
POLICE VIOLENCE AND THE AFRICAN AMERICAN PROCEDURAL HABITUS

TREVOR GEORGE GARDNER*

ABSTRACT

How should an African American respond to a race-based police stop? What approach, disposition, or tactic will minimize his risk within the context of the police stop of being subject to police violence? This Essay advances a conversation among criminal procedural theorists about citizen agency within the field of police-administered criminal procedure, highlighting “The Talk” that parents have with their African American children regarding how to respond to police seizure. It argues that the most prominent version of The Talk—the one in which parents call for absolute deference to police authority in the event of a police stop—may be as reasonable as it is ineffective. If African Americans, as a matter of course, respond to the race-based stop with unqualified submission to police authority, the race-based stop becomes a tidy and efficient exercise, the ease of which is likely to raise the rate at which African Americans are stopped and battered by police. Blanket conformity would seem to create a deleterious feedback loop for this targeted racial cohort.

African Americans could instead opt for a discrete, transactional form of nonconformity in response to the race-based stop—one that accords with the principle of police accountability. Rather than reflexive submission, when subject to such stops African Americans could follow a nonconformist protocol that includes a request for the name and badge number of the seizing officer(s) followed by the filing of a formal complaint. I identify these and similar discretionary maneuvers taken during and after the race-based police stop as “administrative nonconformity.” Such practices require an alternative disposition toward the race-based stop—a reformulation of the African American procedural habitus.

* Associate Professor of Law, Washington University in St. Louis. For helpful comments, criticisms, and encouragement, thanks to: Scott Baker, Kenworthy Bilz, Paul Butler, Devon Carbado, Guy-Uriel Charles, Adrienne Davis, Deborah Denno, Daniel Epps, Jeff Fagan, Chad Flanders, Rebecca Hollander-Blumoff, Elizabeth Katz, Pauline Kim, Sanne Knudsen, Youngjae Lee, Benjamin Levin, Tracey Maclin, Jason Mazzone, Tracey Meares, Shaun Ossei-Owusu, Victor Quintanilla, Addie Rolnick, Kyle Rozema, Rachel Sachs, Jonathan Simon, Tom Tyler, Lea Vaughn, Patricia Williams, and to participants in the Illinois Law School Constitutional Law Colloquium and the Fordham Faculty Workshop. Thanks to the *Boston University Law Review* editorial staff for excellent editorial support, and to Robert Mangone for invaluable research assistance.

CONTENTS

INTRODUCTION851

I. THE AFRICAN AMERICAN PROCEDURAL HABITUS:
THEORIZING AGENCY IN RESPONSE TO THE FOURTH
AMENDMENT LAW OF POLICE SEIZURE.....860

II. THE STOP-KILL COROLLARY.....864

A. *Gateway Theory*.....865

B. *Stop Rates and Use-of-Force Rates*871

C. *Causal Process from Below*.....875

III. LEVERAGING “THE TALK”: THE CASE FOR AFRICAN
AMERICAN AGENCY875

A. *“The Talk” as Protocol*876

B. *The Case for Nonconformity*.....881

CONCLUSION.....892

INTRODUCTION

Journalist Ta-Nehisi Coates's *Between the World and Me* represents the most prominent version of "The Talk" parents have with their African American¹ children about the perils of American policing. Coates wrote the book in the form of a letter to his adolescent son, explaining among other troubles the fraught relationship between police and African American men.² The book also serves as homage to James Baldwin, who styled his classic work, *The Fire Next Time*, as a letter to his nephew marking Emancipation's centennial.³ Applying Baldwin's template, Coates catalogues for his son the anti-black violence replete throughout American history (e.g., "rape so regular as to be industrial").⁴ He then links this violence to the video depictions of police brutality against African Americans whose circulation now seems an ordinary part of American life.⁵ A popular quote from the book captures Coates's central message: "Here is what I would like for you to know: In America, it is traditional to destroy the black body—it is heritage."⁶

Following the book's publication, Coates advised those praising the book not to look to him for hope.⁷ In a playful exchange on *The Late Show with Stephen*

¹ I center the Essay around race-based police stops of African Americans; however, the accompanying analysis pertains to all people of African descent in the United States whose phenotype makes them susceptible to "race-based" police seizure. "African American" is used as a type of shorthand for this larger class of individuals.

² See, e.g., TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 5, 9 (2015). Coates begins the first section of his book by addressing his son. He recalls that his son, in his "fifteenth year," saw

Eric Garner choked to death for selling cigarettes[,] . . . Renisha McBride [shot] for seeking help, that John Crawford was shot down for browsing in a department store. And you have seen men in uniform drive by and murder Tamir Rice, a twelve-year-old child whom they were oath-bound to protect.

Id. at 5, 9.

³ JAMES BALDWIN, *THE FIRE NEXT TIME* 11 (1963).

⁴ COATES, *supra* note 2, at 103.

⁵ *Id.*

⁶ *Id.*

⁷ *The Daily Show: Ta-Nehisi Coates* (Comedy Central television broadcast July 23, 2015), <http://www.cc.com/video-clips/yy2dzc/the-daily-show-with-jon-stewart-ta-nehisi-coates> ("I don't [believe the arc of history is long but it bends towards justice]. I don't. I think it bends towards chaos."); Daphnee McMaster, *In Conversation with Ta-Nehisi Coates: Seeking Hope in a World That Bends Towards Chaos*, BKREADER (Oct. 7, 2017), <https://www.bkreader.com/2017/10/07/201710seeking-hope-in-ta-nehisi-coates> [<https://perma.cc/C59E-7XG5>] (discussing interview that Ta-Nehisi Coates gave at King's Theatre, in which he said: "[I]t's hard for me to see us going back [to moving in the right direction] in my lifetime. So you say, you want me to be hopeful[.] I say, give me the evidence. Give me the receipts."); see also Ta-Nehisi Coates, *Hope and the Historian*, THE ATLANTIC (Dec. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/12/hope-and-the-historian/419961/> ("I think that a writer wedded to 'hope' is ultimately divorced from 'truth.'").

Colbert, the author doubled down on this sentiment in response to a closing question from the host:

COLBERT: You have had a hard time in some interviews expressing a sense of hope that things will get better in this country. Do you have any hope tonight for the people out there about how we could be a better country, how we could have better race relations, [how] we could have better politics?

COATES: No. [*Pause in response to laughter from the audience.*] But I'm not the person you should go to for that. You should go to your pastor. Your pastor provides you hope. Your friends provide you hope. . . . That's not my job. That's somebody else's job.⁸

Over the past several years, Coates and his sobering perspective on the American racial landscape have been celebrated throughout the liberal literary establishment.⁹ However, his treatment in *Between the World and Me* of the notion of African American hope—which he describes as “specious” and akin to a belief in “magic”¹⁰—sparked a bit of controversy among a select group of African American public intellectuals. Professor Cornel West published what appeared to be a hastily written, one-paragraph review of *Between the World and Me* on Facebook, just after the book's release.¹¹ In strikingly personal terms,

⁸ *The Late Show with Stephen Colbert: Pierce Brosnan, Jason Alexander, Ta-Nehisi Coates* (CBS television broadcast Oct. 2, 2017), <https://www.youtube.com/watch?v=X-xssa4BHul>; see also Constance Grady, *Colbert Asked Ta-Nehisi Coates if He Has Hope for America. Coates Said No.*, VOX (Oct. 3, 2017, 11:40 AM), <https://www.vox.com/culture/2017/10/3/16409194/ta-nehisi-coates-stephen-colbert> [<https://perma.cc/8M4K-64QU>].

⁹ See, e.g., Michelle Alexander, *Ta-Nehisi Coates's 'Between the World and Me,'* N.Y. TIMES (Aug. 17, 2015), <https://www.nytimes.com/2015/08/17/books/review/ta-nehisi-coates-between-the-world-and-me.html> (“Whether you agree or disagree, one of the great joys of reading Ta-Nehisi Coates is being challenged in ways you didn't expect or imagine.”); Brit Bennett, *Ta-Nehisi Coates and a Generation Waking Up*, NEW YORKER (July 15, 2015), <https://www.newyorker.com/culture/cultural-comment/ta-nehisi-coates-and-a-generation-waking-up>.

¹⁰ COATES, *supra* note 2, at 10, 12.

¹¹ Dr. Cornel West, *In Defense of James Baldwin*, FACEBOOK (July 16, 2015), <https://www.facebook.com/drcornelwest/posts/in-defense-of-james-baldwin-why-toni-morrison-a-literary-genius-is-wrong-about-t/10155807310625111/> [<https://perma.cc/88KG-MPR7>]. West's post reads in full:

Baldwin was a great writer of profound courage who spoke truth to power. Coates is a clever wordsmith with journalistic talent who avoids any critique of the Black president in power. Baldwin's painful self-examination led to collective action and a focus on social movements. He reveled in the examples of Medgar, Martin, Malcolm, Fannie Lou Hamer and Angela Davis. Coates's fear-driven self-absorption leads to individual escape and flight to safety—he is cowardly silent on the marvelous new militancy in Ferguson, Baltimore, New York, Oakland, Cleveland and other places. Coates can grow and mature, but without an analysis of capitalist wealth inequality, gender domination, homophobic degradation, Imperial occupation (all concrete forms of plunder) and

West described Coates as a “clever wordsmith with journalistic talent” who was “cowardly silent” on the question of black militancy.¹² Two years later, after receiving pointed criticism about the post from former mentee Professor Michael Eric Dyson,¹³ West again addressed Coates’s intellectual agenda, this time in only slightly more measured terms. Writing in *The Guardian*, West argued that Coates “sounds militant about white supremacy but renders black fightback invisible,” all the while “reap[ing] the benefits of the neoliberal establishment.”¹⁴ West then turned to the heart of his case:

In short, Coates fetishizes white supremacy. He makes it almighty, magical and unremovable. What concerns me is his narrative of “defiance”. For Coates, defiance is narrowly aesthetic—a personal commitment to writing with no connection to collective action. It generates crocodile tears of neoliberals who have no intention of sharing power or giving up privilege.¹⁵

What exactly is West getting at? From my own vantage point, *Between the World and Me* is among the most penetrating inquiries into the African American life experience in a generation. More impressive still, the book has prompted white Americans from various walks of life to sit up and give attention to the relationship between our nation’s racial past and present. David Brooks, a conservative columnist for *The New York Times*, described the literary effort as

collective fightback (not just personal struggle) Coates will remain a mere darling of White and Black Neo-liberals, paralyzed by their Obama worship and hence a distraction from the necessary courage and vision we need in our catastrophic times. How I wish the prophetic work of serious intellectuals like Robin DG Kelley, Imani Perry, Gerald Horne, Eddie Glaude commanded the attention the corporate media gives Coates. But in our age of superficial spectacle, even the great Morrison is seduced by the linguistic glitz and political silences of Coates as we all hunger for the literary genius and political engagement of Baldwin. As in jazz, we must teach our youth that immature imitation is suicide and premature elevation is death. Brother Coates continue to lift your gifted voice to your precious son and all of us, just beware of the white noise and become connected to the people’s movements!

Id.

¹² *Id.*

¹³ Michael Dyson, an African American sociologist at Georgetown and a prominent public intellectual, responded to West’s critique, saying that West was “despotically and willfully intolerant of the gifts and talents of those who may potentially eclipse him.” Matthew Kassel, *Cornel West Delivers Blistering Takedown of Ta-Nehisi Coates—Michael Eric Dyson Responds*, OBSERVER (July 16, 2015, 6:21 PM), <https://observer.com/2015/07/cornel-west-delivers-blistering-takedown-of-ta-nehisi-coates> [https://perma.cc/S63X-EHGR].

¹⁴ Cornel West, Opinion, *Ta-Nehisi Coates Is the Neoliberal Face of the Black Freedom Struggle*, THE GUARDIAN (Dec. 17, 2017, 5:00 AM), <https://www.theguardian.com/commentisfree/2017/dec/17/ta-nehisi-coates-neoliberal-black-struggle-cornel-west> [https://perma.cc/3SCH-7UMF].

¹⁵ *Id.*

“a mind-altering account of the black male experience,” adding that “[e]very conscientious American should read it.”¹⁶

I concur. And yet neither the book nor Coates’s worldview is beyond reproach.¹⁷ West and other inspired critics are right to worry over Coates’s skepticism regarding the prospect of hope for racial equality, which necessarily implicates African American agency (rights assertion, political mobilization, and justice advocacy in general). In her review of *Between the World and Me*, Michelle Alexander shared a similar sentiment, expressing admiration for Coates’s literary accomplishment while also identifying a “fork in the road” where Coates departs from Baldwin:

Baldwin, in writing to his nephew, does not deny the pain and horror of American notions of justice—far from it—but he repeatedly emphasizes [his nephew’s] power and potential and urges him to believe that revolutionary change is possible against all odds, because we, as black people, continue to defy the odds and defeat the expectations of those who seek to control and exploit us.¹⁸

Writer Thomas Chatterton Williams offered the perspective of an African American expat in Paris, noting that he too was troubled by what he viewed as Coates’s relegation of racial peers to the status of “permanent subordination.”¹⁹ Echoing his literary contemporaries, Williams identified Coates as a fatalist: “It’s not just black kids in tough neighbourhoods who are hapless automatons. In Coates’s view, no one has agency.”²⁰

As a baseline, this Essay establishes African American agency within the field of police-administered criminal procedure by way of a collective group response to the race-based police stop. “The Talk”²¹ that parents have with their African

¹⁶ David Brooks, Opinion, *Listening to Ta-Nehisi Coates While White*, N.Y. TIMES (July 17, 2015), <https://www.nytimes.com/2015/07/17/opinion/listening-to-ta-nehisi-coates-while-white.html>.

¹⁷ I write this not from a moral perch but as someone similarly situated—a critic of American policing who also reaps the benefits of a privileged position within the academy.

¹⁸ Alexander, *supra* note 9.

¹⁹ Thomas Chatterton Williams, *Loaded Dice*, LONDON REV. BOOKS (Dec. 3, 2015), <https://www.lrb.co.uk/the-paper/v37/n23/thomas-chatterton-williams/loaded-dice>.

²⁰ *Id.* For extended theoretical treatment of the various ways in which agency arises in response to entrenched forms of social structure, see generally SABA MAHMOOD, *POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT* (2005).

²¹ In her now famous dissent in *Utah v. Strieff*, 136 S. Ct. 2056 (2016)—a case regarding application of the exclusionary rule in response to an illegal police seizure—Justice Sotomayor references The Talk:

For generations, black and brown parents have given their children “the talk”—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.

