglements

337. *See Guitierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring); *see also* DeMuth, *supra* note 323, at 151 (criticizing President Obama for "sheer unilateralism" in changing law via the administrative state); *id.* at 173–74 (arguing that administrative rulemaking is inherently more unstable and introduces an "element of surprise" into individual calculation about legal obligations); West Virginia v. EPA, 142 S. Ct. 2587, 2618–19 (2022) (Gorsuch, J., concurring) (arguing that excessive administrative rulemaking would undermine legal stability).

338. *See* Demuth, *supra* note 323, at 173.

339. *See id.*

340. *See* Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 968 (2021) (emphasis omitted).

341. *See id.* at 971, 1018–19.

342. *See, e.g.*, Epstein, *Structural Protections for Individual Rights*, *supra* note 312, at 781–88 (criticizing patent and securities agency adjudications for being insufficiently independent).

where the prosecutor in one jurisdiction would exercise judicial powers in another.[343]

More abstractly, the separation of powers idea that there is a particular danger in too greatly empowering the executive, in view of that official's Hamiltonian "energy,"[344] has long been present in criminal justice scholarship. For example, Skolnick has observed that:

> The police in democratic society are required to maintain order and to do so under the rule of law. As functionaries charged with maintaining order, they are part of the bureaucracy. The ideology of democratic bureaucracy emphasizes initiative rather than disciplined adherence to rules and regulations. By contrast, the rule of law emphasizes the rights of individual citizens and constraints on the initiative of legal officials. This tension between the operational consequences of ideas of order, efficiency, and initiative, on one hand, and legality, on the other, constitutes the principal problem of police as a democratic legal organization.[345]

Those words could just as well have been written about the U.S. President and, for example, national security expediency versus legal fidelity.[346] Nor is the similarity between worries about executive power in the national security, administrative state, and criminal justice areas coincidental.[347] Rather, it is built into the sorts of things that executives do.[348] Thus, Hamilton, in his defense of the single executive, decomposes the components of "energy" which a single executive is supposed to most effectively achieve as "[d]ecision,

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343. *See, e.g.*, FERGUSON REPORT, *supra* note 159, at 49; *see also* Jennifer S. Mann et al., *A Web of Lawyers Play Different Roles in Different Courts*, ST. LOUIS POST-DISPATCH (Mar. 29, 2015), https://www.stltoday.com/news/local/crime-and-courts/a-web-of-lawyers-play-different-roles-in-different-courts/article_b61728d1-09b0-567f-9ff4-919cf4e34649.html (last visited Sept. 29, 2023) (describing network of lawyers that appear before one another in shifting roles of prosecutor, judge, and defense attorney across municipal courts in St. Louis County, including Ferguson). This kind of representation and role-switching network likely facilitated the exploitative nature of the municipal criminal courts in Ferguson and other jurisdictions in St. Louis County by permitting a separation between elites not subject to legal expropriation and masses subject to it. *See id.* (describing numerous incidents in which prosecutors and judges appear to have given one another sweetheart deals for their clients); *see also* Gowder, *supra* note 71, at 343 (arguing that Ferguson system of expropriation by law depended on elite ability to refrain from enforcing exploitative laws against their own social networks).

344. *See* THE FEDERALIST NO. 70, *supra* note 326, at 344 (Alexander Hamilton).

345. *See* Skolnick, *supra* note 11, at 5 (emphasis removed).

346. *See generally* GOWDER, *supra* note 3, at 130–33 (describing "Schmittian dilemma" of executive power).

347. *See id.*

348. *See id.*

activity, secrecy, and despatch."[349] The logic of that decomposition of "energy" is clear: a central part of the job of an executive is to carry out *conflict* on behalf of the state, whether that conflict is foreign or domestic; the central feature of conflict is that it confronts an adversary of some kind (a military opponent, a litigant on the other side, an alleged criminal).[350] The thing about opponents is that they tend to surprise one, and they tend to want to anticipate one's own surprises; keeping one's own plans secret, pivoting quickly to adapt to unexpected behavior from one's adversary—these are the sorts of characteristics that executive organizations are likely to have incentives to build into their internal cultures.[351] Those executive characteristics are fundamentally in conflict with the characteristics that we might naturally associate with an entity that can be trusted to come to final resolutions of legal disputes—like judicial neutrality (an executive oriented toward defeating adversaries is likely to have a hard time neutrally resolving disputes with those adversaries), transparency about reasons and deliberation (as opposed to "secrecy" and "despatch"), and the like.[352]

The Hayekian logic of the classical critique, though it originated as a critique of economic regulation, could just as well stand as a critique of broken windows policing as well as the misdemeanor processing that Kohler-Hausmann described. Because the sorts of things that might count as disorder or disturbance are radically open-ended, and because communities subjected to broken-windows policing are ultimately being regulated not by community norms but by the incentives of external constituencies to contain subordinated groups (notwithstanding what Kelling and Wilson claim),[353] order maintenance policing is unlikely to be able to create general rules

349. *See* THE FEDERALIST NO. 70, *supra* note 326, at 343–50 (Alexander Hamilton).

350. *See id.* at 344; *cf.* Dubber, *supra* note 150, at 1313 (discussing Bentham's characterization of police as "preventive" response to "internal adversaries"); Dubber, *supra* note 119, at 10 (characterizing the object of policing as "a threat to sovereign power").

351. *See* THE FEDERALIST NO. 70, *supra* note 326, at 345–46 (explaining how an energetic, unitary executive is better equipped to respond to exigencies); Skolnick, *supra* note 11, at 5 ("The ideology of democratic bureaucracy emphasizes initiative rather than disciplined adherence to rules and regulations.") (emphasis omitted).

352. *See* THE FEDERALIST NO. 70, *supra* note 326, at 345 (describing the ideal attributes of an executive officer); Skolnick, *supra* note 11, at 5 (describing the conflict between the exercise of executive authority and the constraints of the rule of law).

353. *See supra* Subsection II.A.4 (describing Kelling and Wilson's description of broken windows policing).

known in advance, even promulgated by the police.[354] Rather, administrators (police) issue one-off commands for the sake of expedient resolution of (what seem to them to be) short-term problems, without regard to the individual rights of those allegedly creating the problems.[355]

In order to facilitate such short-term problem solving, the degree of discretion granted police directly implicates the notice critique.[356] As described in the previous Part, a key way in which our law confers discretion on police is by criminalizing a vast amount of ordinary day-to-day behavior, such as standing around on the street or stretching out on the New York City Subway.[357] Under such circumstances, the legal implications of an individual's conduct are likely to be unpredictable to them, at least in the absence of Justice Gorsuch's "army of perfumed lawyers and lobbyists."[358] We can expect it to often come as a surprise that conduct which is well within social norms is actually against the law.[359] Similarly, the informal policies under which police

354. For this reason, Kenneth Culp Davis's solution to the problem of police discretion, namely to take the analogy between policing and administration seriously and require police departments to promulgate rules governing how they would use their discretion, *see* Davis, *supra* note 223, at 112–20, is unlikely to work. To the extent police departments can create rules, we can expect the rules they create to respond to those external constituents who are powerful, such as the Baltimore police supervisor who ordered officers to use the discretion provided by vague and overbroad laws to "'clear corners'" for the sake of "citizens" as opposed to "criminals" (who had violated no laws). *See* FERGUSON REPORT, *supra* note 159, at 29.

355. *See supra* Subsection II.A.4.

356. *See* Guitierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

357. *See supra* notes 194–205.

358. *See Guitierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).

359. For example, I have elsewhere suggested that this likely explains the impact of Ferguson's infamous "occupancy permit" tax, under which domestic violence victims were punished for failing to pay for a permit for their live-in abusers. *See* FERGUSON REPORT, *supra* note 159, at, at 81; *see also* Gowder, *supra* note 19, at 247–48; Gowder, *supra* note 71, at 341–43. Who wakes up in the morning and thinks to themselves, "Do I need to go to city hall and ask for permission before inviting my boyfriend to live with me?" I do not know the extent to which Ferguson publicized this occupancy permit process, but given the general expropriation character of its criminal justice system and the way it seems intended to generate disobedience, *see* Carbado, *supra* note 235, at 556–560 (summarizing Ferguson's system of revenue-oriented policing); Gowder, *supra* note 71, at 341 (arguing that Ferguson revenue system was built on expectation of widespread disobedience), the city seems highly unlikely to have been interested in publicizing such rules (unless perhaps city elites imagined that they'd make more from informed permit revenue than from fines for the violation). If that's true, then obeying it would have either required the "army of perfumed lawyers" to warn a person about the rule, or for a citizen to be so paranoid

exercise their discretion to choose whom to punish for "disorderly conduct" or "loitering" or "impeding traffic" or the like are too malleable to give any person who merely exists in public a basis for knowing what they can do to avoid punishment.

In other words, from the standpoint of a person subjected to supervisory policing, the law does not function as a system of rules on which they may deliberate and then choose to obey.[360] There is no practical way to choose to obey rules against disorderly conduct or blocking the street, as those rules can be interpreted by a motivated police officer to license punishment for any presence in a public space.[361] And rules that fly in the face of ordinary social norms are insulated from deliberation by those who may be called upon to obey them because of the difficulty of bringing them to awareness.[362]

A version of the judicial capture critique also applies to criminal justice. Because of the overwhelming bargaining power of prosecutors under high case volumes, high penalties, and charging discretion, prosecutors, in many cases, have the power to effectively dictate outcomes.[363] It is no coincidence that under such circumstances the U.S. has been compared to a quasi-administrative (or inquisitorial)

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as to imagine that anything they might do, no matter how banal or ordinary, could constitute an offense or a thing that their municipality has chosen to tax on pain of arrest, and hence fire up the Westlaw account (that they don't have) to find out. *See Guitierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring). However, dear reader of this Article, don't take my word for it! Have you ever had a roommate or a live-in romantic partner? If so, did you first check to see whether your city's municipal code required you to pay for a permit? The same point applies with somewhat lesser force to the criminalization of minor norm violations like taking up multiple seats on the subway. *See supra* notes 194–205. While putting one's feet on a subway seat isn't within ordinary social norms like having a roommate or a live-in boyfriend is, being arrested and taken to Rikers Island for doing so is so plainly disproportionate to the norm violation that it seems almost mind-boggling, again in the absence of extreme cynicism or paranoia, to imagine that the behavior is cause for the attentions of the police as opposed to social sanctions like the stink eye from one's fellow passengers. *See id.*

360. *See* Gowder, *supra* note 19, at 247–48.

361. See supra Subsection II.A.1 (describing system of overbroad laws licensing arrest for mere presence in public).

362. *See* Gowder, *supra* note 71, at 341 (describing the policing in Ferguson as a model based on an expectation of disobedience given broad unawareness of laws regulating mundane activity).

363. *See* Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1420 (2010) ("In most cases, prosecutors can charge at will and preordain the ultimate resolution."). *See generally* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004) (arguing that prosecutors rather than law exercise dominating influence on plea bargaining outcomes).

system that merges the role of prosecutor and judge.[364] And yet, prosecutors still have the distinctive *incentives*—for expediency rather than deliberation, and with electoral accountability to a public hunger for ever-increasing harshness—of executives.[365] This is practically similar to the dual roles occupied by, for example, the DOJ attorneys who serve as immigration "judges."[366] Indeed, Natapoff contends that because misdemeanor process is so ineffective at freeing those who were baselessly arrested, police themselves rather than prosecutors have effectively been delegated conviction decisions.[367] This too has a parallel in the administrative process, namely the system of "expedited removal," which delegates final removal decisions in many cases to frontline enforcement officials.[368] It is perhaps not coincidental that Harcourt uses language strongly reminiscent of the critique of administrative regulation in his early critique of broken windows policing, noting that "the policy may facilitate an uncomfortable delegation of the power to define community standards."[369]

To some extent, Malcolm Feeley's insight that "the process is the punishment"—that much criminal punishment in actual fact

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364. *See, e.g.*, Lynch, *supra* note 289, at 2118 (arguing that plea bargaining introduces inquisitorial and administrative element into the U.S. criminal justice system); *see also* Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403–04 (2003) ("[T]he *prosecutor*, rather than a judge or jury, is the central adjudicator of facts . . . ."); *id.* at 1404 (describing plea bargaining as "an informal, administrative, inquisitorial process of adjudication, internal to the prosecutor's office—in absolute distinction from a model of adversarial determination of fact and law before a neutral judicial decision maker"); Barkow, *supra* note 296, at 327.

365. Prosecutorial incentives are somewhat complex. *See generally* Pfaff, *supra* note 302, at 138–44, 166–70 (describing electoral incentives relating to prosecutorial ambition for higher office, geographic divergence between jurisdictions electing prosecutors and jurisdictions paying for prisons, greater political salience of improperly freed criminals than the opposite error).

366. *See* Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts,"* 33 GEO. IMMIGR. L.J. 261, 274–76 (2019) (describing lack of independence of immigration judges). In particular, see *id.* at 276 n.112, describing government's claimed authority to reassign immigration judges to other positions. The Department of Justice has formally characterized members of the Board of Immigration Appeals as "Department of Justice attorney[s]" subject to at-will removal or transfer by the Attorney General. *See* Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54878, 54893 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3); *see also* Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 372–77 (2006).

367. *See* Natapoff, *supra* note 14, at 1317.

368. *See* GOWDER, *supra* note 3, at 156–57.

369. *See* Harcourt, *supra* note 116, at 383.

occurs through systems like pretrial detention, lost work, and bail, that is, administered primarily by police and prosecutors rather than judges—is fundamentally administrative in character.[370] To see this, observe that bureaucratic inefficiency and red tape have been used as a weapon by federal administrative agencies for generations.[371] In the criminal context, perhaps the most clear instantiation of this is the "time served" sentence, in which defendants have an overwhelming incentive to plead guilty to some charge (regardless of their factual guilt) just because they have been in jail for so long awaiting trial that the sentence they get would entail their immediate release.[372] The process is the *official* punishment in such cases.[373]

From the brief discussion above, it should be evident that the rule of law critique of administrative law as it currently exists has some direct application to criminal justice.[374] However, the rest of this Part will suggest that matters are even worse for criminal justice, as the structure of policing, in particular across geographically segregated boundaries of racial and class subordination, exacerbates the rule of law challenges noted above by: (a) providing a positive incentive for the use of violence by state officials to enforce a position in a hierarchical status arrangement; and (b) distributing the burdens of arbitrary government action along preexisting dimensions of social, economic, and political inequality.[375] Both of these additional inegalitarian implications of the operation of policing in the United States are distinct from the scenario presented in challenges to administrative law, which tend to focus on derogations from ordinary legal order in industrial regulation, that is, operating on actors with the social and economic resources to defend themselves in the political domain.[376] For these reasons, criminal justice is more objectionable

370. *See* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 3–6 (1992).

371. *See* PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 1–3 (2018); *see also* GOWDER, *supra* note 3, at 134–35 (discussing abuse of administrative bureaucracies in immigration and voting rights contexts); *cf.* KOHLER-HAUSMANN, *supra* note 108, at 183–220 (describing use of "procedural hassle" for defendant management in misdemeanor courts).

372. *See* Natapoff, *supra* note 14, at 1322.

373. *See id.*

374. *See supra* notes 363–3373 and accompanying text.

375. *See infra* Section III.C.

376. However, this is to some extent a consequence of the fact that the administrative law literature itself is deeply misguided even within administrative law, focusing on areas of administrative law that most impact the wealthy and powerful. *See* Gowder, *supra* note 3, at 38–43. There are areas which predominantly

than administrative law from the standpoint of an egalitarian theory of the rule of law.[377]

Before we get there, however, it will be helpful to contextualize the literature by looking at the recent work attempting to understand policing from a rule of law perspective.

B. Existing Rule of Law Critiques of Policing

Currently, the literature does not (as far as I can discern) contain a full-fledged rule of law analysis of a supervisory model of criminal justice. However, there is some recent literature of particular interest with respect to policing in particular, which this Section will review.

John Lawless has argued that what he terms "preventive policing"—policing oriented less toward after-the-fact punishment of individuals' conduct and more toward *ex ante* management of that conduct by changing the incentives surrounding that conduct (such as by operating DUI checkpoints to deter drunk driving, or taxing unwanted activities) is inconsistent with the capacity of law to define "shared status concepts" among the population.[378] The root of Lawless's argument is essentially expressive: (1) some forms of preventive policing reinforce pernicious social messages about the inherent criminality of subordinated groups or the impunity of advantaged groups and hence "cast some members of the community beyond the law's manifest authority";[379] and (2) preventive policing sometimes "crowds out" the standard legal process with its attributions of responsibility to the law and recognitional "rituals" expressing legal standing.[380]

However, preventive policing, on Lawless's account, still assumes (or at least is consistent with) the model of rule-following: the state can choose to "nudge" people around with DUI checkpoints and Pigouvian taxes in aid of securing their compliance with the ordinary rules of criminal law as assumed by scholars like Waldron, Fuller, and Hart.[381] Consider as an example of a form of police conduct which would arguably be objectionable on Lawless's account but

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affect the poor and powerless, most significantly immigration law, which have largely been ignored by administrative law scholars. *See id.*

377. *See* Gowder, *The Rule of Law and Equality*, *supra* note 12.

378. *See* John Lawless, *Against the Managerial State: Preventive Policing as Non-Legal Governance*, 39 L. & PHIL. 657, 667, 670, 678–79 (2020).

379. *See id.* at 680–84.

380. *See id.* at 684–85.

381. *See id.* at 662–65 n.9.

which does not seem to undermine the basic model of rule-following—the "peace bond" which Jerome Hall described, seventy years ago, as an established item in the crime-control toolkit: a threatening individual might be brought before a judge and required to post a bond to guarantee their nonviolent behavior.[382] Such bonds amount to "preventive policing" in the sense that they aim to prevent rather than punish rule-breaking, but so long as peace bonds are only required on the basis of evidence of a threatened violation of the rules and only forfeited in response to an actual violation of the rules, they are still consistent with the model of rule-following: they don't give authorities a boundless supervisory authority over some individual.[383]

Lawless's account is nonetheless helpful, in part, because it provokes reflection on important questions, such as the compatibility with the rule of law of the "new penology" of Feeley and Simon.[384] Feeley and Simon suggest that the objectives of criminal justice are increasingly described in aggregate rather than individual terms—in terms of managing the aggregate level of "deviance"—and that this is also reflected in managerial practices in more individualized elements of the criminal justice system, such as practices of preventive detention.[385] Yet, at least sometimes, in Feeley and Simon's account, there's still an implicit premise of rule-violation under the hood (here captured in that term "deviance"): the thing to be managed is the overall level of rule violation, and not the broader socially acceptable behavior or lack thereof of a managed population.[386] Contrast this with practices of policing the homeless in which the underlying concern isn't rule violation but the aesthetic preferences or nonspecific "fear" of their more fortunate neighbors.[387] Considering Lawless together with Feeley and Simon leads me to think that there are two ways in which criminal justice might deviate from the model of rule-

382. *See* Jerome Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 150–51 (1953).

383. *See id.*; *see also* Lawless, *supra* note 378, at 657–58. By contrast, the United Kingdom for a few years permitted local magistrates to issue an "anti-social behaviour" order, or ASBO, which was effectively a judicialized version of broken windows, as individuals could be subject to court order to refrain from obnoxious but perfectly legal behavior. *See* Craig Johnstone, *After the Asbo: Extending Control over Young People's use of Public Space in England and Wales*, 36 CRITICAL SOC. POL'Y 716, 718 (2016). This procedure, and the successor procedures Johnstone describes, are in somewhat more tension with the model of rule-following.

384. *See* Feeley & Simon, *supra* note 144, at 149–51.

385. *See id.* at 455–57.

386. *See id.*

387. *See supra* Section II.A.1.

following: it might not be aimed at punishing or preventing rule violations; or it might be so aimed, but it might operate primarily at the aggregate rather than the individual level, for example, by punishing people because of their statistical similarity to rulebreakers. Either way, such a system on the ground would present as individuals being subject to coercion independent of their individualized violation of the rules of criminal law (except for discretionary rules that we all violate, like "loitering"), and it is that separation between individual rule violation and individual coercion that Part II of this Article highlighted.

Niraj Sekhon argues that the police serve as a kind of Schmittian sovereign in street-level encounters: because much of their function is to maintain order rather than to bring people before the courts, the law is largely unable to constrain their moment-by-moment decisions about exercising coercion.[388] Instead of understanding the law as an effective constraint on police authority, Sekhon argues, we should understand it as at most a site of resistance and contestation.[389] While I agree with Sekhon's diagnosis, the normative and theoretical upshots of this Article are different.[390] Sekhon focuses on the abuse of police coercive force, which is not the same as this Article's focus on supervision rather than rule enforcement.[391] To see this, consider that a police officer who beats a confession out of a murder suspect is obviously acting lawlessly—but their behavior is nonetheless recognizable as an attempt to enforce the rules of the criminal law and bring those who violated those rules to justice—a deeply objectionable attempt, but an attempt nonetheless. Accordingly, such police conduct is not the subject of this Article, though it is the subject of Sekhon's; beating confessions out of suspects, which does violate the rule of law, does not amount to an abandonment of the basic premises of the model of rule-following (and rule-enforcement) shared by essentially all legal theorists.[392]

Note that this Article differs from Lawless and Sekhon on essentially the same key point.[393] Lawless and Sekhon focus on conduct that at least putatively aims to enforce the rules of the criminal law against individuals who have violated them (or prevent those violations), and identify that the police often egregiously violate the

388. *See* Sekhon, *supra* note 148, at 1718–19.
389. *See id.* at 1766.
390. *See id.* at 1712-15.
391. *See id.*
392. *See id.*
393. *See id.*; Lawless, *supra* note 378, at 657–60.

rules that apply to their own conduct in the course of doing so.[394] By contrast, this Article focuses on an area that appears to be of unrecognized significance, at least among those whose core concerns are in areas like jurisprudence and the rule of law: the extent to which law enforcement has taken on a wide variety of reasons to deploy the state's coercive power that are not about individual rule violation at all.

I think a similar shift in focus can help us shed light on an important concept that David Sklansky contributed to the criminal law conversation, namely "ad hoc instrumentalism."[395] As Sklansky describes it, ad hoc instrumentalism is the habit of understanding a wide variety of legal processes—criminal prosecution, immigration detention and deportation, national security actions of various sorts, civil sanctions, etc.—as just tools to be chosen by officials in the pursuit of their enforcement ends on grounds of expediency, rather than distinct legal fields with distinct reasons that apply to officials who invoke them.[396] Sklansky has raised the possibility that rule of law ideas might be raised as a critique of ad hoc instrumentalism, just because there seems to be something inappropriately empowering about permitting officials to, in effect, select among a wide menu of options offered by the criminal justice system to handle some troublemaker.[397] He concludes, however, that "the rule of law itself is too vague of an ideal to help clarify what is particularly worrisome about . . . ad hoc instrumentalism."[398]

Yet, Sklansky perhaps misses the opportunity to use the idea of the rule of law to clarify the different kinds of ad hoc instrumentalism, which might raise different kinds of rule of law objections. Ad hoc instrumentalism might be used to describe situations where the state uses what we might think of as alternative rules to punish people who are nonetheless guilty of crimes—the classic example being the prosecution of Al Capone for tax evasion.[399] There might be rule of law objections to this conduct, but they would be fairly narrow, focusing, for example, on a kind of lack of publicity or full opportunity

394. *See* Sekhon, *supra* note 148, at 1721–22; Lawless, *supra* note 378, at 357–59.

395. *See, e.g.*, David Alan Sklansky, *Crime, Immigration, and Ad hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 161 (2012).

396. *See id.* at 201, 203.

397. *See id.* at 209–12.

398. *See id.* at 211.

399. Sklansky alludes to this famous example. *See id.* at 201.

to defend the real charge at issue, which might nonetheless be taken into account at the penalty stage of proceeding.[400]

By contrast, ad hoc instrumentalism might be used to describe situations where the state uses criminal law to control the behavior of those who have not violated any rule of criminal law, or to coerce behavior not required by any such rule and far beyond the scope of behavior that such rules are meant to encourage.[401] Thus, in a different article, Sklansky gives the example of prosecutors who threaten organizations with criminal prosecution "as a bludgeon to coerce broad, organizational reform."[402] This sort of worry about ad hoc instrumentalism more closely matches the rule of law objections raised in other contexts, such as in administrative law, where the real worry is that officials are exercising arbitrary power—that the organizational reforms which they impose on companies are dictated not by the law but by their idiosyncratic preferences. Indeed, rule of law objections have been raised to deferred prosecution agreements in the corporate context.[403]

This shift in focus from misguided attempts to enforce rules to the use of the tools of criminal law to engage in broader social control is also self-consciously in conversation with some of the earlier scholarship on the relationship between law enforcement and rule of law ideals.[404] For example, Herbert Packer, a leading criminal law scholar of the 1960s, described "the Crime Control model" (as opposed to the contrasting "Due Process model") of the entire criminal process, including police, as "far more administrative and managerial

400. For a critique of cases like the Capone conviction on these grounds, see Mendlow, *supra* note 226, at 191.

401. *See, e.g.*, Sklansky, *supra* note 302, at 486.

402. *See id.*; *see also* Barkow, *supra* note 296, at 326 (noting that deferred prosecution agreements are used to require corporations to engage in behavior not directly required by law, such as "stop engaging in specific lines of business" and "fire employees or officers" in order to work a, quoting a deputy Attorney General, "change in corporate culture"). There is a suggestive similarity between the seeming implicit notion that some companies are aberrant and need to be internally reformed in order to cure their propensity for crime and the notion of preemptively regulating abnormality. *See* Simon, *supra* note 110, at 1642.

403. *See, e.g.*, Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 192–93 (2016). For reasons described in Gowder, *supra* note 3, 37–41, I am skeptical that such impositions against corporations ought to be the chief target of our worries about arbitrary power, however.

404. *See* Herbert L Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 238, 239 (1966).

than . . .adversary and judicial."[405] Nonetheless, for Packer, the goal of that model is still to prevent crime by apprehending offenders—that is, to deter and punish violations of the rules—not a broader form of social management.[406]

Of particular interest—if only because of its author's important place in the history of the development of the American rule of law—in the early critical literature on police is a 1966 essay by Charles Reich entitled "Police Questioning of Law Abiding Citizens."[407] Reich identifies a number of the problems associated with arbitrary police encounters. These include the capacity to inquire into behavior that isn't illegal;[408] the race and class bias in police contacts;[409] and the way that arbitrary power is rooted in the unconstrained capacity of police to arrest people for things like "vagrancy," "disorderly conduct, and—particularly vivid to me in light of Michael Brown's death a half-century later—"walking on the wrong side of the road."[410] Reich also identifies the antiegalitarian implications of such police behavior in terms of an assumed hierarchical status between police and citizen.[411] Yet, Reich nonetheless still assumes that crime in the sense of rule violation is the object of the procedure, in that "prevention of crime" is the goal to be achieved by such interrogations.[412]

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405. *See id.*

406. *See* Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 11 (1964) ("What is a successful conclusion? One that throws off at an early stage those cases in which it appears unlikely that the person apprehended is an offender and then secures, as expeditiously as possible, the conviction of the rest with a minimum of occasions for challenge, let alone postaudit. By the application of administrative expertness, primarily that of the police and prosecutors, an early determination of probable innocence or guilt emerges. The probably innocent are screened out. The probably guilty are passed quickly through the remaining stages of the process.").

407. *See generally* Charles A Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L. J. 1161, 1161 (1966). With respect to Reich's place in the history of the development of the American rule of law, I refer of course to his articulation of the scholarly basis for *Goldberg v. Kelly*, 397 U.S. 254 (1970) (extending procedural due process rights to welfare benefits). *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 786–87 (1964) (the articulation of the scholarly basis in question). On the significance of Reich's article and of *Goldberg*, see GOWDER, *supra* note 3, 77–79.

408. *See* Reich, *Police Questioning of Law Abiding Citizens*, *supra* note 407, at 1162.

409. *See id.* at 1164–65.

410. *See id.* at 1165–66.

411. *See id.* at 1163–64.

412. *See id.* at 1171.

C. Why Supervisory Criminal Justice is Worse than the Administrative State

This Section fills out the comparison between criminal justice and the administrative state.[413] It first contextualizes criminal justice in the literature on relational conceptions of freedom and equality. It then offers a synthesis of some of the existing literature on race and class segregation and police violence to elaborate on the distinctive harms of arbitrary power in the context in which criminal justice actually appears, namely, extreme underlying social hierarchy as well as a mode of state power that goes through the direct application of violence.[414]

1. *Supervisory Policing as Domination*

Begin by considering an extreme version of the supervisory model of policing, such as is recounted by scholars who study the policing of homelessness, for example, or a neighborhood like that described by Kelling and Wilson.[415] The day-to-day life of someone in a community subject to pervasive supervisory policing has the potential to be drastically narrower than one who is not in such a community.[416] The autonomy to engage in ordinary activities of daily life, such as congregating with friends in public space, can be taken

413. *See infra* Sections III.C (comparing criminal justice with administrative state).

414. *See, e.g.*, Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57, 68−69 (2014); Raff Donelson, *Blacks, Cops, and the State of Nature*, 15 OHIO ST. J. CRIM. L. 183, 187 (2017) (giving accounts of current police violence as power over minorities). *See also* Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182 (2017) (arguing that laws regulating police violence, particularly in response to resistance, amount to race-based distribution of the burdens of violence). Of course, all law has the threat of violence at the end of it. *See generally* Cover, *supra* note 48, at 1629. But only some areas of law are *routinely* violent, and the sort that involves immediate interactions with people with guns and other people being locked in cages seems to me to be much more direct relative to, for example, the sort of law where, one is only likely to encounter violence if one disobeys multiple court orders and ends up with the sheriff evicting one from one's home in order to execute a money judgment.

415. *See* Stuart, *supra* note 170, at 287; Kelling & Wilson, *supra* note 248, at 3–4.

416. *See generally* Butler, *supra* note 414, at 69 (giving a mother's testimony to how a Black man's life is different because of the police).

away on the whim of a uniformed class of third parties.[417] This is precisely the evil at which Dicey's description of the rule of law's prohibition on arbitrary power was directed.[418] American police have the power to issue orders like "move on" to banish people engaged in no violation of law whatsoever from the street.[419] And they can, and routinely do, punish people for violating those orders.[420] Dicey condemned just that kind of power:

> We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.[421]

It should be readily apparent that this method of policing is inconsistent with the model of rules described in Part I more broadly. The delivery of immediate one-off commands: "move along," "get off the street," as well as the Kelling and Wilson-style adjudication of disputes on the basis of "informal" rules capturing the identity of the parties leaves individuals—particularly "strangers" to the community, as Kelling and Wilson describe them—no opportunity to deliberate about the rules or to exercise their faculties of reason; in effect there are no rules, just a quite literal guy with a stick telling one what to do. Quite contrary to the message of universal aristocracy sent, on Waldron's account, by the ordinary functioning of law, such supervision seems to send the message that its subjects cannot be trusted to manage their own lives or interact responsibly with one another.[422] Such distrust becomes explicit once the pervasive police contacts characteristic of enterprises like broken windows policing sweep a person into Kohler-Hausmann's "Misdemeanorland," as an individual then is marked as increasingly suspicious and expected to

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417. *See generally* Donelson, *supra* note 414, at 186 (giving examples of how the mistrust police have of the Black community lead to fatal confrontation during ordinary activities).

418. *See generally* Dicey, *supra* note 17, at 110 (describing heart of rule of law as requiring "distinct breach of the law" before publishment).

419. *See* EGON BITTNER, THE FUNCTIONS OF THE POLICE IN MODERN Society 100–01 (1970).

420. *See id.*

421. *See* Dicey, *supra* note 16, at 110.

422. *See* Kelling & Wilson, *supra* note 248; Waldron, *supra* note 5, at 33.

routinely demonstrate compliance—they are quite openly not trusted to live their lives independently.[423]

Consider also the supervisory model of policing in the context of Hayek's claim that predictable law is freedom-preserving.[424] Once again, under supervision, these benefits of legal order appear to drop away: a person subject to supervisory policing cannot make plans with foreknowledge of the ways in which the state will interfere with them, for the state might interfere with their plans at any time and for any reason.

Hayek has a particularly important discussion of supervision and command giving in police. He observes that a rule of law oriented around command giving would not be freedom-preserving, of course, but the argument turns out to be more complicated.[425] In his words, "[c]ertainly the principle [of *nullum crimen*, *nulla poena sine lege*] would not be satisfied if the law merely said that whoever disobeys the orders of some official will be punished in a specified manner."[426] But we must not move too quickly through the analysis, for Hayek goes on to recognize that in fact such laws exist: "[y]et even in the freest countries the law often seems to provide for such acts of coercion."[427] He then makes reference to just the troublingly discretion-conferring elements I have described, observing that "[t]here probably exists no country where a person will not on certain occasions, such as when he disobeys a policeman, become liable to punishment for 'an act done to the public mischief' or for 'disturbing the public order' or for 'obstructing the police,'" but promises that the worry that this observation seems to raise—which I read as the fear that the rule of law is nonexistent or impossible—will be resolved after more of his account of the rule of law is filled out.[428]

As best as I can determine, Hayek means to suggest that such punishments are consistent with the rule of law when they are subject to review by an independent judge who does not merely scrutinize whether or not the individual disobeyed an order, but also whether the underlying order was legal—that is, pursuant to some preexisting rule, itself consistent with the rule of law. This is, at least, how I read the following discussion a few pages later, which shifts from criminal law

423. *See generally* KOHLER-HAUSMANN, *supra* note 108, at 263 (describing process of increasing suspicion of those caught up in misdemeanor system).

424. *See* HAYEK, *supra* note 89, at 216.

425. *See id.* at 206.

426. *See id.* at 206–07.

427. *See id.* at 207.

428. *See id.*

to administrative law but captures the same worry about open-ended legislation:

> We have already seen, however, that if the law said that everything a certain authority did was legal, it could not be restrained by a court from doing anything. What is required under the rule of law is that a court should have the power to decide whether the law provided for a particular action that an authority has taken. In other words, in all instances where administrative action interferes with the private sphere of the individual, the courts must have the power to decide not only whether a particular action was *infra vires* or *ultra vires* but whether the substance of the administrative decision was such as the law demanded.[429]

This seems to me to be inconsistent with the sort of command-giving policing that criminal justice scholars have identified, for it centrally features orders that police officers are not, in fact, authorized to give by substantive law—when Kelling and Wilson's officer adjudicates a dispute between a customer and a shopkeeper, or tells a "stranger" to "move on," the officer is not directly exercising some authority given them by statute; rather their power to coerce is conferred on them by a separate overbroad statute permitting the punishment of "disorderly conduct" or some such thing, as well as the practical unlikelihood of such an arrest ever being tested in an adjudication—and so the legality of the underlying order, disobedience of which is the real cause for any punishment handed out, is effectively immune from judicial scrutiny.[430] For Hayek, by contrast, only if an individual who was arrested for disobeying a police order had a real opportunity to challenge the legality of the order, would it be consistent with the rule of law.[431]

Philip Pettit and other neorepublicans in contemporary political philosophy have influentially characterized similar relationships as "domination."[432] According to Pettit, the essence of domination is a lingering power of interference: the dominator has the unchecked capacity to intervene on the dominated's choices.[433] The notion of domination seems to me to be a good match for supervisory policing insofar as the consequence of such supervision is that the supervised

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429. *See id.* at 214.

430. *See generally* Natapoff, *supra* note 14, at 1328 (describing misdemeanor adjudication as "a world largely lacking in a scrutinized evidentiary basis for guilt").

431. *See* HAYEK, *supra* note 89, at 216.

432. *See generally* PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 63 (2012); PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 23 (1997); Phillip Pettit, *Freedom as Antipower*, 106 ETHICS 576, 578 (1996).

433. *See* Pettit, *supra* note 432, at 578.

lack security against the interference of police with their day-to-day choices.[434]

Pettit has expressed just this fear about police:

> [M]odern police represent the salient sort of threat to republican values that the standing army was taken to constitute among traditional republicans. Charged with the job of ensuring public order, guarding against crime, and apprehending criminals, police forces are nowadays given enormous powers, they are exposed to huge temptations to abuse those powers, and their use of the powers is subject only to very imperfect controls. The powers in question include the power to charge or not to charge, perhaps even the power to frame; the power to harass and make life miserable for someone; the power to spread rumors and ensure someone's defamation; and, of course, the power to threaten such ills and thereby coerce people to do what they want. The temptations include the age-old temptation just to assert yourself and command attention; to realize an identity as part of a powerful, self-reinforcing group . . . .[435]

In similar terms, Raff Donelson has aptly compared the relationship between Black Americans and police to a Hobbesian state of nature, insofar as "there is no power available to overawe the police"—that is, the decisions of the police, and particularly the violent decisions of the police, are not actually controlled by legal authority.[436]

Illustrating Pettit's notion of domination, the avoidance and management of police attention can become a persistent fact of life for racially and socioeconomically subordinated Americans.[437] Cop avoidance and cop appeasement impose a continuous burden on an individual's ordinary day-to-day activities.[438] For example, Stuart describes the lives of residents of Los Angeles's skid row as characterized by routine peer education and planning about how to avoid being singled out for arrest—the constant sharing of information among those in the community about which behaviors might look "suspicious" and which people are, because of slip-ups in matters as trivial as personal grooming, likely to be arbitrarily stopped and cited or taken to jail.[439] Those residents who had particular fears of the

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434. *See* PETTIT, *supra* note 441, at 155.

435. *See id.*

436. *See* Donelson, *supra* note 414, at 187.

437. *See, e.g.*, Nikki Jones, *"The Regular Routine": Proactive Policing and Adolescent Development Among Young, Poor Black Men*, *in* NEW DIRECTIONS FOR CHILD & ADOLESCENT DEV. 33, 41 (K. Roy & N. Jones eds., 2014) (describing police avoidance strategies of Black youth in hyper-policed community).