American children about how to respond to a police detention now serves in popular culture as a vehicle for “collective action.” However, the most prominent version of The Talk in popular media—the one in which parents call for absolute deference to police authority in the event of a police stop—may be as reasonable as it is ineffective. I advance this argument by modeling the relationship among three factors: Fourth Amendment law (as social structure),²² The Talk (as a mechanism for African American agency), and police violence against African Americans in the context of the race-based stop (as outcome). I argue that despite the erosion of Fourth Amendment protection against arbitrary police seizure over the past half century—particularly as applied to racial minorities—African Americans can reduce the rate at which they are stopped by police and, as a corollary, the degree to which they are exposed to police violence. *We*, as a racial cohort, need not allow the Fourth Amendment opinions that fetishize the American policeman and his role at the social margins to relegate us to the role of perpetual victim. As Part III makes clear, *resistance is not futile*.

This basic claim deserves a preliminary explanation. To the extent that the Fourth Amendment protection against arbitrary seizure has eroded for African Americans, resulting in the “de facto” legalization of racial profiling,²³ members

Id. at 2070 (first citing W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (1903); then citing BALDWIN, *supra* note 3; and then citing COATES, *supra* note 2). Sotomayor cites both Coates and Baldwin as sources illustrating this parental advisory. She argues that the majority’s decision permitting the admission of evidence gained as a fruit of the illegal stop effectively made “citizens” police subjects. *Id.* at 2070-71 (“[The majority opinion] says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.”). How does the African American citizen escape not only this material circumstance but also its effect on one’s sense of one’s own legitimacy within the national context? I later propose transactional agency in response to each instance of racial profiling as a partial answer to this question.

²² In social theory, “structure” represents “a system of rules that [are] ‘instantiated’ in social systems, but [that have] only a ‘virtual’ or latent existence.” JOHN SCOTT, *SOCIAL THEORY: CENTRAL ISSUES IN SOCIOLOGY* 113 (2006). These structures have a generative effect, which works to control and enforce social conditions. PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 56 (Richard Nice trans., 1990).

²³ Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio’s Pathway to Police Violence*, 64 *UCLA L. REV.* 1508, 1537 (2017) [hereinafter Carbado, *Stop and Frisk*] (“*Terry v. Ohio* facilitates the ‘wholesale harassment’ of African Americans through what I call ‘prophylactic racial profiling.’” (footnote omitted)); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 *CALIF. L. REV.* 125, 132-48 (2017) [hereinafter Carbado, *From Stopping to Killing*] (analyzing hypothetical encounters between African American women and police to demonstrate how current Fourth Amendment framework results in “de facto” legalization of discrimination and racial profiling); see also *Illinois v. Wardlow*, 528 U.S. 119, 124-26 (2000) (finding that reasonable suspicion standard can be satisfied by presence in high-crime area

of the racial group are more likely to be subject to pretextual stops. Given that every stop carries with it the risk of police violence, a high rate of African American stops leaves African Americans uniquely vulnerable.²⁴ Which brings us back to the subject of The Talk. African Americans who adhere to the standard version of The Talk—the version most prominent in popular media—bring a spirit of conformity to the police stop without regard for the officer’s legitimacy, disposition, or adherence to constitutional criminal procedure. While intuition would suggest that conformity maximizes the probability of a violence-free encounter, this Essay’s modeling of the relationship between African American stop protocol and police violence in the context of the race-based stop shows that the conformity narrative is an oversimplification.

For instance, if, as a matter of course, African Americans respond to race-based stops with unqualified submission to police authority, the race-based stop becomes a tidy and efficient exercise, the ease of which is likely to raise the rate at which African Americans are stopped, broadening their exposure to police violence.²⁵ This is a process by which collective conformity creates a deleterious feedback loop for the targeted racial cohort.

African Americans could instead opt for a discrete form of nonconformity that accords with the principle of police accountability. Such a shift would require the introduction of an alternative disposition toward the race-based stop—a reformulation of what I will call the *African American procedural habitus*.²⁶ Rather than reflexive submission, when subject to the race-based police stop African Americans could follow a nonconformist protocol that

and unprovoked flight); *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that subjective motivations of police, including racial animus and biases, play no role in Fourth Amendment analysis); *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968).

²⁴ See, e.g., Carbado, *From Stopping to Killing*, *supra* note 23, at 149 (recalling story of Walter Scott, an African American man who was shot in the back by white police officer in South Carolina after traffic stop for broken taillight).

²⁵ Devon Carbado posits that these race-based stops operate as a “gateway,” opening the door “to more intrusive, potentially violence-producing—but constitutionally reasonable—encounters with the police.” *Id.* at 130. Consequently, the legal doctrine governing stops and seizures is part and parcel with police violence against African Americans—it is impossible to fully understand the one without the other. Carbado, *Stop and Frisk*, *supra* note 23, at 1551. In Carbado’s words, “[I]f the law more tightly restricted police officers’ authority to investigate African Americans, this would both increase the social value of our lives and diminish officers’ opportunities to kill us.” Carbado, *From Stopping to Killing*, *supra* note 23, at 128.

²⁶ See *infra* Part I. Pierre Bourdieu—the sociologist credited with conceptualizing habitus—described the term as encompassing subconscious behaviors of a group or “class” that are shaped by the institutional structures surrounding them. BOURDIEU, *supra* note 22, at 53. The African American procedural habitus expands upon Bourdieu’s conceptualization of habitus and describes the African American response to structures of police violence—namely, Fourth Amendment law and the race-based stop.

includes a request for the name and badge number of the seizing officer(s) followed by the filing of a formal complaint. I identify these and similar discretionary maneuvers taken during and after the police stop as *administrative nonconformity*. An African American procedural habitus oriented toward police accountability for racial profiling, specifically by way of administrative nonconformity, would make the race-based stop and derivative searches more costly for police.²⁷

In sum, the more costly the race-based stop and derivative criminal investigations, the lower the African American stop rate; the lower the African American stop rate, the lower the degree of African American exposure to police violence. The precise cost incurred by police as the result of nonconformity and the degree to which police will change as a function of this cost are empirical unknowns that cannot be determined in this Essay. This Essay is, nevertheless, well positioned to challenge the prevailing view that African American passivity in response to the race-based police stop is the key to minimizing the probability of police violence against African Americans.

The notion of citizen resistance—agency in real time—in response to a police officer’s abuse of discretion extends a normative agenda in the criminal procedure literature designed to counteract the Supreme Court’s promotion of “citizen submission” to police authority as an unequivocal social good.²⁸ Criminal procedure theorists have come to identify the Court’s advocacy for a submission norm as delivering racially disparate effects given that police favor African Americans as search-and-seizure targets. Reflexive African American submission merely serves, then, to grease the wheels of the racial-profiling

²⁷ This conclusion is made with the assumption that the police department’s deployment of resources remains in equilibrium in the face of widespread administrative nonconformity among African Americans and correlative procedural inefficiencies. However, in the event that police administrators sought to deploy more resources in response to broad administrative nonconformity by African Americans, they would likely have to make formal appeals to the executive and legislative branches, giving police-reform advocates an opportunity for intervention.

²⁸ I. Bennett Capers, Essay, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 655 (2018) (“[T]he Court’s citizenship talk [in criminal procedure cases] . . . dictates how a good citizen should behave, move, and even speak. These decisions not only *reflect* ideas about good citizenship. They *produce* good citizenship.”); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1187 (2017) (“[C]onstitutional doctrine . . . expresses core political principles and a narrative of political continuity. It shapes our understandings of community and citizenship.” (footnote omitted)); see also Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295, 312 (arguing that Fourth Amendment “presupposes conflict” between public and police as “[r]esistance or non-compliance is built into the standard for assessing when the police have engaged in a coercive interaction”).

machine.²⁹ But different from identifying the “good citizen” model as a threat to African American liberty interests,³⁰ I argue that unequivocal African American submission to police as a response to the race-based stop may compromise the African American liberty interest as it pertains to police violence.

To state the obvious, administrative nonconformity is not a risk-free enterprise. A commitment to administrative nonconformity imposes an additional burden on African Americans, which itself seems an extension of an unjust circumstance. However, this sort of reorientation to race-based policing—from reflexive submission seemingly affirming African American subordination to dissent in pursuit of police accountability and in service of police reform—connects seamlessly to the history of African American agency that

²⁹ This is not to say that the machine would screech to a halt in the absence of full cooperation. There is ample evidence that racial-profiling regimes were up and running well before the idea of stop-cooperation took root within and around the African American community. See, e.g., Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 226 (1983) (reviewing Arizona Supreme Court decision from 1975 in which court approved racial profiling of Hispanic man and stated: “That a person is observed in a neighborhood not frequented by persons of his ethnic background is quite often a basis for an officer’s initial suspicion. To attempt by judicial fiat to say he may not do this ignores the practical aspects of good law enforcement” (quoting *State v. Dean*, 543 P.2d 425, 427 (Ariz. 1975))); Tracey Maclin, “*Black and Blue Encounters*” – *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 276-79 (1991); Irving Piliavin & Scott Briar, *Police Encounters with Juveniles*, 70 AM. J. SOC. 206, 207, 212 (1964) (discussing results from observational study in “industrial city with approximately 450,000 inhabitants” and finding both that police stopped African American juveniles at higher rate than other juveniles and that these stops were often made “even in the absence of evidence that an offense had been committed”); Kathryn K. Russell, *Racial Profiling: A Status Report of the Legal, Legislative, and Empirical Literature*, 3 RUTGERS RACE & L. REV. 61, 71-75 (2001) (discussing empirical studies of racial profiling of motorists conducted in 1990s); see also LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME 20 (Frank J. Remington ed., 1967) (stating, one year before *Terry*, that “[a] person of one race observed in an area which is largely inhabited by a different racial group may be stopped and questioned”).

³⁰ Even when upholding a constitutional right, the Court cautions “good citizens” against exercising that right. Bennett Capers, *supra* note 28, at 672 (“[L]aws indirectly communicate what behavior is inappropriate, which behavior is orthodox, and what behavior should be rewarded. . . . The same is true of the Court’s opinions.” (footnote omitted)). For example, even if the Constitution does not require a citizen to comply with the police, the Court has maintained that the “good citizen” aids police, consents to otherwise unlawful searches, waives their rights, and welcomes the police into their life. *Id.* at 655. These good-citizen directives are not enforced equally given that, throughout American history, African Americans have been unduly burdened with the responsibility of proving that they are “good citizens.” *Id.* at 672, 674 (“[I]t is in police interactions that many Americans, especially black and brown Americans, become legally socialized into a sense of ‘who is a citizen[] and who is a problem.’” (alteration in original) (quoting Benjamin Justice & Tracey L. Meares, *How the Criminal Justice System Educates Citizens*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 159, 162 (2014))).

characterizes each step of the racial cohort's long, arduous pursuit of racial justice.³¹

I deliver the argument for African American nonconformity in response to the race-based police stop in three parts. Part I briefly fleshes out the features of the Essay's foundational theoretical contribution—the African American procedural habitus. It breaks the procedural habitus into a binary consisting of the “conformist model” and the “nonconformist model” and offers the claim that the nonconformist African American procedural habitus shows the potential to reshape the structure of racial-profiling regimes. Given the state of Fourth Amendment jurisprudence and its role in shaping the norms that govern the policing of working-class minorities and working-class minority neighborhoods, it may be incumbent on African Americans to counteract race-based policing by way of a grassroots, transactional form of social agency.

Part II establishes the structure to which the African American procedural habitus is responsive. This Part forefronts Professor Devon Carbado's thesis that Fourth Amendment seizure law should be understood as a structural feature of (or “gateway” to) police violence against African Americans.³² Carbado argues that the erosion of Fourth Amendment seizure protections for African American citizens elevates the rate of African American stops and with it the rate at which African Americans are subject to police violence. He thus identifies the police stop as a primary site of contestation within the campaign to reduce police violence against African Americans.

Part III models The Talk as a protocol for the African American response to the race-based police stop, subjecting The Talk to the utility-maximization calculus common to law-and-economics scholarship. While both the conformist model and the nonconformist model of The Talk are analytically sound in relation to their objectives (physical security in the short and long-term, respectively), Part III demonstrates that, over time, a deferential orientation to the police stop may very well raise the number of African American stops and with it the African American collective's exposure to police violence. Conversely, an approach rooted in the principle of police accountability would likely lower the same. This Part's modeling exercise thus proposes the African American procedural habitus as an important determinant of the rate at which African Americans are subject to race-based police stops and, by extension, the rate at which they are subject to police violence.

³¹ The history of African American justice-politics is the seed for countless other equality-based movements in the U.S. national context.

³² See, e.g., Carbado, *From Stopping to Killing*, *supra* note 23, at 130. The central aim of Carbado's recent work in this area has been “to disrupt” the tendency “to think of police killings of African Americans as aberrant and extraordinary.” *Id.* at 128.

I. THE AFRICAN AMERICAN PROCEDURAL HABITUS: THEORIZING AGENCY IN RESPONSE TO THE FOURTH AMENDMENT LAW OF POLICE SEIZURE

What is the procedural habitus and why might it be relevant to the issue of race-based police violence? This Part draws on the concept of the *habitus*, a longstanding sociological concept made prominent by French social theorist Pierre Bourdieu,³³ to bring analytical depth to the consideration of African American agency in response to racial-profiling incidents and racial-profiling regimes. The habitus frames a debate in sociology as to the relationship between agency and structure that can aid criminal procedure theorists and African American police-reform advocates in their understanding of African American agency in relation to race-based police stops and derivative police violence.

The habitus represents the “set of deeply internalized master dispositions” held by a social group and responsive to social structure.³⁴ It is analogous to the athlete’s “feel for the game” within a given sport. A feel for the game, though seemingly intangible, arises within the athlete in keeping with the rules of the game, similar to a social actor’s effective engagement with the institutional field. In the same way that the dominant athlete relies on “feel” or instinct to succeed in the game, the social actor intuitively relies on the habitus to navigate the social structures that determine a given social context.³⁵

³³ BOURDIEU, *supra* note 22, at 53. Bourdieu utilized the concept as part of an effort to challenge the claim in social theory of a duality between structure and agency. He presented the habitus as the disposition of a group or “class” that flows from the institutional arrangement within which that group or class is embedded. *Id.* at 54, 58-60 (“The objective homogenizing of group or class *habitus* that results from homogeneity of conditions of existence is what enables practices to be objectively harmonized without any calculation or conscious reference to a norm and mutually adjusted in the absence of any direct interaction, or *a fortiori*, explicit co-ordination.”). In this sense, Bourdieu subverted conventional sociological thinking in arguing that structure (think Fourth Amendment doctrine and corresponding patterns of police-citizen contact) and action (think behavioral responses of the citizen-subject) are relational rather than independent. He introduced the term “habitus” as the mechanism moderating this relationship. *Id.* at 53 (“Objectively ‘regulated’ and ‘regular’ without being in any way the product of obedience to rules, they can be collectively orchestrated without being the product of organizing action of a conductor.”).