438. *See id.*

439. *See* Stuart, *supra* note 170, at 292–95; *see also* Brunson, *supra* note 126, at 84–85 (recounting similar street wisdom of over-policed Black teenagers).

consequences of arrest completely reorganized their lives to avoid spending time in places frequented by police:

> Following the ordeal, Tyrell began deploying a number of strategies that he hoped would decrease his chances of being "caught up" near suspicious sidewalk groups again. First and foremost, he re-routed his daily paths through the neighborhood streets to avoid not just those he knew to be associated with drug activity, but virtually any area that attracted large groups. This particularly included the sidewalks near the neighborhood's major service providers, community organizations, and public toilets. Displaying even more dedication to avoiding police contact, Tyrell timed all his walking routes from his front door to the various bus stops in the area. He discovered that if he could sync his walking times with the transit schedule, he could effectively eliminate the need to stand idly on the sidewalk.[440]

Similarly, Paul Butler describes the experiences of his students with stop-and-frisk harassment, noting that they receive the message that they're obliged to stay home to avoid the attentions of the police.[441] Famous Black professors feel themselves obliged to introduce themselves to the police in new neighborhoods so that the police will know that they are upstanding citizens rather than criminals.[442] Such daily burdens cut against the core of the liberal ideal in which the rule of law is rooted.[443] Central to that ideal is that ordinary citizens can, at least sometimes, go about their lives without having the state on their minds—that they can organize their affairs in sufficient security against state coercion to be able to pursue complex private goals.[444] A mode of policing which forces civilians in certain neighborhoods to walk on eggshells and shape every micro-level decision of their lives in order to avoid the attentions of the police is

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440. *See* Stuart, *supra* note 170, at 297.

441. *See* Butler, *supra* note 414, at 65.

442. *See id.*; *see also* Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L.L. REV. 1, 21–22 (2011) ("[L]aw-abiding minorities curtail their travel through majority white neighborhoods to avoid stops and encounters based on racial incongruity, and limit their styles of dress.").

443. *See* Capers, *supra* note 442, at 21–22.

444. *Cf.* Richard Bellamy, *Hegel and Liberalism*, 8 HIST. EUR. IDEAS 693, 693 (1987) (summarizing liberal theory as that "the state is simply a means to the fulfillment of our private projects. It is therefore subordinate to society, merely providing a legal and institutional framework for the adjustment and reconciliation of the divergent pursuits of its different members."); Jeremy Waldron, *The Rule of Law in Contemporary Liberal Theory*, 2 RATIO JURIS. 79, 84–85 (1985) (discussing connection between the rule of law and liberal value of autonomy).

not one in which they are free to, in Rawls's formulation, pursue their individual "conceptions of the good."[445]

The relationship of domination between police and private citizens, practically speaking, also translates into a relationship of domination between some citizens and others.[446] Order-maintenance is difficult and requires substantial cognitive resources; we can expect the police to develop heuristics as to who "wins" and who "loses" when they find themselves resolving disputes in their order-maintenance role.[447] This seems to me to be a plausible exception for the strangers/regulars and businessperson/customer heuristics in Kelling and Wilson's rules.[448] And in general, those heuristics are likely to track preexisting social hierarchies, particularly those associated with race and socioeconomic class.[449] A police officer making a decision about who "wins" some street-level dispute is likely to be influenced by implicit biases and racial stereotypes about criminality and disorder.[450] We can see this most vividly in the contemporary scandals about White Americans calling the police on Black Americans as a trump card in trivial disputes—comfortable in the shared knowledge of whose side the cops will take.[451] Thus, when

445. *See* JOHN RAWLS, A THEORY OF JUSTICE 491 (1971).

446. *See* PETTIT, *supra* note 432, at 155,

447. *See id.*

448. *See* Kelling & Wilson, *supra* note 248.

449. *See id.*

450. *See* Paul Gowder, *Racial Classification and Ascriptive Injury*, 92 WASH. U.L. REV. 325, 339–43 (2014) (describing literature on implicit racial biases and relationship to perceptions of crime); Morgan, *supra* note 110, at 1658–63 (describing evidence on racial stereotypes of crime and disorder).

451. *See*, *e.g.*, Rachel Siegel, *White Golf Course Owners said Five African American Women were Playing too Slowly. Then They Called the Police.*, WASH. POST (Apr. 25, 2018, at 10:12 AM), https://www.washingtonpost.com/news/business/wp/2018/04/24/white-golf-course-owners-said-five-african-american-women-were-playing-too-slow-then-they-called-the-police/ [https://perma.cc/QM9C-XAKU]; Daniel Victor, *'All I did was be Black': Police are Called on College Student Eating Lunch*, N.Y. TIMES (Aug. 2, 2018), https://www.nytimes.com/2018/08/02/us/black-smith-college-student-oumou-kanoute.html [https://perma.cc/WY7W-F4W7]; Jan Ransom, *Amy Cooper Faces Charges After Calling Police on Black Bird-Watcher*, N.Y. TIMES (July 6, 2020), https://www.nytimes.com/2020/07/06/nyregion/amy-cooper-false-report-charge.html [https://perma.cc/WSE3-9QFW]; Matthew Haag, *Nordstrom Rack Apologizes to Black Teenagers Falsely Accused of Stealing*, N.Y. TIMES (May 8, 2018), https://www.nytimes.com/2018/05/08/business/nordstrom-black-men-profiling-shopping.html [https://perma.cc/BU2P-E3PS]; Daniel Victor, *A Woman Said She Saw Burglars. They Were Just Black Airbnb Guests.*, N.Y. TIMES (May 8, 2018), https://www.nytimes.com/2018/05/08/us/airbnb-black-women-police.html [https://perma.cc/NU6C-YHJE]. *See generally* Chan Tov McNamarah, *White Caller Crime:*

police have the power to act arbitrarily, this power also confers on White civilians arbitrary power over Black civilians, and the Newark police described by Kelling and Wilson conferred on shopkeepers arbitrary power over their customers—some people can call on the police and trust that the police will dispense coercion at their whim, while others must cower in fear of that same coercion.[452]

Elizabeth Anderson has argued that such policing practices effectively label those in the most overpoliced groups as "outlaws" who are publicly outside the protection of the state and "inherently criminally suspect and dangerous," and, in doing so, also makes them vulnerable to a wide array of secondary abuses, both from the state and from their fellow private citizens.[453] For a simple example of the point, we can consider patterns of policing like that in Ferguson, where money-motivated policing led the police to punish those who called on them for assistance, most infamously when women who sought protection from domestic violence were arrested for not purchasing "occupancy permits" for their abusers.[454] This kind of police conduct undoubtedly deters citizens from calling on the police for actual assistance that they might need: when the police are the only socially available method for seeking protection from violence and exploitation by others, those who are afraid to call the police are made vulnerable to all kinds of private aggression.[455] Of course, being an outlaw is also an expression of degraded status, one so severe that Paul Butler has compared being subject to pervasive stop-and-frisk to torture.[456]

Thus far, this Article has repeatedly gestured at the notion that supervisory criminal justice is racialized. The time has now come to fill out that part of the argument.

Racialized Police Communication and Existing While Black, 24 MICH. J. RACE & L. 335, 337–42 (2019).

452. *See* Kelling & Wilson, *supra* note 248.

453. *See* Elizabeth Anderson, *Outlaws*, 23 GOOD SOC'Y 103, 110–11 (2014); Paul Gowder, *Immigration, Government Terror, and the Rule of Law*, 107 IOWA L. REV. ONLINE 94, 109–10 (2022) (providing history of outlawry and its relation to the rule of law).

454. *See* FERGUSON REPORT, *supra* note 159, at 81; GOWDER, *supra* note 19, at n. 29 (discussing the investigation of the Ferguson Police Department).

455. *See* FERGUSON REPORT, *supra* note 159, at 81 ("[O]ur conversations with Ferguson residents revealed many instances in which they are reluctant to report being victims of crime or to cooperate with police, and many instances in which FPD imposed unnecessary negative consequences for doing so.").

456. *See generally* Butler, *supra* note 414, at 57–58.

2. *The Separating Equilibrium of Aggression Versus Legitimacy Under Race/Class Segregation*

One notable fact about policing is the heterogeneity of police departments and of experiences of policing.[457] Another notable fact is that the United States continues to have a substantial degree of racial segregation.[458] Moreover, that segregation is strongly associated with concentrated poverty in Black and Brown communities.[459]

Those facts, I submit, are closely related to one another. To frame the problem, I will sketch an informal model of the geographic organization of policing. The following model is heavily influenced by recent work by Monica Bell,[460] Daria Roithmayr,[461] and Devon Carbado,[462] but attempts to synthesize their core insights and others in an account of how police in segregated communities are under an incentive to adopt aggressive and supervisory strategies.

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457. *See, e.g.*, Geoffrey P. Alpert & John M. MacDonald, *Police Use of Force: An Analysis of Organizational Characteristics*, 18 JUST. Q. 393, 402–03 (2001) (reporting descriptive statistics on police use of force across 265 American departments with a median of 76 use of force incidents per 100,000 residents, but with a range from 0.24/100,000 to 868/100,000—though surely some of that is due to misreporting); Jessica Huff et al., *Organizational Correlates of Police Deviance: A Statewide Analysis of Misconduct in Arizona, 2000–2011*, 41 POLICING: AN INT'L J. 465, 470–77 (2018) (describing organizational differences between police departments that generate disproportionately large amounts of officer misconduct versus disproportionately small amounts.); Jose Javier Lopez & Pedro M. Thomas, *The Geography of Law Enforcement Malpractice: National Patterns of Official Misconduct in the United States, 1989–1999*, 38 J. OF AM. STUD. 371, 376–77 (2004) (describing wide range in prevalence of misconduct charges across U.S. states).

458. *See* Bell, *supra* note 125, at 659–68.

459. *See* Lincoln Quillian, *Segregation and Poverty Concentration: The Role of Three Segregations*, 77 AM. SOCIOL. REV. 354, 354–55 (2012); *see also* Bell, *supra* note 125, 672–73 (further describing concentrated disadvantage in segregated communities). It is possible for a community to experience concentrated disadvantage without segregation—a number of impoverished rural communities in the United States, be they white or Black, suffer from these burdens. *See id.* Such communities probably experience some, but, in the case of the white communities, not all, of the distinctive incentives for aggressive policing identified below. *See id.*

460. *See* Bell, *supra* note 125.

461. *See generally* Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y & L. 197 (2004); Daria Roithmayr, *The Dynamics of Excessive Force*, 2016 U. CHI. LEGAL F. 407 (2016).

462. *See generally* Carbado, *supra* note 175; Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017); Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 160 (2016).

On the informal model, there are two high-level strategies for achieving its goals that what we might call a policing unit (or just "unit") might adopt.[463] Assume that a police unit has at least two goals, which can be pursued to a greater or lesser degree: to stop crime and to preserve or create "order." Further assume that the balance between those goals, and the definition of what it takes to count them as achieved (for example, which crimes are most important, which things count as disorder) is subject to influence from a wide variety of policy-makers, from individual police officers all the way up to politicians and the press. I will call the two strategies the *legitimacy strategy* and the *aggression strategy*.

A policing unit operating under the legitimacy strategy seeks broad-based voluntary and active support within the territory for its goals, support rooted in perceptions by the general public within that territory that the police are, on the whole, providing a positive public service and that helping the police is likely to be individually and collectively beneficial.[464] Such a unit depends, for example, on civilians voluntarily reporting crime, wielding social sanctions and incentives to address disorder, and calling for police assistance when they are in need, and, when undertaking criminal investigations, it also depends on civilian cooperating witnesses who assist police in finding culprits.[465] Such a strategy also assumes, and attempts to support, high degrees of social capital in the territory: police may, for example, encourage the creation of neighborhood watch groups to promote civilian information-sharing, and may seek collaborative relationships with civil society organizations, churches, and other centers of community life.[466]

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463. By "policing unit," I mean a discrete policing organization with a specific geographic territory and command structure that has a sufficient number of individual officers and sufficient organizational complexity to develop different policies with respect to things like resource allocation priorities and use of force, and a different culture, from other policing units. Thus, for example, precincts or divisions in a large metropolitan police department like the NYPD or LAPD may be policing units, as may entire departments in smaller areas.

464. This is what I mean by "legitimacy"—a fairly minimal idea capturing the notion of general attitude of support within the territory. *See* David L. Deephouse & Mark Suchman, *Legitimacy in Organizational Institutionalism*, *in* THE SAGE HANDBOOK OF ORGANIZATIONAL INSTITUTIONALISM 49, 54–55 (2008) (summarizing more sophisticated sociological conceptions of legitimacy).

465. *See* Tom R. Tyler et al., *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization*, 11 J. EMPIRICAL LEGAL STUD. 751, 753 (2014) (explaining that police success depends on perceived legitimacy of the police force).

466. *See id.* at 754.

By contrast, a policing unit operating under the aggression strategy seeks to achieve its goals through force and intimidation.[467] Rather than relying on civilians reaching out to them to report crime and disorder, police engage in active surveillance of their territories and support their surveillance by force.[468] They engage in widespread random searches using pretextual traffic stops and Terry stops for legal cover, both to harass sources of disorder and drive them out of the territory and to search for evidence of crimes.[469] For the same reasons, they also aggressively make use of their power under the open-ended sources of authority described in Part II of this Article to order about and to arrest for loitering and the like those to whom they attribute "disorder."[470] Police largely lack legitimacy under such a strategy, as the aggression they display toward residents of the territory has created a mutually hostile relationship, leading to resentment and to a disposition in residents to resist complying with their commands or offering them assistance in their law-enforcement function—and in turn, to an increasing adoption of aggression as the only means which they can use to achieve their goals, what Roithmayr has described as a cycle of escalation.[471]

To the extent police in a territory can easily and reliably differentiate between insiders and outsiders, they may also adopt a legitimacy strategy for insiders and an aggressive strategy for outsiders—we could call such a hybrid the *gated community strategy*, in which those who appear out of place are subject to aggression for the benefit of insiders.[472] Such a strategy could also be adopted within divided territory, for example, in which richer and older members of a single community seek to deploy police force to control poorer and younger members (such as teenagers).[473]

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467. *See* Fagan & Davies, *supra* note 256, at 462 (describing aggressive tactics associated with broken windows policing).

468. *See* Tyler et al., *supra* note 465, at 755 (describing active surveillance associated with "proactive policing" strategy).

469. *See* Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIA. L. REV. 425, 425–26 (1997) (discussing pretextual stops); Fagan & Davies, *supra* note 256, at 458–59 (discussing Terry stops and racial bias).

470. *See infra* Part II.

471. *See* Roithmayr, *The Dynamics of Excessive Force*, *supra* note 461, at 424–26.

472. *See* Albert J. Meehan & Michael C. Ponder, *Race and Place: The Ecology of Racial Profiling African American Motorists*, 19 JUST. Q. 399 (2002) (giving evidence of disproportionate attention to Black motorists found "out of place" in non-Black neighborhoods).

473. These age dynamics are visible, for example, in the description by Forman of drug addiction and other crime centered on youth in Black support for

The core theoretical idea that this model is meant to suggest is that the organization of police units can—and is likely to—separate on the basis of such strategies, with more aggressive strategies deployed in relatively subordinated communities.[474] This separation is facilitated by segregation, which concentrates race and class subordinated communities in particular geographic areas (and hence police unit jurisdictions) and, in those areas, reduces the costs to police of adopting aggressive strategies because such communities lack the political power to oppose them relative to more advantaged communities.[475] The separation is also facilitated by the stigmatization of such communities, which leads those in advantaged groups to support supervisory policing strategies (such as order maintenance or broken windows) to contain or "reform" such communities: because the exercise of such arbitrary power is perceived as illegitimate, and is likely to lead to resistance from within the community, police units have an incentive to adopt aggressive strategies in order to overcome this resistance.[476]

If the model I have sketched resembles reality to a sufficient degree—and I shall spend the rest of this Subsection filling in the details—then, under conditions of segregation, there is an unavoidable connection between supervisory policing, aggressive (and violent) policing, and race/class inequality. Policing is likely to deviate from the model of rules in the most subordinated communities, and those deviations are likely to be violent. From the rule of law standpoint, this raises additional grounds to object to supervisory criminal justice, as compared to the industrial regulation of the administrative state.[477] I will now proceed to elucidate some of the details of how the informal model works, in aid of illustrating its plausibility and coherence as a description of policing under conditions of segregation.

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antidrug policies. JAMES FORMAN, LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 25–41 (2017).

474. Fagan & Davies, *supra* note 256, at 463.

475. *See* Sarah Wallace, *I-Team: More NYPD Officers Say There's Proof of Quota-Driven Arrests*, NBC N.Y. (2016), https://www.nbcnewyork.com/news/local/nypd-officers-arrest-quota-exclusive-interview-pressure-numbers/748594/ [https://perma.cc/FE4J-FAZF] (last visited Sept. 29, 2023) (quoting New York police officer confessing that in order to meet arrest quotas, "we're going to go for the LGBT community, we're going to the black community, we're going to those that have no vote, that have no power").

476. *See, e.g.*, Tyler et al., *supra* note 474, at 753 (providing evidence that police contact perceived as unjust undermines legitimacy, willingness to cooperate with police).

477. *See supra* Part III.A.

First, observe that segregation separates communities with political power from those without.[478] Accordingly, those in segregated territories are less capable of deploying external political authority to control police.[479] The mayor has little incentive to listen to the voices of those in impoverished and isolated police precincts; the legislature has little reason to respond to those in poor and isolated rural areas.[480]

Relatedly, segregation breaks two kinds of solidarity across different racial and class groupings, which I will call "legal solidarity" and "epistemic solidarity." Legal solidarity represents the idea that all members of a broader political community are genuinely subject to the same laws and have incentives to use their political power to keep those laws from being oppressive.[481] If there are clear divisions, for example, attached to physical location and to physically legible ascriptive identities like race, between those who are subject to certain kinds of legal regimes (such as harassment under loitering laws) and those who are not, then those who are in immune social categories lack an incentive to resist such laws. Epistemic solidarity represents the possibility of shared knowledge across social divisions. If those who are not disadvantaged by some legal regime are also sheltered from knowledge about the experiences of those who are so disadvantaged—if wealthier white people never have to see what poorer Black people experience, because their neighborhoods are physically separate—then even if the advantaged have a latent disposition to protect their fellow citizens, it will be difficult to mobilize them to political action.[482]

Third, segregation and the concentrated poverty associated with it create financial incentives for police to adopt an oppositional relationship with their communities. The denuded public budgets of impoverished communities promote Ferguson-style policing

478. *See* Patrick Flavin & William W. Franko, *Economic Segregation and Unequal Policy Responsiveness*, POL. BEHAV. 845, 846 (2019) (finding that Congressional Representatives better track preferences of residents in affluent communities compared to poorer communities).

479. *See id.* at 849.

480. *See* Carbado, *supra* note 175, at 1492 (arguing that lack of political power in segregated communities facilitates police abuses).

481. *See, e.g.*, Bass, *supra* note 252, at 163 (explaining how "residential segregation provides a means by which wholly different standards of public service [including policing] could be delivered without affecting the white community").

482. *See id.*

strategies in which financially desperate municipalities use over-policing as a source of revenue.[483]

Fourth, segregation promotes a perception of segregated communities as filled with both crime and disorder.[484] In particular, there is extensive evidence of racial stereotypes associating Black Americans with crime; Black neighborhoods are likely to be perceived by outsiders and by police as more dangerous and more criminal than they actually are, leading police to presume that people they encounter are criminal or disorderly, and hence to assume that they need to approach individuals within the territory more aggressively and to engage in more surveillance and questioning of ordinary people going about their business in the territory.[485] There is also strong reason to believe that perceptions of disorder are associated with race and class, among other identity categories.[486]

By undertaking more efforts to remove "disorder" in places where the general population, because of racial and class bias, is perceived as disorderly, the police make it more difficult for themselves to be seen as legitimate.[487] This is a conclusion suggested by the research on police legitimacy associated with scholars such as Tom Tyler.[488] One regular theme of such research is that police legitimacy is associated with "procedural fairness," which captures ideas such as the extent police themselves follow the law and the extent people see themselves as having some control over their interactions with the police and have their views heard and their legitimate interests taken into account.[489] In effect, we can see this as

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483. *See* Atuahene, *supra* note 235, at 170 (explaining predatory municipal revenue strategies, including predatory policing); Carbado, *supra* note 175, at 552 (discussing predatory policing in the forms of arrest, seizures, and citations and how it connects to city revenue).

484. *See, e.g.*, Bell, *supra* note 125, at 706 (describing genesis and consequence of police identifying segregated neighborhoods as "high crime" and targeting aggressive strategies to those communities, as opposed to "service" strategies in white neighborhoods).

485. *See* Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOCIO. 717, 720 (2001) (discussing geographic stereotypes of race and crime).

486. *See* Morgan, *supra* note 110, at 1642; Robert J Sampson & Stephen W Raudenbush, *Neighborhood Stigma and the Perception of Disorder*, 24 FOCUS 7, 7 (2005).

487. *See* Roithmayr, *The Dynamics of Excessive Force*, *supra* note 470, at 424.

488. *See* Tyler et al., *supra* note 474, at 753.

489. *See, e.g.*, Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC'Y REV. 513, 545–46 (2003) (explaining procedural fairness measure including questions about police

a kind of cultural conflict: if police, due to racial and other biases, view ordinary life in a place as disorderly, even if they start out pursuing a legitimacy strategy, the harassment that their biased perceptions of disorder leads them to engage in are likely to undercut their legitimacy, provoke community opposition, and thus cause police to resort to aggressive strategies in order to obtain compliance.[490] This is, I take it, the core dynamic underneath Roithmayr's cycle of escalation.[491]

Fifth, segregated and disadvantaged communities are less likely to be able to use non-police strategies to protect themselves from actual crime as well as the sorts of "disorder" to which local community members actually object (even if that disorder is not criminal).[492] Lacking economic resources, they may be unable to provide their residents with everything from afterschool programs (to keep rowdy teenagers off street corners) to drug treatment and jobs, thus making them vulnerable to crime and disorder.[493] Moreover, they may be less politically capable of defending themselves from categories of business that may lead to criminal or disorderly negative externalities, such as rowdy bars, strip clubs, and polluting factories.[494]

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knowledge of and compliance with the law); Tom R. Tyler, WHY PEOPLE OBEY THE LAW 125 (1990) (procedural fairness judgments influenced by experience of "process control," that is, sense of having their views heard by officer or judge); Tyler et al., *supra* note 465, at 753 (perceived quantity and intrusiveness of police stops associated with lower degree of perceived police legitimacy); Miller, *supra* note 186, at 296 (summarizing literature on "voice" as element of procedural fairness). For a concrete example of this phenomenon, the Department of Justice noted that the Ferguson, MO police department's practice of aggressive (revenue-oriented) citation and arrest for low-level violations deterred citizens from becoming "cooperating witnesses" in actual crime. *See* FERGUSON REPORT, *supra* note 159, at 82; *see also* Jones, *supra* note 437, at 35–36 (reviewing literature on police loss of legitimacy in over-policed communities, identifying cynical attitudes toward police adopted by over-policed youth).

490. *See* Roithmayr, *The Dynamics of Excessive Force*, *supra* note 470, at 424.

491. *See id.* at 424–26.

492. *See* Travis C. Pratt & Francis T. Cullen, *Assessing Macro-Level Predictors and Theories of Crime: A Meta-Analysis*, 32 CRIME & JUST. 373, 411–12 (2005) (meta-analysis of research studies supporting association between poverty and crime); William Alex Pridemore, *Poverty Matters: A Reassessment of the Inequality–Homicide Relationship in Cross-National Studies*, 51 BRIT. J. CRIMINOLOGY 739, 739–40 (2011) (finding relationship between poverty and murders).

493. *See* Carbado, *supra* note 175, at 1491 (explaining criminogenic effects of segregation).

494. *See, e.g.*, Rick Nevin, *Understanding International Crime Trends: The Legacy of Preschool Lead Exposure*, 104 ENV'T RSCH 315, 315 (2007) (explaining evidence that childhood lead poisoning is associated with crime); John Paul Wright et al., *Association of Prenatal and Childhood Blood Lead Concentrations with Criminal*

They may also be less economically capable of defending themselves from such intrusions, to the extent that lower land values make such businesses more economically viable.[495]

The problem of a lack of alternative strategies places segregated and disadvantaged communities in a double-bind. As Randall Kennedy has emphasized, Black communities are frequently "underprotect[ed]" from crime.[496] And even in the order-maintenance policing world in which segregated communities groan under an immense police presence, residents of those communities nonetheless note that police are unresponsive to reports of serious crimes.[497] Because police do actually deter crime,[498] it was rational for Black community leaders, starting in the 1970s, to demand more police

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Arrests in Early Adulthood, 5 PLOS MED. 732, 732 (2008); Mark Patrick Taylor et al., *Further Analysis of the Relationship Between Atmospheric Lead Emissions and Aggressive Crime: An Ecological Study*, 17 ENV'T HEALTH 1, 1 (2018); Robert J. Sampson & Alix S. Winter, *Poisoned Development: Assessing Childhood Lead Exposure as a Cause of Crime in a Birth Cohort Followed Through Adolescence*, 56 CRIMINOLOGY 269, 270 (2018); Tara E. Martin & Scott E. Wolfe, *Lead Exposure, Concentrated Disadvantage, and Violent Crime Rates*, 37 JUST. Q. 1, 2 (2020); Jessica Wolpaw Reyes, *Environmental Policy as Social Policy? The Impact of Childhood Lead Exposure on Crime*, 7 B.E. J. ECON. ANALYSIS & POL'Y 1, 1 (2007).

495. Relatedly, there may be an inherent connection between who the *individuals* are who are most victimized by order maintenance policing and socioeconomic status. Those who are wealthier have more capacity to conduct their business in private; those who are poorer must do some of the things that the wealthy do in private, in public. For example, those who cannot afford cars must rely on public transit, and hence must have their sitting practices subjected to the scrutiny of the New York police. Goldstein & Haughney, *supra* note 207. If you can afford six dollar lattes and twelve dollar cocktails, you hang out with your friends in cafes and bars; if you cannot, you hang out with your friends in public parks and on street corners—at least until some police officer decides that your presence is menacing and offensive and orders you to move along on pain of arrest for loitering. The limit case of this tendency is a homeless person, who has no private space at all in which to conduct their business; it should not be surprising that the homeless are a key target of order-maintenance policing, to the point that they can be seen as definitionally among the disorderly. *See* Harcourt, *supra* note 116, at 343. And this is, yet again, a consequence of the conception of disorder in play, which does not, of course, encompass things like tax evasion characteristically done by the wealthy in private. *See id.* at 383.

496. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 29 (First Vintage Books ed. 1998).

497. *See* Prowse et al., *supra* note 126, at 1442.

498. *See* Klick & Tabarrok, *supra* note 104, at 267; Rafael Di Tella & Ernesto Schargrodsky, *Do Police Reduce Crime? Estimates Using the Allocation of Police Forces After a Terrorist Attack*, 94 AM. ECON. REV. 115, 115 (2004); Mirko Draca et al., *Panic on the Streets of London: Police, Crime, and the July 2005 Terror Attacks*, 101 AM. ECON. REV. 2157, 2180 (2011). I thank David Skarbek for drawing my attention to this literature.

presence.[499] If I may indulge raw speculation for a moment, it may be that this demand for more police presence was misguided not because the crime problem wasn't real, but because community leaders were overly optimistic about the incentives police would be under—they may have thought that police would be under incentives to pursue a legitimacy strategy, when they were really were under an incentive to pursue an aggression strategy. However, aggression strategies may also undercut the crime-preventing effect of police by promoting the continuation of community disadvantage, such as by imposing the collateral employment burdens of conviction or even of arrest on working-age members of those communities,[500] or harming children by incarcerating their parents.[501] And as noted, aggressive strategies may also impede solving crimes that do occur by deterring citizens within a segregated community from reporting crime.[502]

Sixth, segregation allows police to cheaply use gated community strategies to exclude ascriptively marked groups from relatively advantaged areas—wealthier whites who perceive Black and Brown Americans as "out of place" in their leafy suburban neighborhoods can call on police to drive out such intrusions without subjecting themselves to overpolicing, facilitating "white flight" and other private segregation strategies adopted by the advantaged.[503]

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499. *See* FORMAN, *supra* note 473, at 270.

500. *See generally* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 2–3 (2007); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction Sentencing*, 160 U. PA. L. REV. 1789, 1833 (2012); Christopher Uggen et al., *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627, 628 (2014); Benjamin D. Geffen, *The Collateral Consequences of Acquittal: Employment Discrimination on the Basis of Arrests without Convictions*, 20 U. PA. J.L. & SOC. CHANGE 81, 82 (2017).

501. *See generally* Christopher Uggen & Suzi McElrath, *Parental Incarceration: What We Know and Where We Need to Go*, 104 J. CRIM. L. & CRIMINOLOGY 597, 598 (2014).

502. *See, e.g.*, Weaver et al., *supra* note 126, at 617; Matthew Desmond et al., *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOCIO. REV. 857, 858 (2016); Anthony A. Braga et al., *Race, Place, and Effective Policing*, 45 ANN. REV. OF SOCIO. 535, 536 (2019).

503. *See generally* Meehan & Ponder, *supra* note 472, at 421–22 (giving empirical evidence for out-of-place policing of Black civilians); Carbado, *supra* note 175, at 1492–93 (explaining that segregation facilitates police misconduct "by normalizing the idea that particular racial groups belong in particular geographic areas."). On the use of this strategy to guard the boundaries of white communities, see sources cited in Shytierra Gaston & Rod K. Brunson, *Reasonable Suspicion in the Eye of the Beholder: Routine Policing in Racially Different Disadvantaged Neighborhoods*, 56 URB. AFFS. REV. 188, 194 (2020).

Finally, in segregated neighborhoods, the police suffer from a further baked-in legitimacy deficit in the context of persistent racial inequality: those who are subject to police commands are well aware that the police represent a social and economic order in which they are not fully included.[504] In 1960, James Baldwin explained the way that this pushes police toward an aggression strategy:

> Similarly, the only way to police a ghetto is to be oppressive. None of commissioner Kennedy's policemen, even with the best will in the world, have any way of understanding the lives led by the people they swagger about in two's and three's controlling. Their very presence is an insult, and it would be, even if they spent their entire day feeding gumdrops to children. They represent the force of the white world, and that world's real intentions are, simply, for that world's criminal profit and ease, to keep the black man corralled up here, in his place. The badge, the gun in the holster, and the swinging club make vivid what will happen should his rebellion become overt.[505]

We can summarize all of these points into one core dynamic principle. Segregation permits advantaged communities to develop political strategies to protect themselves from crime and "disorder" that externalize the costs on disadvantaged communities.[506] Because segregation and concentrated poverty itself is criminogenic; and because, as discussed above, it deprives communities of economic and social development strategies of crime control, richer and whiter neighbors turn to strategies of exclusion that use their privileged control over the resources of the state in ways that reinforce that segregation.[507] That is, the economically and racially privileged have the capacity and incentive to use policing to exclude those who seem out of place (on the basis of race and of class), and to control the people in those other neighborhoods who are perceived as disorderly and threatening at minimum cost to their own wealth.[508]

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504. *See* James Baldwin, *Fifth Avenue, Uptown*, ESQUIRE (July 1960), https://www.esquire.com/news-politics/a3638/fifth-avenue-uptown/ [https://perma.cc/PQU9-3H6F] (last visited Sept. 29, 2023).

505. *See id.*

506. *See, e.g.*, Morgan, *supra* note 110, at 1658–59 (describing evidence on racial stereotypes of crime and disorder).

507. *See* Nicola Lacey & David Soskice, *Crime, Punishment and Segregation in the United States: The Paradox of Local Democracy*, 17 PUNISHMENT & SOC'Y 454, 463 (2015). *See generally* Lauren J. Krivo et al., *Segregation, Racial Structure, and Neighborhood Violent Crime*, 114 AM. J. SOCIO. 1765, 1793 (2009) (reviewing literature and offering evidence for criminogenic effect of segregation).

508. For a similar account, see Lacey & Soskice, *supra* note 507, at 463.

Police departments in poor, segregated, Black and Brown communities can be expected, for the above reasons, to abandon legitimacy strategies and pursue aggressive strategies.[509] But it should also be noted that aggressive policing contributes to existing segregation in a number of additional ways.[510] Recently, Monica Bell has published an article giving an extensive account of the many factors connecting policing to the maintenance of segregation.[511] The factors Bell identifies include several discussed here as well as a number of others; of particular interest are "mass criminalization," which traps Black and Brown civilians in poverty via the economic and social consequences of arrest and prosecution;[512] "patrolling borders," or deterring Black and Brown citizens from entering or moving to predominantly white, socioeconomically advantaged, areas by subjecting them to harassment for being "out of place";[513] and "constructing neighborhood reputations," in which policing practices do not just result from the characterization of a neighborhood as high-crime or disorderly but also cause it.[514]

Comparative evidence supports the proposition that segregation and subordination tend to encourage aggressive rather than legitimacy-oriented policing strategies.[515] Anthropologist Didier Fassin conducted an ethnographic study of policing practices in the *banlieues* of France, disadvantaged, segregated areas of ethnic minority and immigrant populations.[516] France's police are national,

509. *See id.*

510. *See* Bell, *supra* note 125, at 655–56.

511. *See id.* I have further discussed Bell's work in Gowder, *supra* note 3, at 122–23.

512. *See* Bell, *supra* note 125, at 690–96.

513. *See id.* at 696–701. As Bell describes, this can also be done in conjunction with other bureaucracies, such as housing authorities. *See id.* at 703–04; *see also* Bennett Capers, *Policing, Place, and Race*, 44 HARV. CIV. RTS. – CIV. LIBERTIES L. REV. 43, 68 (2009) (describing "border control" impact of police harassment of citizens of color for being out of place).

514. Bell, *supra* note 125, at 709.

515. *See generally* DIDIER FASSIN, ENFORCING ORDER: AN ETHNOGRAPHY OF URBAN POLICING (2013) (providing comparative evidence of police strategies).

516. *See id.* at xv; *see also* Jean-Louis Pan Ké Shon, *The Ambivalent Nature of Ethnic Segregation in France's Disadvantaged Neighbourhoods*, 47 URB. STUD. 1603, 1603 (2010) (describing segregation in *banlieues*). For a comparison between the French and American models of segregation, see generally Loïc Wacquant, *French Working-Class* Banlieues *and Black American Ghetto: From Conflation to Comparison*, 16 QUI PARLE 5, 5 (2007). For further discussion of Fassin's work, see Paul Gowder, *What Things Undermine the Rule of Law? Ongoing Lessons from American Legal Decay*, *in* RULE OF LAW: CASES, STRATEGIES, AND INTERPRETATIONS 48 (Barbara Faedda ed., 2021).

but there are "special units" devoted to policing the *banlieues*.[517] The *banlieues*, including the area that Fassin studied, are less ethnoracially concentrated than American inner-cities, but are still ethnically distinct from the majority-white population.[518]

Fassin observed a model of policing that appears strikingly similar to how American policing operates in segregated neighborhoods.[519] For example, Fassin recounts routine humiliating—and sometimes explicitly ethnicity-based—stops and frisks and ID checks that appear to do little to control actual crime,[520] even though such checks were not legally permissible,[521] and an explicit model of "preventative" policing in which civilians were scrutinized without any particular criminal suspicion.[522] Relevant to the discussion of violence and status below, he recounts a spiral of escalating aggression that leads from a noise complaint in a community hostile to the police to a weapon being pointed at the head of a nine-year-old child who was "judged insolent."[523] He describes the open police endorsement of racial stereotypes of disorder and animalistic character.[524] The special *banlieues* police unit explicitly relied on their aggressive reputation to evoke fear and compliance.[525] He observed violent retaliation for insults and for disagreement.[526] Illustrating Roithmayr's cycle of escalation, police also appear to be aware that their pervasive harassment undercuts their legitimacy with the community, but do not appear to see any alternative strategy as available to them.[527] Senior

517. *See* FASSIN, *supra* note 515, at xiii, xxii–xxiii, 55.

518. *See id.* at 25; Wacquant, *supra* note 516, at 25.

519. *See* FASSIN, *supra* note 515, at 146.

520. *See id.*, at 2–6, 64–66, 74, 88, 90, 146–47, 161 (giving examples of illegal stops by police).

521. *See id.* at 91.

522. *See id.* at 55.

523. *See id.* at 39.

524. *See id.* at 52–53.

525. *See id.* at 60 ("They often told me with satisfaction that, when an operation involving uniformed police was going badly, their arrival would immediately calm the individuals concerned. They were much readier than their colleagues to use force, but in general their presence was sufficiently menacing and their reputation well enough established to dampen any urge to react in their public, who were aware that things would inevitably escalate into a confrontation that would culminate in charges of insulting and resisting the police. Their harshness aroused fear: they knew it, and were proud of it.").

526. *See id.* at 160–61.

527. *See* Roithmayr, *Locked in Segregation*, *supra* note 461, at 424–26; FASSIN, *supra* note 515, at 92–93, 219-20 (recounting the failure of the aggressive strategy to actually yield crime-prevention results—and in particular noting that police "receive[] remarkably few calls").

police officials are ambiguous about whether the goal of the police is to fight crime or to fight disorder.[528] There's even a version of the Talk familiar to Black American families.[529]

3. *From Aggression Strategies to the Violent Enforcement of Status*

On August 14, 2014, the Washington Post turned its pages over to a police officer to express (what must have seemed to the editors as) the opposing viewpoint to the protests surrounding the killing of Michael Brown.[530] Sunil Dutta, a "17-year veteran" in Los Angeles, took the opportunity to write an op-ed entitled—you couldn't make this up if you tried— *I'm a cop. If you don't want to get hurt, don't challenge me*.[531] That editorial openly threatened violent retaliation for even nonviolent—and constitutionally protected—objections to police conduct:

> Even though it might sound harsh and impolitic, here is the bottom line: if you don't want to get shot, tased, pepper-sprayed, struck with a baton or thrown to the ground, just do what I tell you. Don't argue with me, don't call me names, don't tell me that I can't stop you, don't say I'm a racist pig, don't threaten that you'll sue me and take away my badge. Don't scream at me that you pay my salary, and don't even *think* of aggressively walking towards me. Most field stops are complete in minutes. How difficult is it to cooperate for that long?[532]

Officer Dutta's editorial makes no reference to the First Amendment.[533] But, as it turns out, the First Amendment protects arguing with a police officer, calling the police officer a racist pig, threatening to sue a police officer, and reminding a police officer that

528. *See id.* at 67.

529. *See id.* at 10 ("I had begun a rather special kind of civic education with my son and his friend, explaining to them—not without deep discomfort—that in contemporary France, the color of their skin made them susceptible to frequent stops and frisks, and that, if they were faced with this kind of situation, they should not react in any way, however they were treated by the police.").