³⁴ DAVID L. SWARTZ, *CULTURE AND POWER: THE SOCIOLOGY OF PIERRE BOURDIEU* 101, 103 (1997) (explaining Bourdieu’s characterization of habitus and noting that “term ‘disposition’ is key for Bourdieu, since it suggests two essential components he wishes to convey with the idea of habitus: *structure* and *propensity*”); *see also* PIERRE BOURDIEU, *LANGUAGE AND SYMBOLIC POWER* 86-89 (John B. Thompson ed., Gino Raymond & Matthew Adamson trans., 1991) (discussing adoption of “dominant style[s]” by “dominated classes”).

³⁵ Greg Noble & Megan Watkins, *So, How Did Bourdieu Learn to Play Tennis? Habitus, Consciousness and Habituation*, 17 *CULTURAL STUD.* 520, 520 (2003) (providing “productive conceptualization of habitus that attends to the various intensities of consciousness, the relations between multiple mind-bodies and processes of habituation through a focus on the literature of sports training”).

Though a uniquely successful theoretical endeavor,³⁶ Bourdieu's conceptualization of the habitus has been criticized for its failure to address whether the social actor can consciously engage with her own habitus.³⁷ Critics argue that while most actions flowing from the habitus are a function of unconscious repetition,³⁸ the habitus can in fact be subjected to conscious deliberation.³⁹ In this sense, habitus can be the product of a pedagogical process.⁴⁰ Through conscious "disengagement" with the habitus, the social actor can reorient the habitus in an effort to elevate performance.⁴¹ The social actor's conscious effort to change her orientation to the social structure can be a focused and deliberate process by which "the movement between reflection, attention[,] and automaticity is *built* into preparation for the event."⁴² A dynamic exchange is thought to arise between consciousness and habituation, refining the social actor's "technique" and eventually reformulating the habitus for more effective engagement with structure.⁴³ Thus, while Bourdieu's habitus has generally been

³⁶ Per Google Scholar, *The Logic of Practice*, where Bourdieu offers an extensive explanation of his conceptualization of habitus, has been cited 27,583 times as of this writing.

³⁷ MAHMOOD, *supra* note 20, at 138-39 ("[W]hat I find problematic in [Bourdieu's] approach is its lack of attention to the pedagogical process by which a habitus is learned."); Judith Butler, *Performativity's Social Magic*, in *BOURDIEU: A CRITICAL READER* 113, 118 (Richard Shusterman ed., 1999) ("But because for Bourdieu practical mimeticism works almost always to produce a conformity or congruence between the field and the *habitus*, the question of ambivalence at the core of practical mimeticism – and, hence, also in the very *formation* of the subject – is left unaddressed."); Noble & Watkins, *supra* note 35, at 525 (criticizing Bourdieu's "removal of consciousness from the development of habitus").

³⁸ See, e.g., Noble & Watkins, *supra* note 35, at 535-36 ("Performativity is based on iteration; to be able to do something reliably and 'naturally', one has to do it again and again. Habituation, moreover, allows us to account for how conscious behaviour can become unconscious." (citation omitted)).

³⁹ *Id.* ("There is no doubt that much of what we do remains submerged in the unconscious, that is an unconscious with both a psychological and a bodily dimension, but consciousness allows for the possibility of calibration necessary to repeated actions and to human development.").

⁴⁰ See MAHMOOD, *supra* note 20, at 139 (describing "Aristotelian conception of habitus [in which] conscious training in the habituation of virtues itself was undertaken, paradoxically, with the goal of making consciousness redundant to the practice of these virtues").

⁴¹ Noble & Watkins, *supra* note 35, at 535-36 ("This notion of disengagement suggests that things are in a partly conscious state for them to subside below the level of consciousness. This allows for the possibility of returning habituated activity to the realm of consciousness.").

⁴² *Id.* at 536 (emphasis added).

⁴³ *Id.* ("Leder (1990) has coined the term 'dysappearance' to capture the ways the body becomes an object of consciousness in moments of crisis, but we have shown how such awareness exists as part of the process of bodily transformation. The automaticity spoken of above is a specific mind-body relation: we also have the capacity to make ourselves the object of reflection even in the act of doing, given the appropriate training. It is this 'affinity' between consciousness and habituated technique that is crucial to competent performance." (citing DREW LEDER, *THE ABSENT BODY* (1990))).

understood as a function of the logic of structure, there is, within countervailing theoretical frameworks, a point at which the social actor reflects on the habitus in a conscious manner, attempting to refine, rework, or transform the habitus. The Talk exemplifies such a process.

In delivering The Talk to their African American children, parents raise from the unconscious to the conscious their own sense of how best to navigate the police stop. The purpose of theorizing The Talk in relation to the habitus, then, is to provide a basic framework within which to consider how African Americans can, through the production of new procedural dispositions and related actions (i.e., factors on the “agency” side of the agency-structure ledger), blunt the impact of Fourth Amendment seizure law and the frequency with which African Americans are subject to police violence in the context of the police stop.

A nonconformist habitus would develop within the African American cohort across four discrete stages.⁴⁴ The first stage meshes well with Bourdieu’s concept of the habitus. It pertains to the patterned African American response of conformity or deference in relation to a specific structural configuration of the state—namely, the contraction of the Fourth Amendment protection, an increase in race-based stops, and an increase in police violence as a function of the elevated number of stops. The first stage merely acknowledges the “imperceptible embodiment of mental and corporeal schemata.”⁴⁵ It is entirely free of “discursive mediation” regarding African American procedural dispositions and derivative actions.⁴⁶ It is habit entirely disengaged from consciousness. But unconscious, routinized activity can be subject to either personal or group reflection and then made the subject of discourse.⁴⁷

This brings us to The Talk itself, which represents the second stage in the formation of the nonconformist procedural habitus. At the second stage, the parent reflects upon her own conformist orientation when considering how to minimize the risk posed to her child in the event of a police stop. After the parent comes to recognize her own conformist habitus (assuming this is the parent’s orientation), this habitus, in the third stage, becomes part of what sociologists have identified as an “inter-subjectivity.” Simply put, this is the point at which the parent has a conversation with the child about the appropriate terms of police

⁴⁴ *Id.* at 524-25. Noble and Watkins identify these four dimensions as “acquisition,” “reproduction of power,” “position in field,” and “generativity.” *Id.*

⁴⁵ Loïc J.D. Wacquant, *Pugs at Work: Bodily Capital and Bodily Labour Among Professional Boxers*, BODY & SOC’Y, Mar. 1995, at 65, 72.

⁴⁶ *Id.*

⁴⁷ Noble & Watkins, *supra* note 35, at 531 (describing agentic reflection, “that discursive practice in which we consider our behaviour and its principles, which involves the monitoring of conduct which can be brought to discourse”).

engagement. The conversation is generative if it informs the production of the child's own procedural habitus.⁴⁸

In this sense, The Talk would produce one of two divergent possibilities: a conformist habitus or a nonconformist habitus. The social actor may seek to reproduce the conformist habitus merely by articulating by way of The Talk the precise terms of submission, primarily in regard to language used—"Yes, ma'am," "No, sir"—and physical action—"Don't reach," "No sudden movements." However, the parent could instead make the conscious decision to pivot from her own habitus to recommend to the child a nonconformist habitus and a derivative stop protocol. At the fourth stage, if the child then chooses to adopt the nonconformist procedural habitus, the child's routine implementation of the associated protocol will have produced a new process of habituation—regular adherence to the nonconformist protocol. Both the protocol and the associated habitus would eventually dissolve into instinct and the unconscious.⁴⁹

To be clear, I wish to make just two theoretical points regarding the formulation of an African American procedural habitus in relation to Fourth Amendment seizure law. First, I offer that there is likely a patterned and unconscious African American response to a specific structural configuration that includes Fourth Amendment law and the corresponding rate at which African Americans are subject to race-based police stops and derivative police violence. This patterned response represents the unconscious and undisturbed African American procedural habitus. Second, contrary to Bourdieu's theory of habitus, I take African Americans to have the capacity to bring the procedural habitus into consciousness; to deliberate upon the habitus; and ultimately to transform the habitus, altering their patterned response to a specific set of structural phenomena that shape the social environment.⁵⁰ There is, then, within

⁴⁸ See generally Loïc J.D. Wacquant, *Toward a Social Praxeology: The Structure and Logic of Bourdieu's Sociology*, in PIERRE BOURDIEU & LOÏC J.D. WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY (1992); see also Noble & Watkins, *supra* note 35, at 522 ("[Bourdieu] emphasizes both the objective structuring of habitus and its function as a system of dispositions that have generative capacities in specific fields.").

⁴⁹ Noble & Watkins, *supra* note 35, at 525 (describing criticism of Bourdieu's theory of habitus as unconscious process).

⁵⁰ See MAHMOOD, *supra* note 20, at 139. The form of resistance to police-administered procedure proposed in this Essay falls between two normative obstructionist projects. The first is conventional advocacy in the public square for an end to race-based policing (surveillance, stops, arrests, and violence). Advocates look to persuade the public, political representatives, police, and police administration that race should not serve as a basis of suspicion or risk assessment. This form of resistance is rhetorical and continuous and abstracted from the countless on-the-ground encounters between police and African Americans. The second form of resistance is personal, physical resistance, which has a remarkably long history of legitimation in American law and culture. It is based in a deep historical skepticism of the state's use of physical coercion against the citizenry and manifests in the right to physically resist unlawful seizures by police.

the model, a “before” and an “after” for the African American procedural habitus as mediated by The Talk or other similar conscious interventions attempting to close the gateway between the police stop and police violence.

II. THE STOP-KILL COROLLARY

In a series of interlocking articles, Devon Carbado establishes Fourth Amendment law in conjunction with the police stop as forming a gateway to race-based police violence.⁵¹ Carbado’s underlying sociolegal analysis represents a pivot from the police-violence literature’s focus on the police department’s bad apples and institutional pathologies to careful consideration of the constitutional law of seizure. The causal theorem connecting seizure law to race-based police state violence is clear and compelling: the erosion of constitutional protections against arbitrary seizure over the past half century has delivered the de facto legalization of racial profiling; the legalization of racial profiling has elevated the rate at which police stop African Americans and, in turn, broadened the group’s exposure to the circumstances giving rise to police violence. This theorem, which I will call the “Gateway Theory” of the police stop as it relates to police violence, is based in significant part on doctrinal analysis.⁵² But it is at the same time distinctly sociological as it situates the battering officer less as a rogue agent, or even as a function of a rogue culture, and more as a social actor subject to the structuring force of Fourth Amendment seizure law as dictated by the Court.⁵³ Within the literature on police violence,

⁵¹ Carbado, *Stop and Frisk*, *supra* note 23, at 1551 (“The Article stressed that the stop-and-frisk doctrine is an important part of the police violence problem because that body of law allows police officers to force engagements with African Americans based on little or no justification.”); Carbado, *From Stopping to Killing*, *supra* note 23, at 130 (“The [searches allowed by the Court] open the door to more intrusive, potentially violence-producing—but constitutionally reasonable—encounters with the police.”); Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 549 (2017) (“My thesis, in a nutshell, is that predatory policing works in conjunction with mass criminalization to facilitate not only the surveillance, social control, and economic exploitation of African Americans but also their arrest, incarceration and exposure to police violence.”).

⁵² Professor Alice Ristroph echoes Gateway Theory in her characterization of the metaphorical distance between the police stop and the police killing as the “short blue line from stop to shots.” Ristroph, *supra* note 28, at 1191.

⁵³ Carbado describes the Court’s seizure jurisprudence as “pushing” the police to seize African Americans and “pulling” African Americans into police encounters. Carbado, *From Stopping to Killing*, *supra* note 23, at 129. Ristroph offers a similar argument as to the underappreciated role of the Supreme Court in regard to incidents of police violence. In Ristroph’s view, the Court’s opinions regarding criminal procedure—particularly those under the Fourth Amendment—have a constitutive function because institutional actions flow from the legal structure dictated by the Court. See Ristroph, *supra* note 28, at 1187-88 (“[M]ost American jurisdictions empower officers to the full limits of constitutional doctrine Thus doctrinal choices shape police practices, as courts are well aware.”).

this form of argumentation might be considered the theoretical modeling of causal processes “from above.”⁵⁴ It casts the Court’s seizure jurisprudence as seminal to the governing racial structure that ramps up the frequency of contacts between African Americans and police, multiplying the number of opportunities for African Americans to be subject to police violence and raising the rate at which African Americans suffer police violence relative to their white racial counterparts.

A. Gateway Theory

Figure 1. The Gateway Theory of Police Violence.



*Terry v. Ohio*⁵⁵ and its progeny established the basis for the stop-kill corollary by parsing of two fundamental concepts in constitutional criminal procedure: seizure and suspicion.⁵⁶ When decided in 1968, *Terry* established an officer’s

⁵⁴ See Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1483 (2016) (“This Article sets forth some additional variables. . . . [These variables] frame[] blue-on-black violence as a structural problem.”); Carbado, *From Stopping to Killing*, *supra* note 23, at 129 (“The Supreme Court’s legalization of racial profiling is embedded in the very structure of Fourth Amendment doctrine.”).

⁵⁵ 392 U.S. 1 (1968).