530. *See* Sunil Dutta, *I'm a Cop. If You Don't Want to Get Hurt, Don't Challenge Me.*, WASH. POST (Aug. 19, 2014, 6:00 A.M.), https://www.washingtonpost.com/posteverything/wp/2014/08/19/im-a-cop-if-you-dont-want-to-get-hurt-dont-challenge-me/ [https://perma.cc/GDU6-VU8K].

531. *See id.*

532. *See id.*

533. *See generally id.* (discussing policing without talking about the first amendment).

one's taxes pay that officer's salary.[534] In general, swearing at police or other verbal dissent to police conduct is only subject to criminal sanction if that speech constitutes "fighting words" under *Chaplinsky v. New Hampshire*, and American courts have interpreted the fighting words doctrine quite narrowly in the context of verbal disputes with

534. *See* Chaplinksy v. New Hampshire, 315 U.S. 568, 573 (1942) (explaining what words might constitute "fighting words").

the police.[535] Indeed, I trust it does not seem too bold to suggest that carrying out Officer Dutta's threats itself would be a crime.[536]

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535. *See id.* The leading case on the issue of verbal disputes with police is *City of Houston v. Hill*, 482 U.S. 451, 460–62 (1987), in which the Court struck down, as overbroad, a statute prohibiting the interruption of a police officer, noting that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers" and approvingly citing Justice Powell's concurrence in *Lewis v. City of New Orleans*, 415 U.S. 130, 131 n.1, 132 (1974) (which overturned a conviction for shouting "you god damn m. f. police - I am going to [the Superintendent of Police] about this" at a police officer, striking down statute criminalizing "wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty" as overbroad under First Amendment on grounds that it prohibited more speech than that which rose to the level of fighting words) for the proposition that "a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'" *See id.*; *see also* Buffkins v. City of Omaha, 922 F.2d 465,472 (8th Cir. 1990) (calling police officer an "asshole" is not fighting word and is therefore protected by First Amendment); Posr v. Court Officer Shield No. 207, 180 F.3d 409, 415–16 (2nd Cir. 1999) (vacating dismissal of civil rights lawsuit following arrest for telling police officer "one day you're gonna get yours" "because there exist plausible interpretations of that speech that do not constitute proscribable threats"); Swartz v. Insogna, 704 F.3d 105, 107 (2nd Cir. 2013) (giving police officer "the finger" not legal basis for arrest); Duran v. City of Douglas, 904 F.2d 1372, 1377 (9th Cir. 1990) (making rude gestures and swearing at officer in Spanish not legal basis for arrest); Johnson v. Campbell, 332 F.3d 199, 203 (3rd Cir. 2003) (ordering judgment as a matter of law for civil rights plaintiff suing police officer for unconstitutionally arresting him for giving officer a "hard time" by "questioning [officer] Campbell about his motives for interrogating him, saying he had done nothing wrong" and ultimately calling him a "son of a bitch"); Brendle v. City of Houston, 759 So.2d 1274, 1276–77 (Miss. Ct. App. 2000) (interpreting statute prohibiting "public profanity" in light of the First Amendment to reverse conviction of defendant who said "I'm tired of this God d— police sticking their nose in s— that doesn't even involve them"); *In re* Welfare of S.L.J., 263 N.W.2d 412, 415 (Minn. 1978) (reversing juvenile conviction for saying "fuck you pigs" to police); Marttila v. City of Lynchburg, 535 S.E.2d 693, 695 (Va. Ct. App. 2000) (interpreting breach of peace statute in accordance with First Amendment to reverse conviction of defendant who "called [the officers] fucking pigs, [and said they] were fucking jokes … [and] should be at a fucking donut shop."); R.I.T. v. State, 675 So.2d 97, 99 (Ala. Crim. App. 1995) (reversing disorderly conduct conviction of juvenile for saying "fuck you" to police officer on the grounds that such swearing did not constitute fighting words); *In re* W.H.L., 743 A.2d 1226, 1227 (D.C. 2000) (reversing conviction of teenager who rode bicycle behind police officers who were hassling others, declaring "Y'all petty as s_, F_ y'all," then, when police officer seized teenager's bike, yelled "Y'all can't take my bike. F_ y'all."); Harrington v. City of Tulsa, 763 P.2d 700, 701 (Okla. Crim. App. 1988) (reversing conviction of defendant who shouted at police officers "You're such an ass" and "You mother f_ers, you can't you're not brave enough to go out and catch murders and robbers. You are a couple of pussies.").

Yet, Officer Dutta was sufficiently confident in the view that police are entitled to use deadly violence in response to insults that he said so in the pages of a mainstream, national newspaper—a newspaper often perceived as "liberal," no less—and the practice of such violence is apparently so pervasive and widely accepted that the editors of that paper didn't blink when asked to print those threats.[537]

I contend that Officer Dutta's seventeen years of experience led him to believe that beating and shooting are appropriate responses to calling a cop a racist pig—and that this is built into the structure of supervisory policing, particularly under segregation and the neighborhood stigmatization associated with it.[538] Police operating in organizations that, due to segregation, have adopted aggression strategies including "disorder" rather than crime-oriented policing anticipate conflict and have strong individual as well as collective incentives to preempt that conflict by developing a reputation for harsh and violent responses to the slightest resistance.[539] This creates officers like Dutta, who evidently perceive disagreement as disrespect,

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536. *See, e.g.*, United States v. Reese, 2 F.3d 870, 880, 891 (9th Cir. 1993) (upholding criminal conviction of police officers under 18 U.S.C. § 242 for conduct including, *inter alia*, unnecessarily beating numerous suspects).

537. *See generally* Amy Mitchell et al., *Political Polarization & Media Habits*, PEW RSCH. CTR. (Oct. 21, 2014), https://www.journalism.org/2014/10/21/political-polarization-media-habits/ [https://perma.cc/V9JS-6236] (last visited Sept. 29, 2023) (identifying Washington Post as having a more consistently liberal audience relative to the median). Slightly in Officer Dutta's defense, despite the cases cited in the immediately preceding note, a number of jurisdictions seem to keep dubiously constitutional anti-dissent statutes on the books. My personal favorite is San Diego's city ordinance §56.30, which reads, in its entirety, as follows: "Seditious Language — Prohibited[.] That it shall be and hereby is declared to be unlawful for any person within the said City of San Diego to utter or use within the hearing of one or more persons any seditious language, words or epithets, or to address to another, or to utter in the presence of another, any words, language or expression or seditious remarks, having a tendency to create a breach of the public peace." While the last clause in this ordinance seems to be an attempt to squeeze into the fighting words doctrine (although the ordinance was apparently enacted in 1918, well before Chaplinsky), it's hard to see how the outright prohibition of "sedition" can possibly be constitutional. According to one report, police have actually cited a number of people under this ordinance, mostly for swearing in public. *See* Kate Nucci, *SDPD Is Punishing Speech Using a 102-Year-Old City Law*, VOICE OF SAN DIEGO (Aug. 3, 2020), https://www.voiceofsandiego.org/topics/public-safety/sdpd-is-punishing-speech-using-a-102-year-old-city-law/ [https://perma.cc/2R43-TWF2].

538. *See generally* Christy E. Lopez, *Disorderly (Mis)Conduct: The Problem with Contempt of Cop Arrests*, 4 ADVANCE 71 (2010).

539. Arrests on these grounds are sometimes called "contempt of cop." *See generally id.* at 74–75, 81–82.

disrespect as the risk that people will disobey their commands, and the risk of disobedience as cause for an immediate violent escalation.[540]

The argument to follow is rooted in strategic considerations familiar to scholars in the tradition of "rational choice theory" in political science,[541] and in "law and economics" in law.[542] That is, it does not in the first instance suppose that police officers engaging in violence are doing so because of deep unconscious desires or confused beliefs about the world. Rather, the argument is that police engaged in supervisory command-giving in segregated and subordinated communities have incentives both on an individual basis and on a collective basis to develop a reputation for aggression, where aggression includes both weakly justified or unjustified arrest and weakly justified or unjustified violence in response to perceived disrespect or disobedience (that is, status threats).[543]

First, however, let us look at a concrete example, recently published in the Harvard Law Review by Angel Sanchez, a law student who had previously served a lengthy stint in prison.[544]

> Indeed, my first night in jail came at the hands of a sergeant who slapped me in front of my father and all my friends while we were hanging out on a street corner. That night, we were stopped and frisked as usual. My dad made his way over because he saw all the lights and cop cars on the corner. I was embarrassed. The sergeant called out to me and I responded with an attitude. The sergeant was angry at my response and slapped me across the side of my head saying, "Don't 'what' me!" And as soon as I felt the hit, I instinctively lashed out in rage. In the process, I scratched the sergeant on the arm with the soda can I had in my hand when he slapped me. In a matter of seconds, three officers took control of my undersized thirteen-year-old frame, putting me in a chokehold and punching the wind out of my stomach. They placed me in handcuffs and arrested me for aggravated battery on a

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540. *See id.*

541. *See generally* S. M. Amadae & Bruce Bueno de Mesquita, *The Rochester School: The Origins of Positive Political Theory*, 2 ANN. REV. OF POL. SCI. 269, 271, 278, 283, 289, 291 (1999); Paul K. MacDonald, *Useful Fiction or Miracle Maker: The Competing Epistemological Foundations of Rational Choice Theory*, 97 AM. POL. SCI. REV. 551, 552–53, 559 (2003).

542. *See generally* Robert Cooter, *Expressive Law And Economics*, 27 J. OF LEGAL STUD. 585 (1998) (being example of law and economics); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000) (being example of law and economics).

543. *See generally* Jean Tirole, *A Theory of Collective Reputations (With Applications to the Persistence of Corruption and to Firm Quality)*, 63 REV. ECON. STUD. 1, 1–4 (1996).

544. *See* Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1658 (2019).

> law enforcement officer. In that one incident, I learned what is common knowledge in the hood: the police can get away with abusing you while at the same time using the law to arrest you.[545]

Sanchez does not specify what constituted "respond[ing] with attitude," but, judging by the sergeant's words, the "attitude" was saying "what," presumably with a surly tone of voice, in response to the policeman's summons.[546]

Observe that the interaction that led to Sanchez's victimization was initiated by police behavior characteristic of supervisory policing: the decision to stop and frisk some teenagers—doubtless perceived as "disorderly" due to their lawful behavior of "hanging out on a street corner."[547] The embarrassment (and, doubtless, resentment) occasioned by this demeaning supervision led Sanchez to respond disrespectfully but not to violate the law.[548] The police officer immediately met Sanchez's perfectly lawful disrespect with violence to reinforce his authority.[549] Thus far, the only person who has broken the law is the police officer, who just hit a thirteen-year-old child for being rude.[550] Nonetheless, the escalation occasioned by the violence ultimately ends up with the private citizen doing time.[551]

Likewise, in their broken windows editorial, Kelling and Wilson made no bones about the violent character of the broken windows policing they were advocating.[552] "What the police in fact do is to chase known gang members out of the project. In the words of one officer, 'We kick ass.'"[553] And in practice, broken windows policing in New York meant, in the words of one NYPD officer, "nearly ceaseless confrontations with people hanging out, whether they were relaxing on a Friday night after a hard week of work, or did so as a way of life."[554]

Why does this happen? The supervisory function of policing, I contend, at least partly explains the tendency of police encounters to escalate to violence or to arrests. Supervisory police give more orders, which are less legitimate to those whom they order about, and, having

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545. *See id.*
546. *See id.*
547. *See id.*
548. *See id.*
549. *See id.*
550. *See id.*
551. *See id.*
552. *See* Kelling & Wilson, *supra* note 252.
553. *See id.*
554. *See* EDWARD CONLON, BLUE BLOOD 79 (2004).

chosen to abandon a legitimacy strategy, have weakened expectations of voluntarily compliance with their orders.[555] Such police have individual and collective incentives to develop a reputation for responding to disrespect or disobedience with extreme aggression, whether that aggression is physical (beatings), legal (trumped-up arrest), or both. This is expressed in existing scholarship in the recognition that police use violence to maintain their "dominance" or "edge" over civilians.[556] However, prior work has not identified that attitude as rational or connected it to the supervisory function of police and segregation.

In any police-civilian interaction, there is a background degree of uncertainty about precisely how determined the police are to enforce their orders and how determined citizens are to resist. A rational citizen deciding whether to attempt to disobey the orders of the police will consider the extent to which the police officer is likely to inflict a severe cost on them: if a citizen anticipates overwhelming force from defiance, they're not likely to resist or to try to recruit their friends to resist. But police aggression comes with some cost to the officer—turning an interaction violent or arresting a civilian might pose an increased short-term risk of injury, as well as some risk of legal sanctions. Hence, police cannot just use aggression willy-nilly.

This is a class of problems that has been intensively studied by political scientists and economists.[557] At least two strategic literatures are relevant.[558] First, the literature on deterrence from international relations and from the economics of competition suggests that there

555. See, e.g., Tyler et al., *supra* note 474, at 753 (providing evidence that police contact perceived as unjust undermines legitimacy, willingness to cooperate with police).

556. *See, e.g.*, L. Song Richardson, *Police Use of Force*, 2 REFORMING CRIM. JUST. 185, 194–95 (2017); Geoffrey P. Alpert et al., *Interactive Police-Citizen Encounters That Result in Force*, 7 POLICE Q. 475, 476 (2004); Eugene A Paoline III, *Taking Stock: Toward a Richer Understanding of Police Culture*, 31 J. CRIM. JUST. 199, 202 (2003); Jasmine R. Silver et al., *Traditional Police Culture, Use of Force, and Procedural Justice: Investigating Individual, Organizational, and Contextual Factors*, 34 JUST. Q. 1272, 1280 (2017); William Terrill et al., *Police Culture and Coercion*, 41 CRIMINOLOGY 1003, 1007–08 (2003); Otwin Marenin, *Cheapening Death: Danger, Police Street Culture, and the Use of Deadly Force*, 19 POLICE Q. 461, 470–71 (2016).

557. *See* Amadae & Bueno de Mesquita, *supra* note 541, at 271, 278, 283, 289, 291; MacDonald, *supra* note 541, at 552–53, 559; Cooter, *supra* note 542; Korobkin & Ulen, *supra* note 542.

558. *See* Paul K. Huth, *Deterrence and International Conflict: Empirical Findings and Theoretical Debates*, 2 ANN. REV. OF POL. SCI. 25, 27, 32–33, 35–36, 41–42 (1999).

are situations where an actor may wish to maintain a reputation for aggression in order to deter challenges that might force them to actually carry out aggression—in the jargon of game theory, to move actual conflict off the equilibrium path.[559] Second, a literature on the control of mass populations, most importantly Timur Kuran's work on "preference falsification," has shown how authority figures can keep the public in a sufficient state of fear to be able to rule them notwithstanding overall opposition to their rule (and where they could not stand against coordinated public opposition), by maintaining a state of affairs in which the degree of willingness to resist their rule is not broadly known among their opponents.[560]

With those scholarly literatures in mind, consider the dilemma of a civilian faced with a potentially unlawful order from a potentially aggressive police officer. That civilian might choose to question or defy the order. And if they do so, they might be able to get away with it—their fellow community members might join them in resisting any force from the police officer, and the courts might ultimately back up their evaluation of the legality of the situation. Or they might immediately get beaten up, or hauled off to jail, and then, even if their defiance is ultimately vindicated by the courts, they will have still experienced the stigma of an arrest, lost income from legal proceedings, and/or suffered physical injury.[561]

A rational civilian in those circumstances will weigh the importance of resistance to their personal interests and the likelihood that their fellow citizens will offer support against the likelihood that the police officer will inflict consequences for resistance. Thus, the police officer can reduce the likelihood of resistance—and hence reduce the long-run costs of aggression that they must bear—by

559. *See generally id.*; Walter Trockel, *The Chain-Store Paradox Revisited*, 21 THEORY & DECISION 163 (1986) (explaining the rationality of predatory pricing and its effect on reputation and deterrence).

560. *See generally* Timur Kuran, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION (1997).

561. *See generally* Rachel Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 313–320 (2016) (describing consequences of arrest). If they are beaten or arrested, the combination of the "blue wall of silence," referring to the norm according to which police do not disclose one another's misconduct, see generally Gabriel J. Chin & Scott C. Wells, *The Blue Wall of Silence as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 UNIV. PITT. L. REV. 233, 237–40 (1998) (describing "blue wall of silence" and giving references), and the doctrine of qualified immunity, which protects police from financial liability for their misconduct, see generally Carbado, *supra* note 175, at 1519–23 (explaining how doctrine of qualified immunity shields police officers from consequences for violence against Black civilians), entail that they're unlikely to receive any compensation for their losses.

increasing the subjective probability as perceived by the civilian that this resistance will be met by such consequences—that is, by cultivating a reputation for aggression.[562]

Published accounts by police are explicit about their interest in intervening on citizens' subjective probabilities in experiencing punishment for disrespect, under the label of maintaining their dominance and "edge."[563] For example, Peter Moskos, a criminology justice professor and a former Baltimore cop, explains the thought process that leads to such aggression: "The drug dealer—if he says 'fuck you' one day, it's like getting punked on the playground. You have to go through that every day[.] . . . You're not allowed to get punked as a cop, not just because of your ego but because of the danger of it."[564] Edward Conlon, another cop, expressed the same idea in slightly different terms: "For cops, respect is seen as the foundation of safety. While individual circumstances were always open to interpretation, rudeness or even overfamiliarity can be seen as an opening to physical threat."[565] This is effectively identical to the strategic dynamic of reputation in the literature on deterrence. For example, Pierskalla models the case of government repression of dissidents under incomplete information and finds that "governments have an incentive to cultivate a reputation of being nonaccommodating to deter protest in the long run."[566] If political scientists were cops, they might say that dictators aren't allowed to get punked.

In sum, on a rational choice account of police violence, police have incentives to cultivate a reputation for brooking no disrespect—that is, for punishing any kind of dissent or disrespect—in order to achieve compliance.[567] But, the paradox of deterrence is that in order to achieve that reputation, the police must have a reputation for aggressively retaliating if they see any disrespect.[568] Maintaining such

562. *See generally* Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 215 (2013).

563. *See* Zack Beauchamp, *What the Police Really Believe*, VOX (Jul. 7, 2020), https://www.vox.com/policy-and-politics/2020/7/7/21293259/police-racism-violence-ideology-george-floyd [https://perma.cc/J9PC-73VN]; CONLON, *supra* note 554, at 80.

564. *See* Beachamp, *supra* note 563.

565. *See* CONLON, *supra* note 554, at 80.

566. *See* Jan Henryk Pierskalla, *Protest, Deterrence, and Escalation: The Strategic Calculus of Government Repression*, 54 J. CONFLICT RESOL. 117, 127–28 (2010).

567. *See generally id.*

568. *See* Nagin, *supra* note 562, at 215.

a reputation requires sometimes deploying actual violence when it is legally unjustifiable.[569] Thus, maintaining a reputation for aggression requires actual violence whenever a police officer finds reason to believe that their reputation has decayed—in other words, when they experience disrespect.[570] So that is what they do.[571] This pattern appears quite clearly in Angel Sanchez's story.[572] When Sanchez says "what" while his friends from the street corner are watching, the police officer perceives a threat to his reputation-based dominance over the community and responds by hitting him and arresting him.[573]

4. *Extending the Deterrence Model to the Community Level: Segregation Reenters the Picture*

A police reputation for violence, like all reputations, is relative to a particular set of observers.[574] In the case of the police, the most intuitive place to locate that reputation is within a particular community patrolled by a particular group of police, like a department or a precinct—in which the civilians in that community generally know the reputation of the police officers in that community, both individually and (as further discussed below) collectively.[575] If my earlier argument that aggression strategies, rather than legitimacy strategies, are likely to be more present in race/class subordinated communities holds, then we would expect police to expect more resistance in those communities, and hence to be rationally more prone to aggression in such neighborhoods—whether or not any individual

569. Of course, under perfect deterrence, actual aggression would be off the equilibrium path—they'd never actually have to beat or arrest people. But perfect deterrence is not realistically possible, because reputations decay as civilians and police enter and exit the community. *See generally id.* (explaining why general criminal deterrence might decay).