⁵⁶ *Id.* at 16, 20. Carbado identifies *Terry* as the “genesis” of modern stop and frisk and discusses the historical context surrounding *Terry* as essential to a full understanding of the majority opinion. Carbado, *Stop and Frisk*, *supra* note 23, at 1516. The mid-1960s were marked by large-scale protests, an intensifying civil rights movement, escalating tension between African Americans and the police, and anti-Supreme Court sentiment stemming from the perception that the Warren Court was pro-criminal defendant. *Id.* at 1528-30. The 1960s also ushered in the early stages of research into policing. The Court’s opinion in *Terry* relied on two major studies conducted by the ABA and the Commission on Law Enforcement and Administration of Justice. See generally PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967) [hereinafter CRIME IN A FREE SOCIETY], <https://www.ncjrs.gov/pdffiles1/nij/42.pdf> [<https://perma.cc/K4R7-V5RB>]; TIFFANY ET AL., *supra* note 29. These studies documented the widespread use of “field interrogations” by police departments in the 1960s but did not disavow the use of such interrogations. See CRIME IN A FREE SOCIETY, *supra*, at 95. The ABA Commission found that field interrogations, which are designed to gather information for the purpose of obtaining prosecutions, were often based on factors such as race, sex, and appearance more generally.

authority to search for weapons prior to questioning when he reasonably believes the interview subject to be armed and dangerous.⁵⁷ Subsequent Supreme Court cases established a layered jurisprudence of the police seizure, ultimately determining that the state's lawful ability to detain a person for purposes of criminal investigation extended beyond formal arrest to temporary involuntary detention in service of criminal investigation.⁵⁸ Upon establishing a reasonable suspicion, police may lawfully detain an individual for questioning and then proceed to conduct a frisk should they have reason to believe the detained subject to be in possession of a weapon.⁵⁹ In this respect, the Court set aside the

TIFFANY ET AL., *supra* note 29, at 10, 19-20. Likewise, the Commission on Law Enforcement and Administration of Justice found that "field interrogations are often conducted with little or no basis for suspicion[,] . . . are sometimes used in a way which discriminates against minority groups, the poor, and the juvenile[,] . . . [and] are frequently conducted in a discourteous or otherwise offensive manner which is particularly irritating to the citizen." PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 183-85 (1967). Nonetheless, the Commission concluded that field interrogations were a necessary part of police practice. *Id.*

Against this backdrop, Chief Justice Warren acknowledged that police were involved in the "aggressive utilization of stops and frisks in African American communities," but "suggested that there was little that a case like *Terry v. Ohio* could do to solve that problem." Carabado, *Stop and Frisk*, *supra* note 23, at 1530. Professor Adina Schwartz writes that the Court's failure to challenge racial profiling by the police "contributed to the bedrock assumption that . . . lack of concern with racial issues is simply part of realism about fighting crime" and that "the law is distinctively powerless against racist abuses." Adina Schwartz, "*Just Take Away Their Guns*": *The Hidden Racism of Terry v. Ohio*, 23 FORDHAM URB. L.J. 317, 323, 347 (1995). Professor John Q. Barrett finds that decisions of the early twentieth century recognized that police took similar liberties in policing Italians, conducting stops and searches without a warrant or evidence meeting the probable cause standard. See John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749, 758 n.31 (1998).

⁵⁷ *Terry*, 392 U.S. at 30-31.

⁵⁸ With regard to the question of the constitutionality of a temporary detention for purposes of criminal investigation (i.e., what has come to be known as a *Terry* stop), it took the Court several years after *Terry* to definitively conclude that a temporary police detention is constitutional if based upon a "reasonable articulable suspicion." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (identifying "nervous, evasive behavior" such as flight as proper basis of reasonable suspicion and pertinent to process of determining whether officers established reasonable suspicion); *California v. Hodari D.*, 499 U.S. 621, 623 n.1 (1991) (noting in dicta that unprovoked flight may be sufficient to establish reasonable articulable suspicion); *United States v. Cortez*, 449 U.S. 411, 421 (1981) (holding that investigatory stop represented privacy intrusion but could be justified if reasonably related to evidence that led to stop's initiation); *Adams v. Williams*, 407 U.S. 143, 146 (1972) (indicating validity of "investigatory stop" short of arrest if based upon sufficient evidentiary support).

⁵⁹ *Terry*, 392 U.S. at 27 (noting that this rule "must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason

probable cause standard provided in the plain language of the Fourth Amendment to establish the conceptual parameters of the investigatory stop.⁶⁰ It inserted in its place a standard that would come to be known as reasonable articulable suspicion.⁶¹

The *Terry* line of cases thus established both a seizure gradation (stop vis-à-vis arrest) and a suspicion gradation (reasonable articulable suspicion vis-à-vis probable cause) within Fourth Amendment doctrine.⁶² Together, the two

to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime”).

⁶⁰ *Id.* at 24. The investigatory stop has become a favorite weapon in the arsenal of the police. Carbado, *From Stopping to Killing*, *supra* note 23, at 128. Through a series of linked hypotheticals Carbado illustrates that the conceptual structure of the investigatory stop is highly deferential to police officers and gives them substantial power and discretion to stop African Americans based on racial profiling. *See id.* at 131-49.

While scholars have conceptualized *Terry* as a “compromise” between police interests and the rights of the public, Professor Corinna Lain’s scholarship has challenged that conceptualization. Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1443 (2004). She contends that the *Terry* decision was “profoundly pro-law enforcement.” *Id.* When coupled with the further decay of the reasonable suspicion standard over the past half century, it becomes clear that *Terry* set the table for the substantial expansion of police authority and an undercutting of constitutional protections against the police. *See* Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 423 (2004) (“*Terry* represented a sudden change in direction away from the Warren Court’s focus of protecting individual rights from police abuse of power, evidenced in *Mapp* and *Miranda*, to empowering police and expanding police power on the street in *Terry*.” (footnote omitted)); Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1277 (1998) (“*Terry* deserves critical attention because it authorized a police practice that was being used to subvert the Fourth Amendment rights of blacks nationwide.”).

⁶¹ The term “reasonable suspicion” was first announced in Justice Douglas’s dissent, not the majority’s opinion. *Terry*, 392 U.S. at 37 (Douglas, J., dissenting) (“The term ‘probable cause’ rings a bell of certainty that is not sounded by phrases such as ‘reasonable suspicion.’”); *see also* Carbado, *Stop and Frisk*, *supra* note 23, at 1512 n.6 (noting that Chief Justice Warren’s “specific and articulable facts” standard “was subsequently rearticulated to become ‘reasonable suspicion’” (citation omitted)). Despite *Terry*’s identity as the origin of a line of jurisprudence that would lower the evidentiary threshold for a police stop, the *Terry* majority opinion offered that police stop-and-frisk procedures should be based on a “reasonableness” standard. *Terry*, 392 U.S. at 20-22. For a historical study of the *Terry* decision in relation to the Court’s rigorous internal debate for allowing police to conduct stops and seizures on less than probable cause, see generally Barrett, *supra* note 56. Barrett reports that the decision to rely on a “reasonableness” standard for stops and searches lost Justice Douglas’s vote and unanimity in the Court’s decision. *Id.* at 830-32.

⁶² The Court’s seizure decisions since *Terry* have consistently expanded police authority along two axes. First, these decisions have limited the circumstances under which a “seizure” occurs by stating that so-called “voluntary encounters” between the police and citizens are

doctrinal innovations restructured legal governance of the quality and frequency of police-citizen interaction.⁶³ To the surprise of no one, the decision also spawned a new line of criminal litigation probing the conceptual bounds of the investigatory stop—as a discrete police procedure conceptually shoehorned between the consensual police encounter and the arrest—and the evidentiary threshold for reasonable suspicion.⁶⁴ Moreover, derivative holdings of the Court within seizure doctrine have incrementally encroached upon African American Fourth Amendment protections, all with little direct attention paid by the Court to racially disparate outcomes.⁶⁵

To establish the validity of Gateway Theory, a line must still be drawn between the fundamental shift in Fourth Amendment seizure doctrine in *Terry*

unregulated by the Fourth Amendment. *See, e.g.*, *Florida v. Bostick*, 501 U.S. 429, 436 (1991) (holding that appropriate inquiry is whether person would feel “free to decline” officer’s requests to speak or “otherwise terminate the encounter”); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion) (announcing that seizure occurs when reasonable person would not feel “free to leave”). Officers have no duty to inform citizens that they have a right to decline an officer’s requests, and, given the coercive power of the badge and gun, many such encounters are unlikely to be truly voluntary. *See United States v. Drayton*, 536 U.S. 194, 206 (2002); Carbadó, *From Stopping to Killing*, *supra* note 23, at 131-49 (describing why police powers to stop and surveil fall outside Fourth Amendment and demonstrating how these encounters are often anything but voluntary). Furthermore, even when police are intending to seize someone, the Court has found that no seizure occurs unless the police use force or the person being seized submits to an officer’s show of authority. *Hodari D.*, 499 U.S. at 626. These rules work together to remove a large swath of police-citizen encounters from regulation under the Fourth Amendment.

Second, the Court made it easier for officers to make *Terry* stops after holding that “reasonable suspicion” can be satisfied by as little as “flight” in a “high-crime area.” *Wardlow*, 528 U.S. at 124-26. Even if a person can show that they were not free to terminate an encounter with police, the police officer can point to subjective circumstances, such as furtive movements, evasive actions, or presence in a high-crime area, to justify the stop. *See generally* David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN’S L. REV. 975 (1998).

⁶³ These new gradations give police significant discretion to engage in repeated contacts with citizens, and, as evidenced by New York’s stop-and-frisk program—which is discussed more fully in Section II.B—the police use these new gradations to increase police-citizen contact. *See* Carol S. Steiker, *Terry Unbound*, 82 MISS. L.J. 329, 355-56 (2013) (“From 2002 to 2011, the number of stops made by the NYPD grew from just under 100,000 per year to just under 700,000 per year—a seven-fold increase in less than a decade.”).

⁶⁴ *See, e.g.*, *Wardlow*, 528 U.S. at 124-26 (interpreting reasonable suspicion standard to justify stop based on presence in high-crime area and unprovoked flight); *Hodari D.*, 499 U.S. at 626 (finding that seizure does not occur unless police use force or person being seized submits to officer’s show of authority); *Mendenhall*, 446 U.S. at 554 (announcing that seizure occurs when reasonable person would not feel “free to leave”).

⁶⁵ Carbadó, *From Stopping to Killing*, *supra* note 23, at 148 fig.1 (showing that substantial portion of critical Fourth Amendment Supreme Court cases involved black litigants).

and its progeny and Carbado's claim of a de facto legalization of racial profiling. Carbado argues that since the *Terry* decision the Court has continued to expand the police department's authority to conduct temporary detentions with the associated enforcement burden disproportionately concentrated among African Americans (men in particular, it would seem) given that they are among the most popular police targets.⁶⁶ In *California v. Hodari D.*,⁶⁷ the Court determined that an officer's decision to chase down a suspect based entirely on the suspect's flight did not in and of itself constitute a seizure and thus did not fall within the ambit of police conduct eligible for judicial scrutiny under the Fourth Amendment.⁶⁸ Fast forward to *Illinois v. Wardlow*,⁶⁹ where the Court determined flight itself to be a valid source of criminal suspicion and sufficient to establish a reasonable suspicion when occurring in a "high-crime area,"⁷⁰ and one can feel the walls closing in on the law-abiding, working-class, African American city resident intent on limiting his or her contact with police. Carbado further suggests that the same walls have closed in on the city police officer who, under considerable pressure to reduce crime in working-class African American

⁶⁶ See *id.* at 128 (stating that racially disproportionate policing is endemic in United States in part due to police reliance on stop-and-frisk technique).

⁶⁷ 499 U.S. 621 (1991).

⁶⁸ *Id.* at 626 (stating that word "seizure" does not apply "to the prospect of a policeman yelling 'Stop, in the name of the law!'" at fleeing person). Furthermore, a seizure only occurs when police use force against a person or the person submits to a show of police authority that would make a reasonable person feel that they were not free to disregard the police. *United States v. Drayton*, 536 U.S. 194, 197 (2002) (reformulating seizure standard announced in *Mendenhall* from "free to leave" to "free to refuse"). Although a person being engaged by the police may, in theory, refuse to interact with the police, this option may be illusory in practice. After all, even if a person calmly walks away from the police, the police are free to follow that person and question them, despite the person's clear desire to avoid interaction with the police. See Carbado, *From Stopping to Killing*, *supra* note 23, at 146-48.

⁶⁹ 528 U.S. 119 (2000).

⁷⁰ A recent empirical study based on stop data in New York City found that police have called nearly every area of New York City a "high-crime area." Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CALIF. L. REV. 345, 383-84 (2019) ("Perhaps the most important takeaway is that officers called 98 percent of the block groups in the city high crime . . ."). The study also found that the decision to call an area a "high-crime area" is almost entirely uncorrelated with the actual crime rate. *Id.* (noting that actual crime rate explained only one percent of variation in officers' assessments). Instead, an officer's decision to call an area a "high-crime area" is correlated with the race of the person being stopped and the racial makeup of the neighborhood where the stop is occurring. *Id.* at 388-89 ("According to these models, moving from a block group without any Black residents to a block group with 100 percent Black residents is associated with an 8 to 9 percent increase in the probability that an officer will call the area high crime."). Officers stopping young black men are more likely to call the area of the stop a "high-crime area," and officers conducting stops in predominantly black neighborhoods are more likely to call the area a "high-crime area." *Id.*

neighborhoods in the city, uses (at a minimum) every legal tool available to do so.⁷¹

Justice Scalia would later author the majority opinion in *Whren v. United States*,⁷² which held police stops to be Fourth Amendment compliant where the basis for the stop was objectively lawful but potentially motivated by a pretext such as race.⁷³ The decision to narrow Fourth Amendment seizure analysis to objective factors affirmed the Court's longstanding commitment to making court-crafted rules for police relatively clear in terms of theory and application.⁷⁴ The Court again opted for pragmatism in *Whren*, dismissing defense arguments highlighting the potential for racial abuse by police within a legal framework that willfully ignores the police officer's subjectivity.⁷⁵ In an article lamenting the Court's retreat from consideration of racial profiling under the Fourth Amendment, Professor Tracey Maclin and Maria Savarese point out that Dr. Martin Luther King Jr. was subject to a pretextual stop and arrest as retribution for organizing the Montgomery Bus Boycott.⁷⁶ Remarkably, consensus praise for Dr. King a half century after the fact has not interfered with the Court's

⁷¹ Carbado, *Stop and Frisk*, *supra* note 23, at 1539-40 (noting how former New York City Police Chief Commissioner Raymond Kelly expressly endorsed use of stop and frisk). This pressure is often reinforced by supervisors, who urge officers on the beat to engage in racial profiling, stop-and-frisk practices, and other aggressive policing tactics that raise the number of contacts between police and African Americans. *See, e.g.*, Joseph Goldstein & Ashley Southall, *Race Informed Arrests on Trains, Officers Say*, N.Y. TIMES, Dec. 7, 2019, at A20 ("Six officers said in their affidavits that Mr. Tsachas, now a deputy inspector, pressured them to enforce low-level violations against black and Hispanic people, while discouraging them from doing the same to white or Asian people.").

⁷² 517 U.S. 806 (1996).

⁷³ *See id.* at 812 ("Not only have we never held, outside the context of inventory search or administrative inspection (discussed above), that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary.").

⁷⁴ *Id.* at 814 ("Why one would frame a test designed to combat pretext in such fashion that the court cannot take into account *actual and admitted pretext* is a curiosity that can only be explained by the fact that our cases have foreclosed the more sensible option.").

⁷⁵ *Id.* at 813 (noting that constitutional basis for objecting to intentionally discriminatory application of laws is Equal Protection Clause, not Fourth Amendment).