570. *See id.*

571. The police also engage in other behaviors directed at ensuring respect. For example, van Maanen recounts how police learn on the job to not offer explanations of citizens infractions to them (to, in effect, decline to give reasons for their behavior), because to do so allegedly invites disagreement and resistance. *See* John van Maanen, *Observations on the Making of Policemen*, 32 HUM. ORG. 407, 413 (1973).

572. *See* Sanchez, *supra* note 562, at 1658.

573. *See id.*

574. *See, e.g.*, Brunson, *supra* note 126, at 73, 76.

575. *See, e.g.*, *id.* (describing role of "indirect experiences" in shaping young Black civilians' perceptions of police); Stuart, *supra* note 170, at 292–93 (describing community conversations about police behaviors and strategies for avoiding police).

police officer personally holds racist views.[576] This is an example of what critical race theorists call "structural racism": preexisting patterns of segregation induce racist behavior in police, even if no police officer holds racist views.[577]

Police officers do not just have an individual incentive to maintain a reputation for aggressive retaliation, they also have a collective incentive to do so—one "weak" police officer may lead those in the community to believe that other police are weak.[578] Moreover, police officers who are perceived as weak cannot be trusted to back up their fellow officers in a confrontation.[579] Thus, police are trained and socialized into a culture of collective aggression and collective reputation maintenance.[580] Failing to maintain "the edge" not only undermines the police officer's individual control over a situation, but also undermines an officer's self-respect and the respect of the officer's peers—potentially becoming "a disgrace to the police uniform."[581]

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576. This is supported by empirical evidence. *See generally* Gaston & Brunson, *supra* note 503, at 190–91 (reviewing literature indicating that "officers use more proactive, aggressive, surveillance-oriented tactics in high crime, disadvantaged Black neighborhoods than in advantaged or predominately White communities" and that "Black citizens are disproportionately targeted for involuntary stops and searches and bear the brunt of police misconduct.").

577. *See generally* powell, *supra* note 22, at 794–800 (explaining the concept of structural racism).

578. On the possibility of collective reputation in general, and the risk of shirking in collective reputation, see generally Tirole, *supra* note 543.

579. *See* Van Maanen, *supra* note 571, at 413–14.

580. *See* Jennifer Hunt, *Police Accounts of Normal Force*, 13 URB. LIFE 315, 318–23, 328–29 (1985); *see also* Roithmayr, *Dynamics of Excessive Force*, *supra* note 461, at 407 (modeling police aggression as a contagion where networks of police propagate the knowledge that abusive uses of force are effective at achieving their goals). For example, Armacost describes the training of LAPD officers in the Rodney King era as that "[o]fficers were instructed to maintain a 'command presence,' which required aggressive identification and investigation of potential suspects and generated a high level of confrontations on the street." *See* Barbara E Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 495 (2004). This notion of "command presence" is sufficiently embedded in the culture of policing that it became the subject of an early successful transgender discrimination case under Title VII, *Barnes v. City of Cincinnati*, 401 F.3d 729, 734 (2005), in which a police department denied a transgendered officer a promotion to sergeant because they ostensibly lacked "command presence" with respect to their subordinates. *See also* Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence between Officer and Civilian*, 11 NEV. L.J. 1, 19–20 (2010–2011) (collecting further sources on command presence).

581. *See* John Van Maanen, *The Asshole*, *in* THE POLICE & SOCIETY: TOUCHSTONE READINGS 307, 313 (Victor E Kappeler & Brian P Schaefer eds., 2019).

This training appears to work: there is empirical evidence that police in more aggressive departments are more likely to use aggression in response to disrespect, but not more likely to use aggression in general—suggesting that there really is socialization going on that is focused on collective reputation maintenance to punish disrespect.[582] There is also evidence, consistent with the notion of collective reputation-maintenance requiring collective retaliation, that police violence increases after the killings of police.[583]

In effect, a police unit's reputation is a *public good*, another concept about which there is a vast game theoretic literature.[584] To the extent civilians believe that resistance to the commands of any police officer in a unit are likely to be met with overwhelming retaliation, they're likely to comply with the commands of every officer they meet, and all officers benefit from the ensuing compliance. However, it is difficult to maintain group reputations by purely rational processes alone, because such a reputation is a public good within the department.[585] As the literature on public goods problems indicates, because a police unit cannot exclude individual officers from the benefits of their collective reputation, each individual police officer has an incentive to free-ride on the provision of the public good by their fellow officers to the extent aggression is costly or burdensome (for example, by forcing the police officer to subject him or herself to physical risk or overcome his or her personal compunctions against using unjustified violence on innocents).[586] This explains why internal mechanisms of shame and respect are used by police officers to induce

582. *See* John D. McCluskey et al., *Peer Group Aggressiveness and the Use of Coercion in Police–suspect Encounters*, 6 POLICE PRAC. & RSCH. 19, 32 (2005).

583. *See* Joscha Legewie, *Racial Profiling and Use of Force in Police Stops: How Local Events Trigger Periods of Increased Discrimination*, 122 AM. J. SOCIO. 379, 379 (2016) (police violence against Black Americans measurably increased after killings of police by Black suspects).

584. *See generally*, Jean Hampton, *Free-Rider Problems in the Production of Collective Goods*, 3 ECON. & PHIL. 245 (1987) (analyzing free-rider problem in public goods provision).

585. *See generally* Boldizsár Megyesi & Károly Mike, *Organising Collective Reputation: An Ostromian Perspective*, 10 INT'L J. COMMONS 1082 (2016) (analyzing collective reputation as public good in business context); Federico Boffa & Stefano Castriota, *The Economics of Gossip and Collective Reputation*, *in* THE OXFORD HANDBOOK OF GOSSIP AND REPUTATION 401, 401–16 (Francesca Giardini & Rafael Wittek eds., 2019) (same); David Hugh-Jones & Ro'i Zultan, *Reputation and Cooperation in Defense*, 57 J. CONFLICT RESOL. 327 (2013) (public goods model of collective reputation in self-defense).

586. *See* Hampton, *supra* note 584, at 245–47.

one another to conform to the general goal of aggression.[587] This is consistent with broader literature supposing that punishment of free-riders is a key mechanism in public goods provision.[588]

This informal model of the incentives of police has some potentially testable empirical implications. One that immediately comes to mind is that the model suggests, contrary to an intuitive supposition expressed by Sekhon,[589] that police have more of an incentive to engage in illegal violence when they are being observed, since such observation further reinforces their reputation for brooking no disobedience—at least insofar as they believe that the observers are sufficiently non-credible or the legal system will be sufficiently deferential that they can likely escape ex post sanctions for reported violence.[590] Segregation permits this epistemic separation since a police unit can display violence toward a subordinated community within that community while protecting privileged communities from the uncomfortable knowledge of the human costs of their preferences for "order."[591]

The model matches the reported experience of Black Americans living under supervisory policing in numerous respects.[592] When political scientists interviewed hundreds of Black Americans from "highly policed areas" in five different cities (the "Portals" project), regular themes that they saw included an aversion from police interaction due to their arbitrary power, interfering command-giving in public life, and overwhelming delivery of force.[593] Supporting the point above about epistemic barriers to solidarity, white and minoritized citizens have different perceptions about the extent of police harassment and racial discrimination, as do richer and poorer citizens (although that relationship is somewhat more complex).[594]

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587. *See* Hunt, *supra* note 580, at 319–22.

588. *See*, *e.g.*, Ernst Fehr, *Don't Lose Your Reputation*, 432 NATURE 449, 449 (2004).

589. *See* Sekhon, *supra* note 148, at 1768.

590. *See* William A. Westley, *Violence and the Police*, 59 AM. J. OF SOCI. 34, 39 (1953) (recounting explanations of police officers who emphasized that their use of violence was in part motivated by the need to seem tough in front of third-party observers).

591. See *supra* notes 481–486 and accompanying text for a discussion of the problem of epistemic solidarity.

592. *See* Weaver et al., *supra* note 126, at 1, 1435–36.

593. *See id.*

594. *See* Yuning Wu, *Race/ethnicity and Perceptions of the Police: a Comparison of White, Black, Asian and Hispanic Americans*, 24 POLICING & SOC'Y 135, 135 (2014); Ronald Weitzer, *Citizens' Perceptions of Police Misconduct: Race and Neighborhood Context*, 16 JUST. Q. 819, 819 (1999); Ronald Weitzer & Steven

That finding is consistent with my claim that police reputation for aggression is focused in neighborhoods and among communities where they engage in supervisory control, and those neighborhoods are raced and classed.

Experiences of Black community members in over-policed communities also support the notion that supervisory policing and aggression go together but do not bear any obvious relationship to efforts to actually control crime.[595] In another paper out of the Portals project described above, community members reported a strong association between police intimidation and aggression and general supervisory behavior from the police—but also that police in their communities did not seem to care about protecting them from criminal victimization.[596] Police would bother residents for "minor infractions" and "minor quibbles," and were "overly aggressive" in doing so—yet at the same time, police turned out to be "absent or slow to respond or dismissive" when residents reported serious crimes.[597] Nor is this unusual for communities of color: Mexican-Americans in the 1970s reported similar treatment to the U.S. Commission on Civil Rights.[598]

5. *Aggression, Status, and the Egalitarian Conception of the Rule of Law*

On a libertarian conception of the rule of law like that associated with Hayek, aggression and supervision might be run together as rule of law problems: the wrong that the rule of law seeks to prevent is interference with the capacity of private citizens to plan their lives, and that wrong is fully inflicted by the pervasive supervision that police carry out in communities of color, notwithstanding the means used to enforce it.[599] But on a conception of the rule of law that is more attentive to the status relationships between persons, whether that is an egalitarian conception like my own, or a neorepublican theory focused on domination, the way that hair-trigger aggression further reinforces the hierarchical relationship between police and civilians in

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A. Tuch, *Race, Class, and Perceptions of Discrimination by the Police*, 45 CRIME & DELINQUENCY 494, 494 (1999); Jennifer H Peck, *Minority Perceptions of the Police: a State-of-the-Art Review*, 38 POLICING: AN INT'L J. POLICE STRATEGIES & MGMT. 173, 173 (2015).

595. *See* Weaver et al., *supra* note 126, at 1435–36.

596. *See id.*; *see also* Brunson, *supra* note 126, at 81–82 (reporting similar results).

597. *See* Weaver et al., *supra* note 126, at 1435–36.

598. *See* Bass, *supra* note 252, at 157.

599. *See* HAYEK, *supra* note 89, at 6–8.

targeted communities is a separate ground to identify an inconsistency between the conduct of criminal justice and the rule of law.[600] That separate ground is not shared by contexts of discretionary state power which lack the features of segregation and race/class subordination, such as industrial regulation.[601]

To see this, we need to unpack the relational consequences of aggression. Police in subordinated communities have strong incentives, I have argued, to use aggression not just to enforce their commands—i.e., to overcome defiance—but also to *preempt* defiance by turning to aggression in response to mere disrespect.[602] This is what happened to Sanchez, when he was hit and ultimately jailed for saying "what" in a surly tone in response to a police officer's command to present himself for inspection.[603]

Consistent with Pettit's account of the incentives for individual subordination under relations of dominance, the fact that supervisory policing in subordinated conclusions creates strong incentives for violence leads to cultural scripts within Black communities encouraging self-protective obsequiousness.[604] The most famous example of this is the "Talk."[605] Black parents are obliged to teach their children to act with an unnatural degree of obsequiousness toward the police, and to engage in over-the-top demonstrations of compliance.[606] Black parents have to give the "Talk" because the police have a reputation for violence against Black civilians.[607] The existence of the "Talk" is evidence that such a reputation is effective in procuring obedience, or at least parental attempts to save their children's lives by teaching obedience.[608] As Vesla Weaver explains, "criminal justice has been a site of racial learning," where Black Americans are taught about the social status that comes with skin color through arbitrary

600. *See* GOWDER, *supra* note 19, at 10; *see*, *e.g.*, FRANK LOVETT, A REPUBLIC OF LAW 1 (2016).

601. *See* discussion *supra* notes 370–377.

602. *See* discussion *supra* note 561–598.

603. *See* Sanchez, *supra* note 544, at 1658.

604. *See* Philip Pettit, *The Domination Complaint*, *in* NOMOS: POLITICAL EXCLUSION AND DOMINATION 87, 101–06 (Melissa S. Williams & Stephen Macedo eds., 2005); Pettit, *supra* note 432, at 584; Tracy R. Whitaker & Cudore L. Snell, *Parenting While Powerless: Consequences of "the talk"*, 26 J. HUM. BEHAV. SOC. ENV'T 303, 303 (2016).

605. *See id.*

606. *See id.* at 303–06.

607. *See id.*

608. *See id.*

police aggression.[609] Jones describes the routine of the stop-and-frisk in a hyper-policed neighborhood, in which adolescent civilians learn to anticipate the officer's next demand and preemptively comply with it, so used are they to being required to submissively put their hands up against a wall and submit to intrusions of their personal space.[610] In the words of one Black mother, "[w]hatever the police officer tells you to do—you do that—so that at the end of the day, you make it home at night."[611]

Qualitative empirical research identifies racial differences in the "Talk" that correspond to racial differences in policing.[612] While White parents also talk to their children about how to conduct themselves in the presence of police, White parents teach their children that reporting police misconduct is likely to be successful, while Black parents teach their children to be more submissive and passive when confronted by police.[613] In the aggregate, Black and Latino survey respondents worry much more about being victimized by the police than Whites.[614]

The inegalitarian implications of these incentives in the context of segregation provide a new gloss on Michelle Alexander's argument that mass incarceration is "The New Jim Crow."[615] The Jim Crow regime was an attempt to restore not just the economic hierarchies associated with slavery, but also the social hierarchies.[616] White southerners used violence to reinforce the norm that Black citizens were obliged to defer at all times to White ones.[617] But the

609. *See* Vesla M. Weaver, *Black Citizenship and Summary Punishment: A Brief History to the Present*, 17 THEORY & EVENT (2014).

610. *See* Jones, *supra* note 437, at 43–45; *see also* Capers, *supra* note 442, at 21 (arguing that police interactions with Black and Brown citizens follow a "script" requiring submissive behavior).

611. *See* Shannon Malone Gonzalez, *Making It Home: An Intersectional Analysis of the Police Talk*, 33 GENDER & SOC'Y 363, 378 (2019).

612. *See* Myrna Cintron et al., *"The Talk" Regarding Minority Youth Interactions with Police*, 17 J. ETHNICITY CRIM. JUST. 379, 380, 389 (2019).

613. *See id.*

614. *See* Amanda Graham et al., *Race and Worrying About Police Brutality: The Hidden Injuries of Minority Status in America*, 15 VICTIMS & OFFENDERS 549, 556, 565 (2020).

615. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2 (1st ed. 2010).

616. *See id.* at 38.

617. *See generally* Stephen A. Berrey, *Resistance Begins at Home: The Black Family and Lessons in Survival and Subversion in Jim Crow Mississippi*, 3 BLACK WOMEN, GENDER, & FAMS. 65, 71–73 (2009) (describing violent socialization of Black children into norms of racial deference under Jim Crow).

contemporary "Talk" to which Black parents are forced to subject their children, in which they are told to act out excessive deference to the police, is little different than the talks that Black parents were forced to inflict on their children under Jim Crow, except that under Jim Crow the number of people to whom one was obliged to bow and scrape was somewhat larger.[618] Some of the strategies are effectively identical.[619] Here's one from today:

> I tell all the young kids: if you ever . . . get pulled over or stopped by the police, always be respectful. Always say "yes sir," "no sir," and ask them how can you help them, instead of just going off and asking, "What you pulling me over for? I haven't done nothing." Always be very respectful to them.[620]

And here's one from Jim Crow:

> As Johnny Jones realized when he was about thirteen years old: "Then I began to see how white people do colored people. . . . If you said something you wasn't supposed to say, you got beat up. . . . If you didn't say yes sir, no sir, you might get beat up . . . They called everybody n[——]. Wouldn't call you by your name. . . . All the n[——]s that talked back to them got beat up, run out of town, or something.[621]

An egalitarian account of the rule of law can explain why the "yes sir, no sir" feature of both Jim Crow and contemporary policing in communities of color renders that use of arbitrary power worse than the administrative state, from the standpoint of the rule of law. The CEO of a multinational oil company confronting the allegedly arbitrary power embedded in some EPA regulation is unlikely to feel the need to bow and scrape to the agency, because they have sufficient reserves of social status, political power, and wealth to stand as equals with respect to a government bureaucrat. By contrast, the arbitrary power of policing in race/class subordinated communities represents the use of officially sanctioned violence to reinforce a system of caste in which some are defined as social subordinates who must bow and

618. *Compare id.* at 76–77 (parental instruction under Jim Crow), *with* Arienne Thompson Plourde & Amelia Thompson, *The Talk: Surviving Police Encounters While Black*, NOTRE DAME MAGAZINE (2017), https://magazine.nd.edu/stories/the-talk/ [permalink: https://perma.cc/Q2HN-W95U] *reprinted in* UTNE READER (2017), https://www.utne.com/community/police-racial-discrimination-zm0z17uzcwil [permalink: https://perma.cc/DTG9-3H37] (describing parental instruction under police domination).

619. *See* Rod K. Brunson & Ronald Weitzer, *Negotiating Unwelcome Police Encounters: The Intergenerational Transmission of Conduct Norms*, 40 J. CONTEMP. ETHNOGRAPHY 425, 437 (2011); Berrey, *supra* note 617, at 73.

620. A Black parent, quoted in Brunson & Weitzer, *supra* note 619, at 437.

621. *See* Berrey, *supra* note 617, at 73 (elision of racial slur is mine).

scrape before their superiors.[622] And in the context of segregation, this amounts to what Judith Shklar once described as a "dual state" instantiation of the rule of law, in which the state protects some people via law but "some of its population is simply declared to be subhuman, and a public danger, and as such excluded from the legal order entirely."[623] Of course, the American criminal justice state is not so dual as was the American slave state, or the Jim Crow state—and those subject to supervision are no longer classified as subhuman, but simply as disorderly—but the lingering duality from those systems can be seen in the way that they still require a performance of subordination from Black people on pain of violence.[624]

6. *On the Concept of Arbitrary Power*

Gerald Postema describes the notion of arbitrary power as the thing that the rule of law has classically been understood to resist as follows:

> An exercise of power is arbitrary in the rule-of-law relevant sense if it is it the expression of the *liberum arbitrium*, the free decision or choice, of its agent. Philip Pettit observes: 'An act is perpetrated on an arbitrary basis . . . [if] the agent was in a position to choose it or not choose it, at their pleasure.' The act is arbitrary, even if it is reasonable, reasoned, or justified, if it is undertaken entirely at the will or pleasure of its agent. The dominus—owner and master—exercised this kind of power or dominion over his estate according to medieval understanding of Roman Law; the use and disposition of property was entirely at his pleasure. He answered only to his own arbitrium. Arbitrary power is unilateral power. The only relevant perspective on the action is that of the agent; no other side or perspective need be considered. Arbitrary power is not necessarily unreasoned, or unpredictable, or even in a strict sense unruly. Rather, it is unaccountable.[625]

A criminal justice official whose actions are meaningfully constrained by law does not exercise arbitrary power in this sense, because a core function of law is to subject one's choices to the accounting of others.[626] For example, if the police officer may only arrest someone pursuant to a law that provides a discrete set of bases for arrest, and that officer's choice to arrest someone is subject to

622. On the official sanction of Jim Crow violence, *see* Gowder, *supra* note 71, at 347–51.

623. *See* Shklar, *supra* note 319, at 2.