⁷⁶ In 1956, Dr. King was driving bus boycotters home when officers stopped him for allegedly driving thirty miles-per-hour in a twenty-five miles-per-hour zone. Tracey Maclin & Maria Savarese, *Martin Luther King, Jr. and Pretext Stops (and Arrests): Reflections on How Far We Have Not Come Fifty Years Later*, 49 U. MEM. L. REV. 43, 44 (2018). The officers ordered Dr. King out of the car, arrested him, and took him to the Montgomery County Jail. *Id.* This practice of using low-level traffic offenses to stop, investigate, and arrest African Americans has not abated in the sixty years since it was used on Dr. King. *Id.* at 46. In fact, *Whren*, which was decided forty years after King's arrest in Montgomery, in effect, facilitates police use of these traffic stops as a gateway to investigate more serious crimes for which they do not have reasonable suspicion. *Id.* at 56.

affirmation of the racial profiling that governed the intimate, day-to-day quality of his persecution.

In the contemporary context, the cumulative effect of the post-*Terry* seizure cases is the silent declaration of open season for police seizure of African Americans. The Court has sketched the legal parameters governing the stop, leaving police and African Americans to situate themselves within and around the governing legal structure.⁷⁷ It is worth noting again that Carbado's claim of seizure law as social structure, and thus as determinative of the frequency with which African Americans are subject to seizure and police violence in the specific context of the seizure, reframes the ongoing conversation about the underlying cause of police killings of African Americans from one centered on the subject of bigoted officers and implicit racial bias to that of constitutional law.⁷⁸ Though certainly playing a significant role in the causal story of police brutality against African Americans, bigotry and unconscious bias could theoretically be held in check—at the very least circumscribed—by a formulation of seizure doctrine attentive to the African American lived experience. Instead, the doctrine quite effectively obstructs the sanctioning of the state for race-based seizures of the person.

B. *Stop Rates and Use-of-Force Rates*

A brief review of descriptive statistics on stop rates and use-of-force rates by race sets an empirical backdrop for further consideration of Gateway Theory. First, we know that most people encounter police in the context of traffic enforcement. Among the extensive research on the subject, one survey found that of the Americans in contact with police for any reason in the prior year, most of them (52%) made contact as the result of a traffic stop.⁷⁹ Of the well

⁷⁷ Carbado, *Stop and Frisk*, *supra* note 23, at 1514 fig.1 (illustrating police violence model and structure); *see also infra* Part III. The web of decisions spun by the Court over the past half century, particularly those in the *Terry* line of cases, have “empower[ed] the police to target African Americans, and disempower[ed] African Americans to resist that targeting.” Carbado, *Stop and Frisk*, *supra* note 23, at 1545.

⁷⁸ Carbado, *Stop and Frisk*, *supra* note 23, at 1551 (“An additional problem with some of the advocacy against police violence is that to the extent it engages with questions of racial profiling, it sometimes conceptualizes the phenomenon as a problem of individual lawlessness obscuring the degree to which the underlying rule of law itself is problematic.”).

⁷⁹ *See* ELIZABETH DAVIS, ANTHONY WHYDE & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, U.S. DOJ, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015, at 6 tbl.5 (2018), <https://www.bjs.gov/content/pub/pdf/cpp15.pdf> [<https://perma.cc/5Z4L-4E98>] (noting that approximately twenty-five million out of fifty-three million people who came in contact with police in 2015 did so as result of traffic stops). For analysis regarding racial profiling in the traffic context, *see generally* Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275 (2004). For a discussion of racial profiling that occurred

over thirty-five million police stops in 2011, just under 74% of them occurred in the traffic context—the proportion dipping to 70% in 2015.⁸⁰

Second, we know that traffic enforcement is rife with racial bias. An analysis of nearly one hundred million state and local police stops by the Stanford Computational Policy Lab found that both highway patrol and municipal police show a bias against African Americans in their enforcement of traffic laws.⁸¹ A separate study on racial disparities in the traffic context found African Americans to be more than two-and-a-half times as likely to be stopped by police as whites and found African American men to be four times as likely to be stopped as white women.⁸² Further tilting the scales, federal law enforcement agencies, in their training of state and municipal police, have aggressively promoted traffic enforcement as the primary entry point for drug enforcement, for which African Americans are known to be selectively targeted.⁸³ It is now

contemporaneously with the *Whren* decision, see Maclin & Savarese, *supra* note 76, at 54-55.

⁸⁰ DAVIS, WHYDE & LANGTON, *supra* note 79, at 6 tbl.5.

⁸¹ EMMA PIERSON ET AL., STANFORD COMPUTATIONAL POLICY LAB, A LARGE-SCALE ANALYSIS OF RACIAL DISPARITIES IN POLICE STOPS ACROSS THE UNITED STATES (2019), <https://5harad.com/papers/traffic-stops.pdf> [<https://perma.cc/WMH9-X32P>] (abstract).

⁸² CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 72-73 (2014) (“Gender compounds this disparity in pretext stops: African American men are almost four times more likely than white women to be subjected to these stops.”); see also Maclin & Savarese, *supra* note 76, at 49 (“Study after study has demonstrated that African Americans are targeted for pretext stops at a rate greater than white Americans . . .”).

⁸³ Maclin & Savarese, *supra* note 76, at 46 (noting that federal government actively encouraged state and local police departments to use traffic laws as basis for stopping cars suspected of drug smuggling); see also Frank R. Baumgartner et al., *Racial Disparities in Traffic Stop Outcomes*, 9 DUKE. F.L. & SOC. CHANGE 21, 47 (2017) (finding that African American and Hispanic drivers were “searched, *on average*, at more than double the rate of whites” during traffic stops). One example of the federal government’s encouragement of racial profiling and pretext stops can be found in Operation Pipeline, a Drug Enforcement Agency program that was launched in 1986. Maclin & Savarese, *supra* note 76, at 46 n.17; David A. Harris, *Driving While Black: Racial Profiling on Our Nation’s Highways*, ACLU (June 1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways> [<https://perma.cc/ZW9L-WYTV>]. The program encouraged officers to “use pretext stops in order to find drugs in vehicles” and “some of the training materials used and produced in conjunction with Pipeline and other associated programs have implicitly (if not explicitly) encouraged the targeting of minority motorists.” Harris, *supra*.

These aggressive tactics disproportionately impacted African Americans. See Jamie Fellner et al., *Decades of Disparity: Drug Arrests and Race in the United States*, HUM. RTS. WATCH (Mar. 2, 2009), <https://www.hrw.org/report/2009/03/02/decades-disparity/drug-arrests-and-race-united-states> [<https://perma.cc/8T73-57CH>] (noting that black drug offenders are principal targets in war on drugs and feel most burden of drug arrests and incarceration). Between 1980 and 2007, there were significant disparities in drug arrests by race, with African

standard law enforcement policy to use the traffic stop as a pretext for drug enforcement.⁸⁴ Noting this normative shift, Professor David Harris has deemed the traffic code “the best friend of the police officer.”⁸⁵

At this point in the discussion, one might wonder about the elasticity of police stops. To what extent is the stop total in a given city a function of the seizure policy set by central police administrators and to what extent is it a function of the standard exercise of discretion that individual police officers apply apart from stop-and-frisk programming? Evidence from New York City suggests that, like the turn of a water spigot, police administrators can stem the flow of police stops with remarkable ease. The New York City Police Department (“NYPD”) engaged in a relentless stop-and-frisk campaign between 2002 and 2012,⁸⁶ reaching a peak of 685,724 stops in 2011, 53% of which were of African Americans.⁸⁷ The NYPD then changed course in 2012 under newly elected Mayor Bill de Blasio, who kept his campaign promise to end his predecessor’s

Americans arrested at anywhere from 2.8 to 5.5 times the rate of whites. *Id.* Recent scholarship examining why these disparities may exist has found that they cannot be explained by racial differences in “the extent of drug offending, nor the nature of drug offending.” Ojmarh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, 32 JUST. Q. 288, 309 (2015); see also Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419, 420-21 (2005) (noting many different possible explanations for racial disparities in drug offending). Instead, it may be racial bias in law enforcement that best explains the findings in these studies. See Beckett et al., *supra*, at 436; Mitchell & Caudy, *supra*, at 310.

⁸⁴ Maclin & Savarese, *supra* note 76, at 46 (“Various types of law enforcement agencies utilize pretext stops, and high-ranking police officials endorse pretext stops as a crime control measure.”). These pretextual stops are so institutionalized that the International Association of Chiefs of Police “created an award—Looking Beyond the License Plate—to recognize police officers who successfully employed traffic stops to effectuate more serious criminal arrests.” Carbado, *From Stopping to Killing*, *supra* note 23, at 156 (citing EPP ET AL., *supra* note 82, at 36).

⁸⁵ Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risk of Driving While Black*, N.Y. TIMES, Oct. 25, 2015, at A1.

⁸⁶ In *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013), a federal district court judge ruled that New York’s stop-and-frisk practices were unconstitutional under the Fourth and Fourteenth Amendments. *Id.* at 562. The judge outlined her findings of fact, which included the fact that the NYPD conducted over 4.4 million *Terry* stops over an eight-year period, only 12% of which resulted in an arrest or summons and 83% of which involved black or Hispanic residents. *Id.* at 573-76. Based on these facts and expert testimony, the judge found that “the City’s highest officials . . . willfully ignored overwhelming proof that the policy of targeting ‘the right people’ is racially discriminatory” and that the NYPD was deliberately indifferent to its constitutional violations. *Id.* at 562.

⁸⁷ *Stop-and-Frisk Data*, N.Y. CIV. LIBERTIES UNION, <https://www.nyclu.org/en/stop-and-frisk-data> [<https://perma.cc/F382-GFK5>] (last visited Apr. 2, 2020) (noting that at height of stop-and-frisk era in 2011, approximately 350,000 of the 685,000 people stopped by NYPD were black).

stop-and-frisk regime.⁸⁸ By 2018, the Administration had reduced the number of police stops to 11,008—1.6% of the 2011 total.⁸⁹

The de Blasio Administration's policy shift was forward-looking. To this end, it did not substantively address the 4.4 million police stops in New York City between 2004 and 2012, only 12% of which had resulted in either a court summons or an arrest.⁹⁰ And despite the precipitous fall in stops after 2011, minorities in New York continue to bear the brunt of what is left of the city's stop-and-frisk regime. Of the stops conducted between 2014 and 2017, young African American and Latino men (aged fourteen to twenty-four), who account for 5% of the city's population, represented 38% of the reported stops—66% of which proceeded to a frisk.⁹¹ Ninety-three percent of these frisks did not produce a weapon.⁹² More to the point, police used force in 28.1% of African American stops between 2014 and 2017 and in 20% of their stops of whites.⁹³ There is little doubt that in New York City the police stop—still heavily concentrated among African American and Latino men—regularly serves as the immediate predicate to police violence.⁹⁴

National studies show even greater racial disparity in police use of force. Nationally, police are 3.6 times as likely to use force against African Americans as compared to whites,⁹⁵ and African Americans represent 26.1% of the subjects

⁸⁸ Azi Paybarah, Brendan Cheney & Colby Hamilton, *DeBlasio on Stop-and-Frisk: 'We Changed It Intensely'*, POLITICO: N.Y. (Dec. 8, 2016, 5:36 AM), <https://www.politico.com/states/new-york/city-hall/story/2016/12/de-blasio-on-stop-and-frisk-we-changed-it-intensely-107886> [<https://perma.cc/Z6TL-D4T8>] (noting report showed that stops dropped by 94% around time de Blasio became mayor). Bill de Blasio made reducing stop and frisk a cornerstone of his campaign, and although the drop in stop-and-frisk rates began while he was running for office, it continued throughout his time as mayor. *Id.*

⁸⁹ *Stop-and-Frisk Data*, *supra* note 87. As of this writing, the city has not fallen to pieces. See James Cullen, *Ending New York's Stop-and-Frisk Did Not Increase Crime*, BRENNAN CTR. FOR JUST. (Apr. 11, 2016), <https://www.brennancenter.org/our-work/analysis-opinion/ending-new-yorks-stop-and-frisk-did-not-increase-crime> [<https://perma.cc/R6B8-PWGQ>].

⁹⁰ See *Floyd*, 959 F. Supp. 2d at 561-63. Professor Bennett Capers notes that the stop-and-frisk regime in New York was even more troubling than summons-arrest rates would indicate, given that the government dismissed nearly half of the cases arising from arrests under the stop-and-frisk program. Bennett Capers, *supra* note 28, at 689.

⁹¹ CHRISTOPHER DUNN & MICHELLE SHAMES, N.Y. CIVIL LIBERTIES UNION, STOP-AND-FRISK IN THE DE BLASIO ERA 12, 14 (Dianna Lee ed., 2019), https://www.nyclu.org/sites/default/files/field_documents/20190314_nyclu_stopfrisk_singles.pdf [<https://perma.cc/AU7R-DMBG>].

⁹² *Id.* at 14.

⁹³ *Id.* at 23 fig.1.

⁹⁴ *Id.* at 23.

⁹⁵ PHILLIP ATIBA GOFF ET AL., CTR. FOR POLICING EQUITY, THE SCIENCE OF JUSTICE: RACE, ARRESTS, AND POLICE USE OF FORCE 15 (2016), https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf [<https://perma.cc/V55W-2BQV>].

of police homicide despite being only 12.2% of the national population.⁹⁶ In 2015, African American men—at 6% of the population—were 40% of the *unarmed* individuals shot by police.⁹⁷ The racial disparity in death by police Taser is just as stark, with African Americans representing 48.4% of such deaths followed by whites (32.3%) and Hispanics (6.5%).⁹⁸

C. Causal Process from Below

The evolution of Fourth Amendment legal doctrine as it relates to police seizure has triggered a causal process from above that far too frequently ends with the death of an African American at the hands of police. The police department's liberal use of seizure of the person as an investigatory tool, whether by way of temporary detention for purpose of investigation under *Terry* or pretextual stops in the traffic context via *Whren*, facilitates the targeting of African Americans. Such targeting elevates the rate at which African Americans are stopped and, as a corollary, the rate at which they are subjected to police violence. Moreover, this grim sequence is likely to repeat uninterrupted for the next several decades given the Court's ideological constitution.⁹⁹ Are African Americans destined to remain mere subjects to this subordinating legal structure? As members of the racial cohort cycle through the state's seizure regime, might they engage the regime in ways for which Gateway Theory should account? Put another way, to what extent does the African American disposition toward racial-seizure as a primary investigatory tool shape the quality of the seizure regime? The Gateway Theory can and should be coupled with a modeling of causal processes "from below." When subject to an adverse and durable legal structure and derivative state brutality, we might alternatively think of African Americans as both attentive to the structural elements that author their victimization and as fully capable of crafting procedural safeguards in response.

III. LEVERAGING "THE TALK": THE CASE FOR AFRICAN AMERICAN AGENCY

How should an African American respond to a race-based police stop? What approach, disposition, or tactic would minimize his risk within the context of the

⁹⁶ FRANKLIN E. ZIMRING, *WHEN POLICE KILL* 45 fig.3.1 (2017).

⁹⁷ Kimberly Kindy et al., *A Year of Reckoning: Police Fatally Shoot Nearly 1,000*, WASH. POST (Dec. 26, 2015), <http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/>.

⁹⁸ ZIMRING, *supra* note 96, at 49 fig.3.2, 52 fig.3.3.

⁹⁹ See Brent E. Newton, *The Supreme Court's Fourth Amendment Scorecard*, 13 STAN. J. C.R. & C.L. 1, 25 (2017) (finding that Fourth Amendment litigants had strong likelihood of losing in front of Supreme Court over past thirty years); Adam Liptak, *How Nominee Could Redirect Supreme Court*, N.Y. TIMES, Sept. 3, 2018, at A1 (noting that Justice Kavanaugh could make Court even less likely to find in favor of criminal defendants). For further discussion of how and why courts defer to police officers, see generally Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017).

police stop of being subject to police violence? As with any number of other issues of grave importance to the African American community, African Americans seek help from racial peers in making this sort of calculation.¹⁰⁰ It is in this spirit that The Talk has come to prominence. This Part takes the conformist model of The Talk—the version advising absolute deference to police authority in the event of a race-based police stop without regard for police behavior—as a model often (if not most often) articulated in popular media on the subject. It illustrates the conformist model using several examples from various media outlets and argues that while each African American subject to the race-based police stop benefits from the application of a conformist protocol, broad adoption of the protocol across the racial collective may increase exposure to police violence by capping the transactional costs police incur as a function of the race-based stop. The logic underlying this central claim is fairly easy to digest: as the transactional cost of the race-based police stop goes down, the number of race-based stops goes up; the higher the number of race-based stops, the higher the number of incidents of police violence against African Americans in the context of the police stop.¹⁰¹

Given the prospect of perverse outcomes produced by broad application of the conformist protocol across the African American racial group, this Part proposes an alternative version of The Talk designed to minimize African American exposure to police violence over the long term. If instead of absolute deference, The Talk cultivated a procedural habitus oriented toward police accountability and, likewise, advised a protocol that coupled physical compliance with administrative resistance, African Americans could become a causal force from below that reduces the rate at which they are seized and battered by police.

A. *“The Talk” as Protocol*

The forthcoming examples of The Talk are not meant as an empirical inquiry. They should not be taken to indicate the version of The Talk that parents

¹⁰⁰ See, e.g., Amanda Datnow & Robert Cooper, *Peer Networks of African American Students in Independent Schools: Affirming Academic Success and Racial Identity*, 66 J. NEGRO EDUC. 56, 62-67 (1997) (discussing how peer networks formed among African American high school students in predominantly white independent high schools “functioned in important ways to simultaneously foster school success and provide a mental space for them to reaffirm their racial identities”). See generally CAROL STACK, *ALL OUR KIN* (1974) (studying familial and social “kin networks” among black people in impoverished, urban areas); Silvia Domínguez & Celeste Watkins, *Creating Networks for Survival and Mobility: Social Capital Among African-American and Latin-American Low-Income Mothers*, 50 SOC. PROBS. 111 (2003) (describing social networks that encourage advancement and facilitate opportunities for low-income African American and Latin American women to gain social capital).

¹⁰¹ This assumes a fixed ratio between police stops and police use of force in the context of a stop.

generally give to their African American children given that many of the examples are taken from media platforms that do not take the African American community as their principal audience. In light of these and other factors, I leave the question of the representativeness of the conformist model of engagement for future research and narrow the Essay's analytical focus to the conceptualization of the conformist model and the model's utility. The examples below thus serve the limited purpose of establishing conformist protocol as relayed from parents to their African American children.

It should come as no surprise that African Americans respond emotionally when police use their phenotype as a basis for seizure or that The Talk represents, among other things, a preemptive step in managing this emotion. When considered as an artifact of African American culture, The Talk has been characterized as an "heirloom,"¹⁰² a "rite of passage,"¹⁰³ and akin to the "birds and the bees" for African American households.¹⁰⁴ The African American narrator of an NPR segment on The Talk described the project succinctly: "The goal is always, always, always to get home safely."¹⁰⁵ An interview subject coupled this goal with a claim regarding The Talk's primary insight: The Talk teaches you that anger will get you killed.¹⁰⁶

A documentary video on The Talk published in the "Black Voices" section of the news and opinion website *HuffPost* depicts The Talk through interviews with African American mothers in Baton Rouge, Louisiana.¹⁰⁷ The piece opens with a news clip of former New York City Mayor Rudy Giuliani counseling parents on how their African American children should behave when interacting with

¹⁰² Nina Wilder, 'The Talk' Brings the Discussion Surrounding Police Brutality to the Stage, *DUKE CHRON.* (Jan. 9, 2019, 12:30 AM), <https://www.dukechronicle.com/article/2019/01/the-talk-brings-the-discussion-surrounding-police-brutality-to-the-stage> [<https://perma.cc/9REG-ZSHG>].

¹⁰³ Arienne Thompson Plourde & Amelia Thompson, *The Talk*, *NOTRE DAME MAG.* (Winter 2016-17), <https://magazine.nd.edu/stories/the-talk/> [<https://perma.cc/Y789-8VA5>].

¹⁰⁴ Austin American-Statesman, *The Talk*, *YOUTUBE* (Aug. 18, 2018), <https://www.youtube.com/watch?v=eYTBj7dbLwM&>.

¹⁰⁵ Arionne Nettles & Monica Eng, *Having 'The Talk': Expert Guidance on Preparing Kids for Police Interactions*, *NPR: WBEZ CHI.* (Aug. 27, 2019), <https://www.npr.org/local/309/2019/08/27/754459083/having-the-talk-expert-guidance-on-preparing-kids-for-police-interactions> [<https://perma.cc/4CXN-5ELV>]. Comedian Dave Chappelle begins a bit about the distinction between African American and white male dispositions toward police with a telling premise: "Black people are very afraid of the police. That is a big part of our culture." *HBO, Dave Chappelle: Talking to the Police*, *YOUTUBE* (Dec. 20, 2017), <https://www.youtube.com/watch?v=K4N2OhUI4Vk>.

¹⁰⁶ Cf. generally Nettles & Eng, *supra* note 105.

¹⁰⁷ Taryn Finley, *Black Parents in Baton Rouge on How They're Talking to Kids About Police Brutality*, *HUFFPOST: BLACK VOICES* (July 15, 2016, 2:04 PM), https://www.huffpost.com/entry/black-parents-in-baton-rouge-on-how-theyre-talking-to-kids-about-police-brutality_n_57890ebde4b08608d3344a03 [<https://perma.cc/6YG6-JQ2U>].

police. “If you want to deal with this on the black side,” Giuliani counseled, “you’ve got to teach your children to be respectful to police.”¹⁰⁸ The remainder of the presentation serves to rebut Giuliani’s assumption that his instruction is not already a critical part of African American child-rearing.

One of the parents in the documentary recalled telling her child to address police officers with simple, respectful answers: “Yes, sir. No, sir. Yes Ma’am. Y’know. Just be [respectful] towards them.”¹⁰⁹ Another shared that she emphasizes listening: “No matter what you do or what you say, you’ll probably never be right. So what you can do is listen; and like I say at home, follow directions.”¹¹⁰ Neither the documentary video nor the accompanying *Huffington Post* editorial mention police accountability. Instead, the narrow objective is to leave the encounter without being subject to violence.

A similar documentary video published on the online media platform *Cut*,¹¹¹ is titled “How to Deal with the Police | Parents Explain.”¹¹² In a series of clips, African American parents and their children discuss the subject of police violence. In one clip, an African American mother observes her two pre-teen sons acting out a stop for a traffic violation. One brother plays the police officer, the other the African American person subject to the stop.¹¹³

BROTHER 1: Why do you think I pulled you over?

BROTHER 2: I don’t know, tell me.

MOM, *interjecting*: When a police officer says something to you—You’re black, you can’t be looking at them saying, ‘Oh, I don’t know, why don’t you tell me?’ That right there is giving them—to them—the license to pull you out of your car and physically harm you, because it will be done.¹¹⁴

A subsequent scene with a mother and her daughters includes an exchange regarding the question of whether children should show respect to a police officer who appears to have violated procedural rules.¹¹⁵

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Cut is a platform dedicated to telling people’s stories through video. *Brands*, CUT, <https://www.cut.com/brands> [<https://perma.cc/4UE4-FUCS>] (last visited Apr. 2, 2020) (displaying videos on variety of subjects which tell “stories for fun, for serious, and for real”). It hopes to share those stories virally to “solve the issues that matter.” *Id.*

¹¹² Cut, *How to Deal with Police | Parents Explain*, YOUTUBE (Feb. 6, 2017), <https://www.youtube.com/watch?v=coryt8IZ-DE>.

¹¹³ *Id.* at 02:42.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 03:08.

MOM: Do you think [that] a police officer [who pulls] you over, regardless of if you feel as if you've done something or not, they should get your respect?

DAUGHTER, *whispering*: That's a tricky question.

MOM: The answer is yes!¹¹⁶

In a third scene, a mother echoes the “always get home safely” mantra while advising her daughter on how to interact with police in the event of a stop.

MOM, *becoming emotional*: If [the officer] tells you to be quiet, be quiet.

Do everything that you can [*extended pause*] to get back to me.¹¹⁷

The documentary spans six interviews referenced in segments over five-and-a-half minutes. At no point does the subject of rights receive sustained attention, as nearly every conversation between parent and child makes deference to police authority the most promising path to safe passage through the stop.¹¹⁸

A more prominent representation of The Talk was referenced in a nationally televised interview of Mayor de Blasio. In the wake of a New York grand jury's decision not to indict the police officers involved in the choking death of Eric Garner,¹¹⁹ George Stephanopoulos of the Sunday morning news program *This Week* interviewed de Blasio, asking him to comment on the jury's decision.¹²⁰ De Blasio initially refused to answer, stating that he made it a point not to discuss the criminal cases litigated by New York City prosecutors given his position as the city's chief executive.¹²¹ Undeterred, Stephanopoulos pressed again, asking,

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 04:02.

¹¹⁸ *Id.*

¹¹⁹ J. David Goodman & Al Baker, *New York Officer Facing No Charges in Chokehold Case*, N.Y. TIMES, Dec. 4, 2014, at A1 (“A Staten Island grand jury on Wednesday ended the criminal case against a white New York police officer whose chokehold on an unarmed black man led to the man's death, a decision that drew condemnation from elected officials and touched off a wave of protests.”).

¹²⁰ *This Week* Transcript: Mayor Bill de Blasio, ABC NEWS (Dec. 7, 2014, 9:53 AM), <https://abcnews.go.com/ThisWeek/week-transcript-mayor-bill-de-blasio/story?id=27369383> [<https://perma.cc/7RV2-QEJK>]. Eric Garner was killed by an NYPD officer who claims to have approached him because Mr. Garner was selling loose cigarettes. See, e.g., Christina Carrega, *5 Years After Eric Garner's Death, a Look Back at the Case and the Movement It Sparked*, ABC NEWS (July 16, 2019, 5:42 AM), <https://abcnews.go.com/US/years-eric-garners-death-back-case-movement-sparked/story?id=63847094> [<https://perma.cc/RSK5-DYAB>]. The officer took Mr. Garner to the ground, placed him in a chokehold, and refused to let go, despite Mr. Garner's repeated pleas: “I can't breathe.” *Id.* Federal prosecutors did not bring charges against the officer who killed Mr. Garner, and he was only recently fired from the NYPD—almost five years after Mr. Garner's death. See Ashley Southall, *N.Y.P.D. Fires Officer in 2014 Chokehold Case*, N.Y. TIMES, Aug. 20, 2019, at A1.

¹²¹ *This Week* Transcript: Mayor Bill de Blasio, *supra* note 120.

“[Is] your son . . . at risk from your own police department?”¹²² The question seemed to overcome de Blasio’s defenses, prompting him to reveal his own concerns regarding how New York City police might treat his biracial, afroed teenage son, Dante:

It’s different for a white child. That’s just the reality in this country. And with Dante, very early on with my son, we said, “Look, if a police officer stops you, do everything he tells you to do, don’t move suddenly, don’t reach for your cell phone.” Because we knew, sadly, there’s a greater chance [his behavior] might be misinterpreted[.]¹²³

Despite de Blasio’s inclination toward diplomacy on the issue of race and policing, the head of the Sergeants Benevolent Association (New York’s second largest police union)¹²⁴ offered a scorched-earth response, referring to the mayor’s comments as “moronic,” adding, “[I]f this individual who’s in charge of running this city doesn’t have faith in his own son being protected by the NYPD, he may want to think about moving out of New York City completely. He just doesn’t belong here.”¹²⁵ The president of the city’s largest police union¹²⁶ also issued a statement saying that de Blasio had thrown city police under the bus.¹²⁷ Former Mayor Giuliani went so far as to deem de Blasio’s comments “racist.”¹²⁸ Yet to similarly situated parents the mayor’s basic observations regarding implicit racial bias in policing and his parental counsel urging deference to police authority will likely seem right on the mark.

A thirty-year African American police veteran who walked both sides of the line (police and parent) took a different tack than the union representatives. He understood The Talk to be a mandatory exercise for the parents of African American children, necessary to protect them from “potentially deadly encounters” with himself and his colleagues.¹²⁹ In giving The Talk, the officer

¹²² *Id.*

¹²³ *Id.*; see also Erin Durkin, *Bill de Blasio Details Talk with Biracial Son About Interacting with Police*, N.Y. DAILY NEWS (Dec. 8, 2014, 6:35 AM), <https://www.nydailynews.com/news/politics/de-blasio-details-talk-son-dealing-cops-article-1.2036870> [<https://perma.cc/Y6G8-VBUK>].

¹²⁴ Christopher Robbins, *NYC Police Union Tweets Graphic Video to Protest the ‘AUDACITY’ of Congestion Pricing*, GOTHAMIST (May 8, 2019, 2:02 PM), <https://gothamist.com/news/nyc-police-union-tweets-graphic-video-to-protest-the-audacity-of-congestion-pricing> [<https://perma.cc/56BJ-83VP>].

¹²⁵ Durkin, *supra* note 123.

¹²⁶ *Who We Are*, POLICE BENEVOLENT ASS’N CITY N.Y., <https://www.nycpba.org/about-the-pba/who-we-are/> [<https://perma.cc/EL9V-NLQ9>] (last visited Apr. 2, 2020).

¹²⁷ Durkin, *supra* note 123.