624. *See* Brunson & Weitzer, *supra* note 619, at 437.

625. *See* Gerald J. Postema, *Law's Rule: Reflexivity, Mutual Accountability, and the Rule of Law*, *in* BENTHAM'S THEORY OF LAW AND PUBLIC OPINION 7, 12 (Xiaobo Zhai & Michael Quinn eds., 2014).

626. *See id.* at 7, 12.

practically accessible judicial scrutiny and sanctions if that rule is violated, then that officer's choice whether or not to arrest is not a matter of their own pleasure.

The supervisory account of criminal justice suggests that law enforcement officials have a substantial amount of power that is not constrained by law in this sense.[627] Police officers might order someone on the street to do whatever they please; prosecutors might dictate the terms of their plea bargain without genuine legal scrutiny.[628]

However, just because their power is not controlled by law does not mean it is arbitrary. It is possible that their power might be controlled by some other mechanism. A comparison to the literature on federal executive power may be in order. Posner and Vermeule, in their book on presidential power, argue that despite the unavoidably Schmittian character of that power—despite the fact that, particularly in emergencies, presidential power cannot be constrained by law, that power is not tyrannical (or, we might say, arbitrary, as tyrants characteristically exercise arbitrary power) because that power is adequately constrained by the democratic process.[629]

With respect to some dimensions of executive power, such as control over economic regulation, Posner and Vermeule's claim certainly seems plausible: corporate lobbyists are immensely influential, and those lobbyists likely can wield sufficient political sanctions to reduce the risk of gross abuse of presidential power over the administrative state.[630] However, if we take Posner and Vermuele together with Postema to offer a general account of arbitrary power—as power that is inadequately constrained by law, *or* by society, *or* by politics—by some important source of countervailing force, be it political, economic, etc.—then we can easily identify that race/class subordinated individuals and communities, because of their lack of political and economic power, are likely to be particularly vulnerable to arbitrary law enforcement.[631]

Because of their predominantly race/class subordinated status—but also because of the criminal process itself—criminal defendants are particularly at risk of being subjected to arbitrary power. Thus, Natapoff notes that a key part of the justification for the extreme formalism of traditional criminal procedure is that "unfettered official

627. *See supra* Part II.
628. *See supra* Part II.
629. *See* POSNER & VERMEULE, *supra* note 23, at 4, 7, 12–15, 208–10.
630. *See id.* at 14; Gowder, *supra* note 3, 37–42.
631. *See* POSNER & VERMEULE, *supra* note 23, at 12–15, 208–10; Postema, *supra* note 625, at 12.

decisionmaking" is particularly dangerous in the context of those who are "socially and politically vulnerable."[632] And, of course, criminal defendants are always unpopular, so Natapoff in effect argues that the traditional model of criminal adjudication responds to a lack of social and political power by ratcheting up legal protections.[633] When legal protections are absent, this suggests that those within the criminal process are substantially more likely to be subject to arbitrary power.[634]

CONCLUSION

This Article has described what seems to me to be a stark disjuncture between the dominant model of how law operates among rule of law scholars and normative legal theorists more generally—the rule-following model—and the actual way that American criminal justice functions with respect to race/class subordinated persons—the supervisory model.[635] Something must give way.

One option is to ask the model of rules to give way.[636] One way in which that might occur is for theorists to conclude that the rule of law just isn't the right value by which to judge criminal justice.[637]

This position cannot be casually dismissed, for it is genuinely possible that supervisory criminal justice provides some morally valuable benefits, notwithstanding the immense harms it also inflicts. In particular, if supervisory criminal justice does effectively protect people from crime and predation, this is a genuine value. And supervisory criminal justice might indirectly protect people from crime even though it does not function via detecting and punishing crimes on an individual basis: it may be that, for example, pervasive police presence and interference in the day-to-day lives of

632. *See* Natapoff, *supra* note 340, at 1041–42.

633. *See id.* For a classic—although somewhat simplistic, especially on issues of race—discussion of the unpopularity of criminal defendants and its consequences in eliminating restraints on the criminal justice system, see Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused*, 44 SYRACUSE L. REV. 1079 (1993); *see also* Barkow, *supra* note 296, at 321 (noting that criminal defendants typically lack the resources to organize or influence the political process, and that the criminal process itself further deprives individuals of those resources, such as by felon disenfranchisement).

634. *See* Natapoff, *supra* note 340, at 1042.

635. *See* discussion *supra* notes 1–11.

636. *See* discussion *supra* note 11–13.

637. *See* discussion *supra* notes 1–11.

subordinated communities creates a deterrent effect on actual criminals, even as it imposes the cost of that deterrent effect on the people who are subject to immediate supervision.[638] There's a kind of utilitarian calculus under which we might imagine that this is acceptable.[639]

The same point might even be made with respect not to mere utilitarianism but in terms of the very ideals of freedom and equality that animate rule of law advocates. Consider, for example, that many forms of crime amount to inflicting Pettit-style domination on victims.[640] The most obvious example is domestic violence, which is the violent enforcement of gendered domination in the home.[641] Other cases can easily be imagined; for example, people might be dominated by organized crime that rules a neighborhood through intimidation. At a lower level, those who are vulnerable even to ordinary day-to-day crime may find themselves with unjustly circumscribed lives and a kind of imposed obsequiousness.[642] This kind of dominating impact is not true of all crimes—the occasional stolen catalytic converter, to pick an evidently popular contemporary crime, is *bad*, to be sure, but I fail to see how it might be characterized as *oppressive*. But it is true of some crimes.[643]

However, while there is strong empirical evidence that police presence *in general* is effective at deterring crime, I am not aware of evidence that supervisory policing like that conducted in broken

638. *See supra* Part II.

639. For a careful discussion, see Malcolm M. Feeley, *Criminal Justice as Regulation*, 23 NEW CRIM. L. REV. 113, 117–19, 125, 132–35 (2020), who—as I read him—seems to suggest that various sorts of preventative criminal justice practices are permissible to the extent they actually are effective at controlling crime. Feeley also suggests that broken windows policing is not thus effective, and that lack of effectiveness suggests that it really is operating to "sort out and impose controls on racial and ethnic groups or an underclass in order to maintain a modicum of order." *See id.* at 135.

640. *Cf.* Pettit, *supra* note 432, at 578.

641. For further discussion of the rule of law and the possibility of a state obligation to prevent domestic violence or other kinds of dominating crime, see the exchange between Robin West and me, Robin West, *Paul Gowder's Rule of Law*, 62 ST. LOUIS UNIV. L.J. 303, 310–11 (2018); Gowder, *supra* note 71, at 352–56.

642. *See* Kelling and Wilson claim, for example, that elderly people in disorderly neighborhoods are driven to lock themselves in their homes out of fear of crime. *See* Kelling & Wilson, *supra* note 248.

643. *See, e.g.*, Paul A. Eisenstein, *Thieves Are Stealing Catalytic Converters from Parked Cars, as Prices of Precious Metals Spike*, NBC NEWS (July 22, 2021), https://www.nbcnews.com/business/autos/thieves-are-stealing-catalytic-converters-parked-cars-prices-precious-metals-n1274757 [https://perma.cc/MBL2-XCL5].

windows regimes—that is, the aggression strategy—is any more effective at controlling crime than the legitimacy strategy.[644] Nor am I aware of any evidence that the subsequent lawless processing of those arrested for misdemeanors by prosecutors and courts is effective at controlling crime.[645] And even if those things are effective at controlling crime, in order to avoid brute utilitarianism, we would ideally require evidence that such enforcement methods were effective at controlling the kinds of crime that genuinely impinge on the freedom and equality of victims and their communities, such as organized gang domination and domestic violence. Moreover, it is far from uncontroversial that carceral strategies in general are compatible with the movement to end domination; for example, there have been sustained feminist critiques of the resort to policing and incarceration as a solution to gendered relations of domination.[646]

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644. *See* Klick & Tabarrok, *supra* note 104, at 277; Di Tella & Schargrodsky, *supra* note 498, at 116; Draca et al., *supra* note 498, at 2180. The studies cited above leverage quasi-random variation in police presence following terror alerts or attacks to allow causal inference. At most, they can suggest that the visible presence of police deters crime, rather than any specific style of policing conditional on visible presence. Moreover, the police in the cited studies who were deployed in response to terrorism were unlikely to be using aggressive order-maintenance strategies. *See, e.g.*, Di Tella and Schargrodsky, *supra* note 498, at 117. In one of the papers, they were deployed to protect specific locations, rather than roaming the streets looking for subordinated populations to bother. *See* Di Tella and Schargrodsky, *supra* note 498, at 117 (Jewish and Muslim organizations in Buenos Aires). In the other two, there appears to be some general increase in patrolling, and the papers did not describe the nature of that patrolling, however, in both one of them, there was also particular concentration of police in vulnerable-to-terrorism locations with extremely large and diverse groups of people—as opposed to the subordinated neighborhoods most typically targeted for aggression strategies. *See* Draca et al., *supra* note 498, at 2164 (explaining that extra police distributed at tube stations and "major public spaces" with particular concentration in central London); Klick and Tabarrok, *supra* note 104, 272–75 (explaining that the city did not disclose distribution of police, but most visible effect on crime in high-tourist areas of Washington D.C. around National Mall; authors argue that it is likely that police were predominantly distributed there). Accordingly, it is safe to conclude that the studied police did not engage in supervisory policing of the sort discussed in this Article. Of course, that does not entail that supervisory policing would not do better at deterring crime than the kinds of police presence that cities deploy after terrorist attacks—but that would be speculation in the absence of evidence.

645. On that lawless processing, see discussion *supra* at Section II.B; Natapoff, *supra* note 340, at 968; KOHLER-HAUSMANN, *supra* note 108, at 2.

646. *See, e.g.*, Aya Gruber, *A "Neo-Feminist Assessment" of Rape and Domestic Violence Law Reform*, 15 J. GENDER RACE & JUST. 583, 585 (2012); Leigh Goodmark, *Reimagining VAWA: Why Criminalization Is a Failed Policy and What a Non-Carceral VAWA Could Look Like*, 27 VIOLENCE AGAINST WOMEN 84, 85 (2021).

Nonetheless, there may be something to say for efforts to evaluate the segments of criminal justice under examination on their own terms.[647] This approach may draw some inspiration from a recent paper by Lewis Kornhauser, who argued that law is a "species" of the genus "governance."[648] According to his "achievement account" of law, it "is the evaluative kind that identifies the (functioning) governance systems that realize the value of legality."[649]

If that's right, it leaves open the possibility that there might be other species within the same genus, ones which represent the achievement of different values which may be in tension with legality.[650] In particular, one might treat "administration" as another species of governance, one with its own internal evaluative standards relating, say, to adaptability and the ability to manage social change. It may be that criminal justice is best evaluated by those standards, and, while it may still be deficient with respect to them, the shift to administrative standards and an abandonment of the conceit that the goals of legality represented by the rule-following model apply may be in order.[651]

One advantage of such a strategy is that it might allow us to make sense of American criminal justice in terms of the goals that its defenders actually have. By surfacing those goals and taking them seriously, and leaving aside the pretense of rule-enforcement, we can have an honest conversation about the extent to which those goals are (a) morally valuable, (b) actually achieved by the existing criminal justice system, and (c) generating unacceptable tradeoffs in terms of other values.[652]

So consider that some degree of social control is at least arguably valuable. Few people want to live in a neighborhood with literal

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647. *See, e.g.*, Lynch, *supra* note 289, 2141–47 (arguing that the failure of processes like plea bargaining and prosecutorial discretion to correspond to our preexisting due process categories suggests developing normative ideas drawn from administrative law to evaluate those systems on their own terms—or just throw out the enterprise of theory-building in favor of what I interpret as a kind of pragmatism that allows for local reforms that reflect the internal logic of the system).

648. *See* Kornhauser, *supra* note 32, at 2.

649. *See id.*

650. *See* Feeley, *supra* note 639, at 129 (discussing potential to understand existing processes of criminal justice as more like regulation of Fullerian "polycentric" problems).

651. *Cf.* Cheesman, *supra* note 156, at 111 ("[L]aw and order is not a negative of the rule of law, like rule of men. It has its own specific virtues, its own contents disagreeable to the rule-of-law ideal.").

652. *See* discussion *supra* notes 1–13.

broken windows. And Reiss describes a gendered dimension to his "soft crime" which ought to be taken seriously: even if some kinds of gendered verbal harassment on the street are protected against criminalization by the First Amendment, the inegalitarian consequences of that harassment are something that a healthy society would at least count as worth preventing.[653] Indeed, there is good reason to believe that gendered forms of "disorder," such as street harassment, may also constitute a form of domination; there is certainly evidence that it constrains women's full access to public space.[654] The way that these kinds of disorder are currently being policed—in blatantly race and class-disparate ways—is unacceptable.[655] But if we could find a way to control gender-based public harassment and intimidation without race and class oppression, and without wielding criminal tools that violate other important values (like the First Amendment), there's at least a preliminary case to be made that we ought to do so.

After abandoning the pretense that public order regulation is about rule enforcement, legal theorists might be able to contribute to that case by developing a theory of the sort of governance necessary to promote that sort of social order without trading off those other important values (i.e., without racism). Such an enterprise might require legal theory to expand its horizons a bit: Rather than merely Hart, Fuller, and their many contemporary footnotes, we might need to read, say, Jane Jacobs, Elinor Ostrom, and other theorists who have considered less coercive ways of managing public resources and space—and integrating them into our "legal" theory as an adjacent and partly overlapping category of governance. [656]

Some hints of this approach may be seen in the mid-twentieth-century literature on police organization.[657] As David Sklansky recounts, scholars in the 1950s and 1960s flirted with the idea of reforming police behavior by democratizing their internal decision-

653. *See* Reiss, *supra* note 257, at 6.

654. *See* Sara Bastomski & Philip Smith, *Gender, Fear, and Public Places: How Negative Encounters with Strangers Harm Women*, 76 SEX ROLES 73, 85 (2017).

655. *See* discussion *supra* Part II.

656. *See, e.g.*, JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 29–54 (Vintage Books ed., 1992) (advocating approach to neighborhood safety focused on encouraging civilian activity in public space); Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641, 643–45, 665 (2010) (describing polycentric approach to public goods management with application to policing).

657. *See* David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1777 (2005).

making methods, in an effort to preserve police discretion without subjecting them to the top-down control either of executive hierarchies or courts.[658] The problem with this plan, as identified by scholars such as Jerome Skolnick, is that there is a "conflict" between such so-called "nontotalitarian" methods of police self-regulation and "the ideal of legality."[659] But if the ideal of legality just doesn't apply to police operating outside of the narrow context of catching murderers, rapists, and kidnappers, then perhaps judicial regulation, at least on a case-by-case basis, isn't appropriate for them at all—it certainly seems like judicial regulation is ineffective in controlling police discretion at the misdemeanor level, in virtue of the vast number of cases presented to the courts.[660] By contrast, the legacy of cases like *McCleskey v. Kemp* suggests that the courts are unwilling to regulate police discretion in the aggregate.[661] Abandoning the pretense of police legality, and legality in social control criminal justice more broadly, might create discursive space to reverse that pattern of oversight—to permit police to be self-governing on a day-to-day basis and build the institutional structures within police departments to permit that control to be responsible, while relying on courts operating a robust form of Equal Protection scrutiny or statutory regulation directly incorporating ideas like disparate impact to control the aggregate effects of that case-by-case discretion, punishing police for observed race or class disparity.[662] For litigants, a path toward such reforms may begin with more aggressive use of *Monell* claims to challenge police misconduct at the policy level rather than at the individual incident level.[663] Or, perhaps, the courts could be cut out of the picture altogether and the budgets and level of autonomy of police agencies could be subject to control (and sanction as a penalty for aggregate patterns of disparity) by higher-level administrative agencies. *McCleskey v. Kemp* could be outright overruled, as could *Washington v. Davis* to the extent it rules out, through blocking Equal Protection disparate impact liability, challenges to aspects of the organization of policing that lead subordinated racial groups to bear the brunt of aggregate crime and

658. *See id.*

659. *See id.* (quoting JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 230–32 (1966)).

660. *See* discussion *supra* at Section II.B.

661. *See* discussion *supra* at Part II.

662. *See, e.g.*, Sklansky, *supra* note 657, at 1777.

663. *See* Monell v. Department of Soc. Servs., 436 U.S. 658, 660–61, 661 n.2 (1978) (holding municipal government liable for claim under 42 U.S.C. § 1983 for unconstitutional government policies).

disorder-prevention goals.[664] Borrowing once again from administrative law, we could adapt ideas like Professor Gillian Metzger's concept of a "duty to supervise" to forbid methods of achieving crime and disorder control that rely on the delegation of unconstrained discretion to street-level officers.[665]

The point is not to identify specific institutional structures that might provide substitute controls for the police, but to illustrate the possibilities that might become apparent if we let the veils fall from our collective eyes about the relationship between criminal justice and law.[666] The legal method of governance is distinctively individualistic: It depends on individual people responding to rules and then having the opportunity to participate in serious individual disputes about the application of those rules to their conduct.[667] But the evidence described in Part II of this Article suggests that the individualistic controls over supervisory criminal justice are not working—police can punish people for disobeying their orders without the people punished having any real capacity either to defend themselves or to secure legal sanctions for official misconduct. The most plausible reason our existing individualistic, legal controls are not working is precisely the one that Simon gave: the policy goals driving supervisory criminal justice are aggregate rather than individual, and policymakers who confer those goals on the carceral state have shaped its legal institutions to permit those goals to be pursued.[668] As it turns out, we have other species of the genus governance beyond law which are more suited to operating and being controlled at the aggregate level.[669] Like sociologists, perhaps legal theorists need to move beyond methodological individualism.[670]

A. Fiat Justitia Ruat Caelum

The other response to the disjuncture between legal theory and the reality of criminal justice holds onto the theory and demands that

664. *See* Washington v. Davis, 426 U.S. 229, 242 (1976); McCleskey v. Kemp, 481 U.S. 279, 298–99 (1987).

665. *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L. J. 1836, 1836 (2015).

666. *See, e.g.*, *id.* at 1840.

667. *See, e.g.*, *McCleskey*, 481 U.S. at 297–98.

668. *See* Simon, *supra* note 110, at 1642.

669. *See, e.g.*, JACOBS, *supra* note 656; Ostrom, *supra* note 656.

670. *See* discussion *supra* notes 7–13.

the world change to conform to it.[671] In other words, condemnation.[672] And here we may return to the rule of law critics of the administrative state for inspiration.