¹²⁸ *Id.*

¹²⁹ Ronald Davis, Opinion, *My Truth About Being a Black Man and a Black Cop*, HUFFPOST (Apr. 24, 2018, 1:32 PM), https://www.huffpost.com/entry/opinion-davis-black-police_n_5adf4328e4b061c0bfa22ef8 [<https://perma.cc/R7FE-H4S5>].

sought to convey to his children “how to conduct themselves in encounters with law enforcement to make sure they leave with their lives.”¹³⁰

Dana Canedy, senior editor at *The New York Times*, described in an op-ed the specific features of the stop-protocol she prepared for her son:

That recent gray day, not long after the grand juries failed to indict the police officers who killed unarmed black men in Ferguson, Mo., and Staten Island, I had steadied myself to lay out the rules: Always address police officers as “sir” or “ma’am.” Do not make any sudden moves, even to reach for identification. Do not raise your voice, resist or run.¹³¹

Canedy’s son, who has fair skin and blue eyes, asked if he could simply pretend to be white, adding that he did not wish to be black anymore. Canedy dismissed this notion. She determined that her son would master a stop etiquette particular to African Americans, irrespective of his position along the color line: “He will be law-abiding. He will respect authority. He’ll understand the perception of black boys wearing hoodies or sagging pants. But will that be enough?”¹³²

B. *The Case for Nonconformity*

Given that the structure of Fourth Amendment law, in effect, precludes the routine sanctioning of police for racial profiling—what Carbado loosely identifies as the de facto legalization of race-based seizure¹³³—African

¹³⁰ *Id.* The officer further described The Talk as a “mandatory course for young people of color” designed to protect them from “potentially deadly” encounters with his colleagues. *Id.*

¹³¹ Dana Canedy, *A Shaded Conversation*, N.Y. TIMES, Dec. 14, 2014, at SR7.

¹³² *Id.*

¹³³ Carbado, *From Stopping to Killing*, *supra* note 23, at 129. Carbado describes these as “instances in which Fourth Amendment law turns a blind eye to racial profiling or makes it easy for the police to get away with the practice.” *Id.* He argues that legalized racial profiling is now “embedded in the very structure of Fourth Amendment doctrine.” *Id.*

There would seem to be four manifestations of the police stop to which African Americans might be subject: (1) the baseless stop, (2) the stop for an unfounded reason, (3) the pretextual stop (i.e., facially valid but race-based), and (4) the legitimate stop (i.e., facially valid and unrelated to the racial identity perceived by the seizing officer). A stop of an African American driver for no stated reason is, in my view (and perhaps in the view of many others), highly suggestive of a race-based stop—as is a stop for an unfounded reason. The more difficult stops to assess are those based on a facially valid reason.

While any one such stop is not highly suggestive, there are circumstances in which police stop African American individuals for what seems to be an excessive number of times within a given time frame (admittedly, a highly subjective determination) for both facially valid and facially invalid reasons. A recent example is the tragic story of the now-deceased Philando Castile, who was stopped forty-nine times in thirteen years in the St. Paul, Minnesota, metropolitan area. On average, Castile was stopped about once every three months, with the final stop culminating in his own shooting death at the hands of a seizing officer. See Sharon LaFraniere & Mitch Smith, *Driver Killed by Officer Had Trail of Tickets*, N.Y. TIMES, July

Americans require a strategy for negotiating the police stop in real time in order to limit their exposure to police violence. Hence, The Talk. In this Section, I argue that, when advising conformity, The Talk is a relatively layered, normative proposition with an array of costs and benefits that have yet to be discussed in popular culture or by criminal procedure theorists. Adherence to the conformist model is thought to be the best choice for the African American detained by police either in the traffic context or as a function of the *Terry* stop. Conformity is understood as a signal to the seizing officer that the stopped subject is not a threat. But logic would seem to suggest that as police profiling of African Americans is made easier by way of collective application of the conformist model, more African Americans will be stopped under dubious circumstances. More stops means more police violence. Consequently, application of the conformist model, while lowering the probability of police violence in relation to the very next police encounter, may prove to be counterproductive over time.

What if, rather than circulating a version of The Talk designed to minimize any one African American's probability of being battered by police in the context of a stop, African Americans instead designed The Talk to serve the entire racial collective? What if the cohort collectively gamed the stop in keeping with Gateway Theory? Rather than serving the limited purpose of reducing the probability of violence within the context of any one police stop, The Talk could instead be designed to eliminate any number of future stops. To state expressly what may appear obvious, the probability of police violence within the context of a stop that does not actually transpire is nil, making the conformity question, in this limited sense, irrelevant.

As represented in Section III.A, there is a prominent version of The Talk that promotes conformity with police instructions as giving an African American subject to a race-based police stop the best chance of exiting the encounter without also being subject to police violence. And while this logic makes good sense within a rational-actor model in which the calculation is in relation to the goal of avoiding police violence within a single, discrete encounter, it may also paradoxically elevate the collective rate of African American victimization at the hands of police.

16, 2016, at A1. These numbers do not in and of themselves *establish* racial profiling. Castile had an invalid license for several years, though his license was in good standing in the three years before his death. The officer that pulled him over and killed him initiated the stop not based on the invalid license but on what the officer claimed to be a *cracked* taillight. *Id.* In the recent past, Castile had been pulled over for, among other justifications, turning into a parking lot without signaling, failing to repair a broken seatbelt, and driving with tinted windows. *Id.*

Nevertheless, with regard to facially valid stops, it would seem prudent for the African Americans adopting the administrative nonconformity protocol to refrain from pursuing a complaint and officer sanctions unless they are subject to a stop pattern that is also highly suggestive of racial bias.

Figure 2. The Conformist Model of The Talk.

Consider Figure 2. The African American community may broadly embrace the conformist model (a) and respond to a race-based police stop with passivity and absolute deference.¹³⁴ But while conformity is thought to reduce the probability that the compliant actor will be subject to police violence during the stop in question (b),¹³⁵ conformity broadly practiced across the racial cohort would all but eliminate the cost associated with citizen opposition. To the extent that police can racially profile without incurring a corresponding cost in terms

¹³⁴ Recall the parent’s general instruction from Section II.A: “Do everything that you can to get back to me.” See *supra* note 117 and accompanying text.

¹³⁵ There is still the question of whether The Talk is working on its own terms. That is to say, if police automatically view African Americans—particularly African American men—as an immediate physical threat, will the African American citizen’s conformity in response to a police stop do anything at all to overcome the officer’s racial bias? To the extent that the efficacy of conformity is overestimated with respect to its effect on the probability of police violence in the context of a given stop, the nonconformist model becomes more attractive.

of time, effort, administration,¹³⁶ and reputation,¹³⁷ the systematic practice of racial profiling will be relatively inexpensive (*c*). If we assume that police perceive a “private benefit”¹³⁸ to the race-based stop, lowering the cost of the stop will result in more stops (*d*); a higher number of race-based stops would result in more incidents of police violence against members of the racial cohort (*e*).

¹³⁶ Police departments have cited overworked officers and understaffed departments as reasons not to implement new policing policies such as community policing. *See, e.g.*, David M. Kennedy, *The Strategic Management of Police Resources*, PERSP. ON POLICING, Jan. 1993, at 1, 1 (discussing Mayor Bud Clark of Portland, Oregon, who resisted implementing community-oriented policing because, even though he recognized its importance, he believed his department was too understaffed to effectively implement those policies).

¹³⁷ The widespread growth of implicit-bias training in police departments may be the best example of the power of reputation to affect change. Before 2014, implicit-bias training was an anomaly in police departments around the country. Since 2014, the year that Michael Brown was killed in Ferguson County, Missouri, these trainings have become the norm in departments across the country. CBS News recently conducted a survey of 155 police departments across the country and found that “[a]t least 69% . . . have implicit racial bias training and 57% of those departments said it was added in the five years since Michael Brown was shot to death . . .” *We Asked 155 Police Departments About Their Racial Bias Training. Here’s What They Told Us.*, CBS NEWS (Aug. 7, 2019, 7:32 AM), <https://www.cbsnews.com/news/racial-bias-training-de-escalation-training-policing-in-america>[<https://perma.cc/6NWU-U5CV>]. While it may be difficult to isolate the variables that have led to this increase, the widespread acknowledgement of implicit bias seems likely to have had some effect on department policies and trainings. *See, e.g.*, PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 58 (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [<https://perma.cc/WS8X-NW7Y>] (recommending that police departments “ensure both basic recruit and in-service training incorporates content around recognizing and confronting implicit bias and cultural responsiveness”).

¹³⁸ Professor William Stuntz presented a similar cost-benefit analysis of pretextual stops but argued that “street sweeps” based in discrimination are preferable to targeted individual stops marked with a similar taint. William J. Stuntz, Essay, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2137 (2002). Stuntz argued that large-scale investigations have the benefit of visibility and transparency and thus high potential for both collective grievance and responsive regulation. He argued that discriminatory police behavior against targeted individuals generally occurs in the shadows and is thus relatively cheap for police. A ban on “group seizures,” Stuntz reasoned,

would be a bad thing at any time, but it is a particularly bad thing when the level of police surveillance in public places is kicking up a few notches. . . . Make one tactic cheaper relative to the other, and police will shift at the margin from the more expensive tactic to the cheaper one.

Id. at 2167-68. Similar to Stuntz, I see value in analyzing police behavior by exploring the incentive structure within which police operate while in the field. However, Stuntz conceptualized the costs of investigatory sweeps far too narrowly, ignoring steep costs to both group psyche and group standing in broader society.

The relationship between African American conformity in the context of a race-based stop and the probability that African Americans will be subject to police violence can also be expressed numerically. Assume first that of 100 race-based stops of African Americans within a municipality in a given week, two result in police use of force. If the number of African American stops were somehow reduced to fifty and the same violence-to-stop ratio held,¹³⁹ the number of African Americans in the jurisdiction subject to police violence as the result of a race-based stop would be halved. If we were to scale up to 100,000 race-based African American stops within a state in a single month, and then half the total to 50,000, the number of African Americans subject to police violence in a month as a function of a race-based stop drops from 2000 to 1000 persons.

Rather than conceding the frequency of the race-based stop as a given, subject only to policy negotiations among political and institutional elites, the African American community could work proactively to discourage such stops. This sort of effort would be based in collectivist logic, requiring a turn away from the rational actor's inclination to act based upon immediate self-interest, narrowly conceived in relation to the very next discrete encounter with police. In seeking to reduce the frequency of race-based stops, the collectivist approach aspires to narrow a primary gateway to race-based police violence. The approach reflects the "black fightback"¹⁴⁰ Cornel West nostalgically referenced in his critique of what he deemed to be fatalist social commentary on modern American racism.¹⁴¹ African Americans adhering to the collectivist approach would therefore be physically compliant when subject to a race-based police stop—following each police instruction—but would take definitive steps during the stop in pursuit of police accountability. A *nonconformist* protocol in response to the race-based stop would include, at a minimum, (1) requesting and/or recording information that identifies the seizing officer including name, badge number, and license plate number; (2) articulating constitutional rights when such rights become germane to the encounter; and (3) filing a formal complaint immediately after the improper stop.

¹³⁹ Critics may wonder why the violence-to-stop ratio would assume to hold under a scenario in which African Americans broadly choose the nonconformist program. It seems at least plausible that the violence-to-stop ratio holds despite the actor's request for officer identification or the notation of an officer's license plate number. But even if the ratio rises it would need to rise to a level at which the additional risk exposure caused by the rise in ratio exceeds the risk exposure eliminated by the elimination of stops in order for the conformist model to be considered the safer choice.

¹⁴⁰ West, *supra* note 14.

¹⁴¹ See *supra* notes 11-15 and accompanying text (discussing West's critique of Coates's pessimistic outlook on prospects of antiracist activists prevailing over white supremacy).

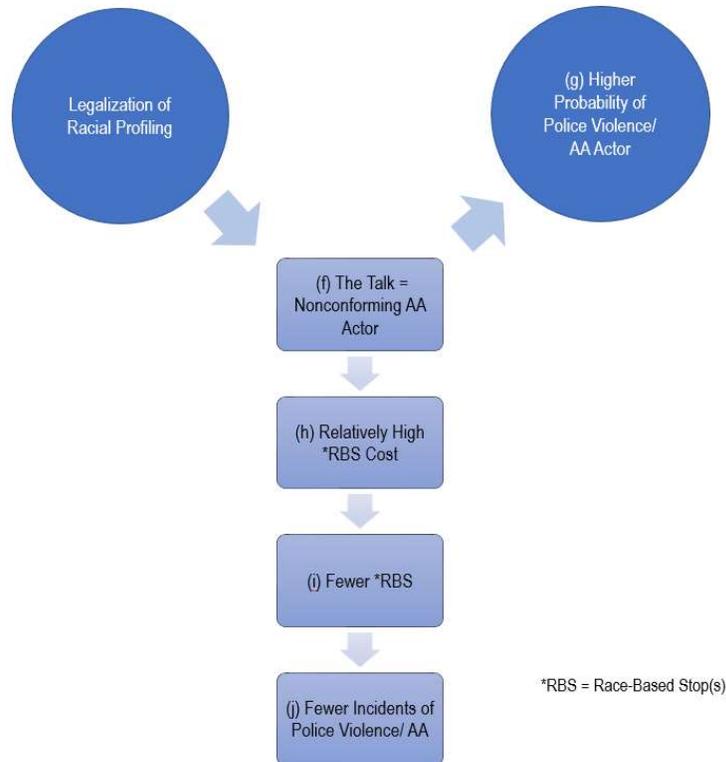
Figure 3. The Nonconformist Model of The Talk.

Figure 3 illustrates an alternative process triggered by the nonconformist model of The Talk. Each African American opting for administrative nonconformity in response to a race-based stop (*f*) is likely to elevate (however slightly) his or her own probability of being subject to police violence in the context of that stop given that the refusal to show absolute deference to police authority introduces a degree of friction into the encounter (*g*).¹⁴² Thus, the

¹⁴² Scholars have noted the physical risks associated with rights assertion in the context of a police stop. Frank Rudy Cooper, “Who’s the Man?”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 721 (2009) (recounting story of Edward Stevens, a black professor who was pulled out of his car and told he had “no right to question a police officer” when he let officer know that he needed to call his school to tell them that he would be late to class he was teaching. Stevens was subsequently arrested and placed in a jail cell for resisting arrest and disorderly conduct); Maclin & Savarese, *supra* note 76, at 49 (recounting story of Don Jackson, an African American former police officer who was stopped by police and pushed through window when he asked them why he was being stopped); Ristroph, *supra* note 28, at 1213 (“In official policy, mere lack of respect for

nonconformist model of The Talk runs counter to the narrow goal of the conformist model as it fails to minimize the probability of police violence for the very next stop to which the actor is subject. However, Figure 3 illustrates that nonconformity may pay bigger dividends in the long run if broadly adopted by the racial collective. *How so?*

Routine administrative challenges by African Americans to race-based police stops would make such stops more costly, both in terms of the execution of the stop itself and in terms of risk to the officer's professional standing in the near and long term. The police department would presumably have to commit additional resources to the processing of complaints, assuming the appropriate administrative mechanism for registering complaints is in place.¹⁴³ There is also the risk that complaints that would embarrass the department are discovered and publicized by the media or, similarly, that the volume of complaints draws intense scrutiny to the department. Administrative nonconformity would therefore assign a transactional cost to the officer and to the police institution. Such a cost would reduce the efficiency of the race-based stop (*h*) as well as the number of race-based African American stops (*i*), obstructing what Carbado has established as a primary gateway to police violence. If every African American adhered to this alternative protocol despite the protocol's association with a higher probability of police violence for any one individual (*g*), the shared approach would, in keeping with the model, reduce the number of incidents in which African Americans are subject to police violence (*j*).