Cass Sunstein and Adrian Vermeule have observed, with some fairness, that critics of the administrative state typically tend to resist the consideration of tradeoffs in their quest to reconcile the administrative state with their conception of legality (by tearing it down).[673] The policy goals to be achieved by federal administrative agencies like the SEC, the EPA, and other popular targets are disregarded in favor of a kind of legal purity.[674]

Perhaps the most blatant example of this sort of legal singlemindedness was a lawsuit brought in summer 2020 by Arizona State University law professor Ilan Wurman on behalf of a group of bar owners.[675] That lawsuit asked the state judiciary to strike down the (Republican) governor's emergency public health order to close those bars from in-person service during the early days of the COVID-19 pandemic on a variety of constitutional theories relating to due process and separation of powers.[676]

Whatever might be said of the legal merits of such a lawsuit, it's hard to deny that the suit represented a serious misjudgment in utilitarian terms, i.e., a total failure to balance costs and benefits.[677] After all, at that point in the pandemic, pretty much all that public health officials knew was that COVID-19 was spreading with astonishing speed, overwhelming hospitals, and leading to a growing mound of American corpses—and there was no vaccine yet in sight.[678] While scholars have contrasted the traditional view of emergency executive power in the national security context with "Madisonian" models of emergency governance during pandemics which appear to be functional, it is also worth noting that the distinctive harms of the national security context such as the abuse of secret power, arbitrary

671. *See* discussion *supra* notes 11–13.

672. *See* discussion *supra* notes 11–13.

673. *See* CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE 34–35 (2020).

674. *See id.* at 34–35.

675. *See* Brett Bavcevic, *Unhappy Hour: Bar Owners Sue, Call Ducey Closure Order Unconstitutional*, TUCSON SENTINEL (July 28, 2020), https://www.tucsonsentinel.com/local/report/072820_bars_sue_ducey/unhappy-hour-bar-owners-sue-call-ducey-closure-order-unconstitutional/ [https://perma.cc/E5P6-3MVG].

676. *See id.*

677. *See id.*

678. *See id.*

detention, or ethnic oppression, are distinctively present in the national security context as opposed to the pandemic context.[679] The only interests on the other side of Wurman's lawsuits were the financial interests of a handful of bartenders and their employees—meaningful interests to be sure, but not on the same scale as mass death.[680] And even those interests were mitigated by federal subsidies like expanded unemployment benefits and forgivable small business loans.[681]

While the Arizona lawsuit is a particularly extreme example, it is far from alone.[682] As I was finalizing a draft of this Article, the Supreme Court issued a decision in *West Virginia v. E.P.A.*, which struck down important efforts to combat climate change on the basis of a "major questions doctrine" which represents part of the effort to reign in the regulatory power of the administrative state.[683] And a variety of CDC COVID-19 measures have fallen to administrative law challenges as exceeding the agency's statutory authorization, including the eviction moratorium and mask mandates on airlines and public transportation.[684]

Even second-best versions of rule of law values themselves can be set aside in the quest to purify administrative law. For another prominent example, the separation of powers critique of the administrative state tends to include the proposition that all

679. *See* Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers During the Pandemic*, 19 INT'L J. CONST. L. 1, 1 (2021); *see, e.g.*, Korematsu v. United States, 323 U.S. 214, 215–16 (1944) (ethnic internment); Hamidi v. Rumsfeld, 542 U.S. 507, 509 (2004) (arbitrary detention of individuals). Of course, public health can and has been used for various sorts of pernicious oppression. *See, e.g.*, Buck v. Bell, 274 U.S. 200, 205, 207 (1927) (eugenic justification for forced sterilization). *See generally* Dorothy E. Roberts, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY ch. 2 (1997) (describing eugenic attacks on Black reproduction). But I am aware of no credible claims that COVID-19 public health measures have been used for such purposes in the United States.

680. *See* Bavcevic, *supra* note 675.

681. *See generally* Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136 (2020); Paycheck Protection Program and Health Care Enhancement Act, Public Law No: 116–139 (2020).

682. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

683. *See id.*

684. *See* Health Freedom Defense Fund v. Biden, 599 F. Supp. 3d 1144, 1153 (M.D. Fla. 2022); Ala. Ass'n of Realtors v. DHHS, 141 S. Ct. 2485, 2486 (2021). This final example may not quite be apposite as an example of the consequence-disregarding application of the critique of the administrative state, as the eviction moratorium was arguably directed not at immediately preventing the spread of the virus but at mitigating the economic consequences of its prevention measures. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2486.

administrative officials must be accountable to the President.[685] Charitably interpreted, this is meant to facilitate rule of law values, as insulating executive personnel from the control of elected officials arguably makes it more likely that they will exercise arbitrary power.[686] But in actual practice, it has entailed the sacrifice of rule of law values, as it has been used to undermine the independence of administrative adjudicators, to the point where the Fifth Circuit has recently ruled that for cause termination protections for Securities and Exchange Commission Administrative Law Judges (and by logical extension, all the other agencies as well, at least to the extent their adjudicators are protected by two layers of for-cause termination via the Merit Systems Protection Board) are unconstitutional.[687] While there are plenty of reasons to think that administrative adjudicators are insufficiently independent, making them even less independent from the executive in order to supposedly preserve rule of law values, when independent adjudicators are a central rule of law practice, is a kind of extreme cutting off of one's nose to spite one's face.[688]

Crime has killed many fewer people in the last three years than COVID-19.[689] And the failure to achieve the vague quality of life

685. *See supra* Section III.A..

686. *See supra* Section III.A.

687. *See* Jarkesy v. SEC, 34 F.4th 446, 449, 464 (5th Cir. 2022). This is precisely the dangerous threat to adjudicative independence that Justice Breyer warned us about five years ago. *See* Lucia v. SEC, 138 S. Ct. 2044, 2059–62 (2018) (Breyer, J., concurring in part and dissenting in part) (warning that implications of Court's removal clause and executive officers jurisprudence threaten to destroy statutory scheme of Administrative Procedure Act with respect to ALJ independence).

688. *See, e.g.*, Epstein, *The Perilous Position of the Rule of Law and the Administrative State*, *supra* note 312, at 7, 16 (criticizing biased adjudications in administrative state); GOWDER, *supra* note 19, at 13–14.

689. *See COVID Data Tracker*, CDC, https://covid.cdc.gov/covid-data-tracker/#datatracker-home [https://perma.cc/89JQ-DAR9] (last visited Sept. 29, 2023) (reporting over a million killed in the United States from COVID-19); *Provisional Mortality Data — United States 2021*, CDC, https://www.cdc.gov/mmwr/volumes/71/wr/mm7117e1.html [https://perma.cc/UBH5-533V] (last visited Sept. 29, 2023) (listing COVID-19 as third largest cause of death in U.S., after heart disease and cancer, estimating 460,000 COVID-19 deaths in U.S. in 2021). Figure two of *id.* lists the top ten causes of death in the U.S., and crime was not among them; as the lowest of the top ten represented fewer than 100,000 deaths, COVID-19 killed at least 4.6 times as many Americans as anything off the list, including crime. I was unable to find crime deaths specifically, or even homicide deaths from 2021, but the CDC reports 24,576 homicide deaths in 2020. *National Center for Health Statistics FastStats, Assault or Homicide*, CDC, https://www.cdc.gov/nchs/fastats/homicide.htm [https://perma.cc/6G57-ZMDE] (last visited Sept. 29, 2023). Hence, it is reasonable to conclude that COVID-19 is upwards of an order of magnitude more deadly than crime. Economically minded readers may

interests plus the pernicious race/class supervision interests that the parts of the criminal justice state under examination actually pursue probably hasn't killed anyone. So, if we are willing to sacrifice public health, securities regulation, environmental protection, and countless other public goals in the pursuit of a purist conception of what the rule of law requires, then consistency seems to require that the public order goals of American criminal justice also be sacrificed for those goals.[690]

In this context, it is worth considering, finally, the movement to defund or even abolish policing (and prisons) in the United States.[691] This movement has been criticized for lots of reasons, for example, by President Obama on the grounds that it is allegedly so extreme that it turns off those who might otherwise support criminal justice reform.[692] But one important, and perhaps more serious, critique focuses on the likely consequences of successful movements to defund or abolish.[693]

For example, Rushin and Michalski argue against movements to defund or abolish police on the grounds that doing so would inequitably subject some communities to the increased risk of crime, and perhaps even be counterproductive with respect to the stated goals of reformers, for example by impeding efforts to improve police training on the appropriateness of using force or by encouraging such police departments as remain in defunded form to turn to Ferguson-style expropriation to finance their operations.[694] If Rushin and Michalski are right, then abolishing police could cause serious harms, and defunding police could even be counterproductive by causing more rather than less police abuse.[695] These are certainly serious objections to defund/abolish movements that should be taken seriously.[696]

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note that crime may indirectly cause many more deaths by increasing the vulnerability of victims and communities to poverty and other health risks—but, of course, so may Covid.

690. *See, e.g.*, Health Freedom Defense Fund v. Biden, 599 F. Supp. 3d 1144, 1153 (M.D. Fla. 2022); West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

691. *See, e.g.*, Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4–5 (2019); Amna Akbar, *An Abolitionist Horizon for Police (Reform)*, 108 CAL. L. REV. 1781, 1783 (2020); Allegra M McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1615 (2019).

692. *See* Chandelis Duster, *Obama Cautions Activists Against Using "Defund the Police" Slogan*, CNN (Dec. 2, 2020), https://www.cnn.com/2020/12/02/politics/barack-obama-defund-the-police/index.html [https://perma.cc/P84J-FYPA].

693. *See* Rushin & Michalski, *supra* note 30, at 301–02, 313–15.

694. *See id.*

695. *See id.*

696. *See id.*

Yet, the same could be said of legal challenges to the administrative state. If the Arizona litigation had succeeded, it likely would have contributed to an increase in deaths from COVID-19.[697] It's probably impossible to reliably estimate the number of deaths that will be caused by impeding the administrative state's efforts to fight climate change, but I submit to you that the following is a fair estimate: "lots and lots." (Moreover, to the extent the underlying ideal driving the rule of law critics of the administrative state is individual freedom, I daresay that the freedom to walk down the street without being bossed, bullied, beaten, arrested, or killed by some swaggering police officer is rather more important than the freedom to run a bar when there's a plague afoot or to spew unlimited carbon into the atmosphere.) And as noted above, efforts to promote the principle of the unitary executive in aid of increasing the accountability of administrative officials, to the extent they are motivated by rule of law ideals, may be counterproductive as they subject relatively neutral administrative law judges to increased political interference.

It seems like the implicit view of critics of the administrative state like Epstein, Lawson, Hamburger, and Gorsuch is that mere utilitarian calculus is insufficient to justify derogations from legality in the context of the federal executive branch and that radical interventions which attack the administrative state at the roots are not only permissible but required.[698] *Fiat justitia ruat caelum*: let justice (or at least legality) be done, though the heavens may fall.[699] But, I have argued, the rule of law ideals animating that critique (interpreted charitably) license a critique of American criminal justice that carries much greater force.[700] Consistency would seem to require that such scholars, activists, and jurists at least consider similarly radical

697. *See* discussion *supra* notes 675–681.

698. *See* discussion *supra* Part III.

699. *See, e.g.*, HAMBURGER, *supra* note 312, at 502 (characterizing defenses of the administrative state on grounds of "mere necessity" as "the standard defense of absolute power"). That being said, some administrative law critics, even from the rule of law standpoint, certainly do argue that curtailing the administrative state would be good on consequentialist grounds. *See, e.g.*, RICHARD EPSTEIN, DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW (2011), 51–54 (arguing that libertarian restrictions on government intrusion in the economy are also welfare-enhancing).

700. Of course, we might interpret the critique of the administrative state uncharitably, as just the tactical use of the ideals of liberal legality in pursuit of corporate-libertarian deregulatory ends. But the charitable interpretation seems to me to be more intellectually fruitful.

solutions in the realm of criminal justice.[701] Perhaps Angela Davis and Neil Gorsuch are, in the ultimate calculus, rather closer than one might expect just from contemplating their respective political ideologies.

One of my colleagues, at a workshop for this Article, suggested to me that I might be overstating the ambitions of critics of the administrative state, which are closer to foundational reform rather than outright elimination.[702] The thing is, the same can be said for the movement for police abolition: none of its academic or social movement advocates mean by "abolition" to recommend that we put a padlock on the door of your local police station right away—instead, they tend to focus on reducing the pervasiveness of policing in American life and its function as the go-to method of resolving disputes—a program which may *end* in the end of policing, but only at the end of a very long path of building substitute institutions to meet public safety and community solidarity needs.[703] Such scholars and advocates mean to highlight the mismatch between what we say police

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701. The reader might object: why ask critics of the administrative state to engage with the movements to abolish or defund police in their entirety? Why not just consider banning supervisory policing, like that associated with broken windows policies? In response, I refer to the model given in Part III of this Article, which suggests that the project of policing in the context of a society with segregated and subordinated communities has a strong tendency to turn supervisory. That is why the literature on policing as supervision cited in Part I runs at least back to the 1960s, some twenty years before Kelling and Wilson. *See supra* Subsection II.A.4. If that is right—if Kelling and Wilson are just the natural outgrowth of American race and class inequality—then abolishing supervisory policing without more radical changes might be impossible (though we should still try to figure out if we can). Of course, if the model in Part III is right, we could also solve the problem by abolishing white supremacy, class inequality, and segregation. I would, of course, delightedly endorse that alternative solution to the dilemma presented by this Article, if only we can figure out how to do it.

702. My thanks to Steve Calabresi for making this point, and also for suggesting as a (quite appealing) example of a foundational rule of law reform the idea of requiring Administrative Law Judges to be life tenured and not located in the agencies they oversee.

703. *See, e.g.*, Akbar, *supra* note 691, at 1826–37 (describing goals of defund/abolish activists, including "contesting the scale and power of police and reconceiving modes of collective life"); Meghan G. McDowell & Luis A. Fernandez, *"Disband, Disempower, and Disarm": Amplifying the Theory and Practice of Police Abolition*, 26 CRITICAL CRIM. 373, 379–87 (2018) (similar). My colleague Andy Koppelman has suggested to me that the language of "abolition" is counterproductive in pursuit of these relatively measured goals. While this objection may be right (or it may not: I take no position on it), it is not germane to the question of whether the same arguments that seem, for so many scholars and jurists, to recommend the dismantling (whether measured or merciless) of the administrative state also recommend the dismantling at a similar pace of the carceral state.

are for—protecting the innocent, catching criminals—and what they actually do and to provoke us to reflect on whether the police ought to be as pervasive in our society as they are.[704] This, I submit, is not dissimilar to the approach of the rule of law critics of the administrative state.

In short, either the ideals of legal order apply to criminal justice, or they don't.[705] If they don't, then it behooves legal theorists to come up with an account of what does—of what kinds of evaluative standards we might apply to it. And if they do, then the system as a whole seems to drastically fail by its lights. At a minimum, that in turn requires that we offer some account of whether or not there are countervailing values that may be traded off against legality; but consistency with respect to existing trends in the legal academy and on the bench may instead suggest that we say "let justice (or at least legality) be done, though the heavens may fall," and throw the entire system out.

What we cannot do is continue to simply ignore the problem: have a philosophy of law and rule of law dialogue, and a criminal justice dialogue, and allow them to run in separate tracks as if philosophers and rule of law scholars are perfectly happy to shut their eyes to the fact that the most important—and for subordinated citizens, pervasive—way in which Americans come into contact with "the law" bears essentially no relationship to either the conceptual or the normative versions of the dominant theories of legality.

Conceptual legal philosophy seems to be built on what can only be described as a fantasy version of criminal law. For example, its most famous example is the imagined ordinance "no vehicles in the park," itself a vehicle for endless debates and teaching examples about legal interpretation understood as a reasoned discursive exercise.[706]

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704. *See, e.g.*, Akbar, *supra* note 691, at 1788–1802 (describing "structural critique" of scale and activities of police).

705. Even this dichotomous presentation is drawn from the critical literature on administrative law. *See* Lawson, *supra* note 312, at 1253–54 (arguing that "one must choose between the Constitution and the administrative state" and leaving it to "moral philosophers" to advise on the choice).

706. *See generally* Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109 (2008) (explaining debate over "no vehicles in the park" in legal theory). A close friend of mine who works as a public defender has suggested to me in personal conversation that "no vehicles in the park" might actually be a fairly easy case on an individual-by-individual basis, as actual statutes tend to define things like vehicles with careful particularity. However, the friend in question also observes that even if defense lawyers tend to win dismissals on such issues, that legal outcome is, in practice, unlikely to change police behavior. This, of course, is

But in actual reality any "no vehicles in the park" law in the United States would be interpreted entirely by police officers for instrumental reasons. Police would use it as a pretext to disperse Black children on skateboards whose presence in the park they perceived as rowdy or uncontrolled. If any of the children resisted dispersal and were arrested, they would never have the realistic opportunity to make the kinds of legal arguments about whether a skateboard is a vehicle imagined by legal philosophers. Instead, they would be coerced by the burdens and risks of the criminal process into accepting the label of a petty offender and with it their first irrevocable step into an underclass constructed by the carceral state. In the context of that grim reality, the endless theorizing about "no vehicles in the park" conducted in jurisprudence circles seems less a serious scholarly exercise than a sick joke.[707]

From the rule of law standpoint, the heart of the problem is that our moral concern when we engage in rule of law talk is backwards. Academics and advocates routinely raise rule of law concerns on behalf of those who have little reason to fear arbitrary power, such as multinational corporations subjected to the authority of the administrative state or property holders alarmed by Black demands for inclusion.[708] But few raise them on behalf of those who lack political, social, and economic resources, such as the victims of police harassment and violence in segregated neighborhoods or immigrants subjected to kangaroo adjudications in the bowels of the national security state.[709] Those are the people who are in genuine danger from arbitrary government authority. Those are the people on whose behalf we must invoke the rule of law.

There is a traditional left-wing critique of the rule of law, according to which it is just a cover for unjust social hierarchy.[710]

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precisely the point: from the police standpoint, their goals have been achieved once they've used the threat of arrest to control someone's behavior, or carried out that threat—the ultimate legal disposition of that arrest isn't meaningful to them.

707. *See id.*

708. *See, e.g.*, Paul Gowder, *The Paradox of Property in the American Rule of Law*, L. & POL. ECON. BLOG (Jan. 17, 2022), https://lpeproject.org/blog/the-paradox-of-property-in-the-american-rule-of-law/ [https://perma.cc/4S5U-S3AY].

709. On the latter, for example, Gowder, *supra* note 3; GOWDER, *supra* note 19, at 151–56, 172–73. I describe immigration adjudications as "kangaroo" advisedly. For a careful elucidation of the proper domain of "kangaroo courts" as a derogatory description of unfair adjudicators, *see generally* Shaun Ossei-Owusu, *Kangaroo Courts*, 134 HARV. L. REV. F. 200 (2021).

710. *See* Gowder, *Equal Law in an Unequal World*, *supra* note 44, at 1023–24, 1076–78.

Maybe that critique is right—at least as applied to the way we currently use the idea of the rule of law.[711] *But it doesn't have to be that way*. We can invoke the same ideals of equality and freedom from arbitrary power on behalf of the poor, the subordinated, and the vulnerable, and thereby make the rule of law into a goal worth achieving.

711. *See id.* at 1023–24, 1076–78.

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