The reduction in violent incidents under the nonconformist model is contingent on a reduction in race-based stops. However, a reduction in race-

authority is not identified as a form of resistance that warrants a use of force. But in practice, many officers view a lack of respect in just that way, so much so that it is standard to speak of arrests for the uncodified but very real offense called 'contempt of cop.'"); Devon W. Carbado & L. Song Richardson, *The Black Police: Policing Our Own*, 131 HARV. L. REV. 1979, 1997 (2018) (book review) ("For one thing, simply asserting rights could undermine the hierarchy upon which social dominance policing rests. . . . For another, questioning an officer's authority more directly challenges that dominance and could prompt the officer to express his power by arresting the black citizen.").

¹⁴³ Police unions have established formidable barriers to accountability for problematic field behavior. See generally Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545 (2019). However, citizen complaints filed at the municipal level have drawn the attention of the federal government and resulted in Department of Justice "pattern and practice investigations" under 42 U.S.C. § 14141 (recodified at 34 U.S.C. 12601) and, in many cases, legally-binding consent decrees with the associated municipal government. See Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 13-16 (2009). Indeed, the International Association of Chiefs of Police has identified the civilian complaints as a key mechanism by which to notify city administrators of the need for "early intervention" into a police department in order to isolate the location of the undesirable behavior. See generally INT'L ASSOC. OF CHIEFS OF POLICE, PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT (2006), https://www.theiacp.org/sites/default/files/all/p-r/Protecting_Civil_Rights.pdf [<https://perma.cc/33TS-QUHX>].

based stops is itself contingent upon the cost police assign to the race-based stop under the nonconformist model. Does the cost attached to the race-based stop under the nonconformist model exceed the private benefit perceived by profiling police? Put another way, to what extent will nonconformity change police behavior, reducing both the probability of and the total number of race-based stops? The answer will be determined by the size of the private benefit received from the race-based stop after adoption of the nonconformist model, in relation to the size of the cost incurred as a result of the race-based stop under the same model. *Does nonconformity ultimately pay its way?*

A variety of factors within a given racial-profiling regime will provide the answer to this question. But perhaps the most salient point in this Part is that we should not assume the efficacy of the conformist model. This Section demonstrates that in any number of circumstances the conformist model, despite its visceral appeal, will ultimately fail to pay its way.

Nonconformity, moreover, delivers any number of benefits that will not be explored at length in this Essay but should be flagged for future consideration of the nonconformist protocol. When African Americans opt to oppose the race-based stop through the practice of administrative nonconformity, they are likely to (re)shape the norms of police engagement. The decision to register dissent—formally in the case of the nonconformist model—shapes the expectations of the profiled and the profiler, their respective affinity groups, and perhaps legislative representatives and society at large.¹⁴⁴ There is something to be said for nonconformity in terms of its ability to leave a large cultural footprint when African Americans adopt the strategy collectively. In which case the project is not to merely reduce the number of police stops in an effort to reduce police violence but also to pursue the transformation of cultural expectations and values.

A few additional caveats are in order. First, the proposal of an alternative version of The Talk based in the principle of police accountability should not be taken as a recommendation that parents advise children to engage as a matter course in the collective project of procedural obstruction. Parents, it should be noted, give The Talk to children as young as six or seven.¹⁴⁵ When asked by a *New York Times* journalist how early he gave The Talk to his two sons, a father replied that he gave it “[b]efore they were no longer seen as cute.”¹⁴⁶ A related story on National Public Radio advised the parents of African American children to give The Talk in stages—basic details about police encounters for school-aged African American children; the introduction of race-related concepts, such

¹⁴⁴ Trevor G. Gardner, *Racial Profiling as Collective Definition*, 2 SOC. INCLUSION, no. 3, 2014, at 52, 57-58.

¹⁴⁵ See, e.g., Kenrick Cai, *The End of Innocence: When Black Parents Give Their Children ‘The Talk,’* HERALD SUN (Jan. 30, 2019, 3:26 PM), <https://www.heraldsun.com/news/local/article225104120.html>.

¹⁴⁶ Canedy, *supra* note 131, at SR7.

as discrimination and racial injustice, between the ages of ten and eleven; and the likely impact of implicit racial bias on their interaction with police by age fourteen.¹⁴⁷ However, rather than setting the parameters by which to engage children about police accountability and administrative nonconformity, this Essay argues more generally that an African American procedural habitus oriented toward resistance may be critical to the fight against African American subjugation under contemporary seizure law and practice.¹⁴⁸ The Talk merely serves as an empirical vehicle by which to explore and theorize a generative African American procedural habitus as it relates to police seizure.

Second, while administrative nonconformity aims to address a collective action problem (given that the conformist model of The Talk only considers how best the individual can manage the next instance of police seizure), the approach raises additional collective action questions. How do African Americans come to act in their collective interest in lieu of immediate self-interest (“(b)” vis-à-vis “(g)”) ? Why would any one person in the racial cohort take on more risk in the context of their next seizure by applying nonconformist protocol on the mere chance that racial peers will do the same in the pursuit of the collective benefits? Social scientists have identified social institutions as instrumental to resolving collective action problems,¹⁴⁹ and African Americans had the benefit of such an institution in the African American church over the course of the Civil Rights Movement.¹⁵⁰ However, given the decline of the African American church in

¹⁴⁷ See generally Nettles & Eng, *supra* note 105 (surveying panel of experts who advocate talking to children about discrimination and racial bias at early age).

¹⁴⁸ This procedural habitus would also challenge the Court’s “good citizen” directives. See Bennett Capers, *supra* note 28, at 654 (explaining that Supreme Court criminal procedure jurisprudence includes hidden remarks on what it means to be “good citizen”). In so doing, it resonates with Bennett Capers’s call for an intervention that challenges the Court’s citizenship talk. See *id.* at 700 (“[T]his Part imagines an interstitial space in which it would be a mark of a healthy democracy that *all* citizens have the ability, without repercussions or recrimination, to talk back to the police, to ask why and how come, to assert their rights . . .”). Bennett Capers imagines “a more pluralistic model of good citizenship . . . that at least tolerates if not welcomes dissent and opposition, and that valorizes rights and equality.” *Id.* at 711. Administrative nonconformity could help effectuate this change in discourse and values by demonstrating the merit of contradicting and subverting the Court’s good-citizen directives.

¹⁴⁹ Resource mobilization theory seeks to explain the circumstances in which individuals engage in collective action. Studies within this literature find that “social movement” organizations are essential to affinity-group recognition of the goals of a particular social movement. For further discussion of resource mobilization theory, see John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 AM. J. SOC. 1212, 1216, 1218-20 (1977).

¹⁵⁰ See generally Sandra L. Barnes, *Black Church Culture and Community Action*, 84 SOC. FORCES 967 (2005) (collecting research on influence of African American church in social movements and examining aspects of church that relate to community action); Allison Calhoun-Brown, *Upon This Rock: The Black Church, Nonviolence, and the Civil Rights Movement*, 33 PS 169 (2000) (examining role of African American church in Civil Rights

terms of influence and membership along with that of affinity organizations such as the National Association of the Advancement of Colored People,¹⁵¹ it is not readily apparent how this new and potentially volatile group project would come together.¹⁵² Moreover, the nonconformist project is premised upon a tipping point at which the number of African Americans systematically practicing nonconformity corresponds to a reduction in the total number of African American stops (Figure 3). Police must first recognize the additional cost to the race-based stop under the nonconformist model before deciding to limit or end race-based stops of African Americans. This is merely to suggest that in the period prior to the tipping point, the African Americans engaging in administrative nonconformity would be at higher risk of victimization within any one race-based police stop without also realizing the benefit of a lower stop rate. And there is no guarantee that their sacrifice would pay off given that the tipping point would be, for the nonconformist protocol adherents, nothing more than an aspiration until the African American stop rate actually declined.

After accounting for these challenges, I nevertheless take a narrow channel in proposing a resistance-oriented procedural habitus in response to race-based police stops. While administrative nonconformity turns sharply from the principle driving *The Talk* as represented in Part III.A—risk minimization in relation to the stop to which the actor is immediately subject—in practice it merely adds another dimension to the conformist protocol. It combines (a) absolute physical conformity with (b) the initiation of administrative nonconformity in the form of the collection of the bits of information needed to hold the transgressing officer accountable before state administration.

In late 2019, Vermont Senator Bernie Sanders stumbled onto this two-pronged approach when answering questions at a Historically Black Colleges

Movement); R. Khari Brown & Ronald E. Brown, *Faith and Works: Church-Based Social Capital Resources and African American Political Activism*, 82 SOC. FORCES 617 (2003) (analyzing influence of church on African American political activism through lens of social capital model).

¹⁵¹ Adrian Florido, *In the Age of #BlackLivesMatter, the NAACP Tries to Reach a Younger Generation*, NPR: CODE SWITCH (July 15, 2015, 6:15 PM), <https://www.npr.org/sections/codeswitch/2015/07/15/423188063/youth-activists-criticize-naacp-for-falling-behind-the-times> [<https://perma.cc/S5ZM-9TPA>] (“NAACP leaders have also addressed claims that their organization is losing relevance, especially for young people who are coming of age in an era of online activism and new protest movements like Black Lives Matter.”); Jeffrey M. Jones, *U.S. Church Membership Down Sharply in Past Two Decades*, GALLUP: NEWS (Apr. 18, 2019), <https://news.gallup.com/poll/248837/church-membership-down-sharply-past-two-decades.aspx> [<https://perma.cc/ZN8Y-KY4G>] (noting that Black church membership fell from 78% to 65% over past two decades).

¹⁵² The Movement for Black Lives, though still in its nascent stages, shows promise in this regard. For an overview of the Movement for Black Lives as it relates to the Black Lives Matter “ecosystem,” see generally Anna K. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018).

and Universities forum for presidential candidates.¹⁵³ In light of recent police shootings of unarmed African American men, an audience member asked Sanders, if he were Sanders's son, what advice Sanders would give him on how to respond if detained by a police officer. Sanders did not recommend absolute deference to police authority or physical confrontation but rather a procedural habitus oriented toward police accountability.¹⁵⁴

I would do my best to identify who that police officer is in a polite way - ask him or her for their name. I would respect what they are doing so that you don't get shot in the back of the head. . . . But I would also be very mindful of the fact that as a nation, we have got to hold police officers accountable for the actions that they commit. So to answer your question, I would be very cautious if you were my son, in terms of dealing with that police officer, but I would also defend my rights and know my rights and make sure, if possible, that the police officer's camera is on¹⁵⁵

Sanders's response drew a fair amount of criticism given that he did not also take a moment to address how he would, as president, address the issue of systemic racism in policing.¹⁵⁶ But if we take Sanders's answer strictly in terms of the degree to which it was responsive to the question asked and also in relation to *The Talk*, it oddly enough represents a step forward. Former President Barack Obama said almost nothing about police abuse as it relates to African American men until Harvard Professor Henry Louis Gates Jr. was arrested for disorderly conduct at his home.¹⁵⁷ President Obama, reticent to speak to social issues at the intersection of race and crime, waded into these waters to defend a renowned

¹⁵³ Brandon Tensley, *Racism, Bernie Sanders, and the Limits of 'Respect,'* CNN: POL. (Oct. 29, 2019, 6:17 PM), <https://www.cnn.com/2019/10/29/politics/bernie-sanders-race-police-respect-2020/index.html> [<https://perma.cc/K7Q4-KKSU>].

¹⁵⁴ *See id.*

¹⁵⁵ Chandni Ganesh, *Bernie Sanders to Black Student: Respect Police to Avoid "Being Shot in the Back of the Head,"* UPWORTHY (Oct. 28, 2019), <https://scoop.upworthy.com/bernie-sanders-to-black-student-respect-police-to-avoid-being-shot-in-the-back-of-the-head> [<https://perma.cc/Q63S-XXPV>].

¹⁵⁶ Kamilah Newton, *Bernie Sanders Tells Black College Student to 'Respect' Police—and Social Media Has Mixed Feelings,* YAHOO!: LIFESTYLE (Oct. 28, 2019), <https://www.yahoo.com/lifestyle/bernie-sanders-tells-black-college-student-to-respect-police-and-social-media-has-mixed-feelings-213151084.html> [<https://perma.cc/BZ2H-BK63>] (collecting criticism of Senator Sanders's comments posted on Twitter); Tensley, *supra* note 153 ("Sanders' reply, at least without a meaningful nod to the racial hierarchies that partly govern America, also seems to assume, quietly, that 'respect' can act as a shield.").

¹⁵⁷ *See, e.g.,* Helene Cooper, *Obama Criticizes Arrest of Harvard Professor,* N.Y. TIMES (July 22, 2009), <https://www.nytimes.com/2009/07/23/us/politics/23gates.html>; *see also* Ta-Nehisi Coates, *My President Was Black,* THE ATLANTIC (Jan./Feb. 2017), <https://www.theatlantic.com/magazine/archive/2017/01/my-president-was-black/508793/> (noting that President Obama's comments on Professor Gates's arrest was one of "rare moments when Obama made any sort of comment attacking racism").

member of the African American elite. Sanders, in his impromptu formulation of The Talk on the campaign trail, in effect called for a police accountability protocol—transactional, nonviolent resistance to race-based police seizure.

Rest assured, Sanders is not on an island in offering advice that couples physical compliance and administrative resistance. In the NPR program referenced above, an African American police officer was the only African American parent to incorporate accountability as an element of The Talk. His interviewer, an African American mother and journalist, shared that she had a faint sense that criminal rights were relevant to the conversation but was uncertain as to how her son could ensure that his rights were respected.¹⁵⁸

What I tell my kids, and the children I teach, is just comply If the police officer asks you to do something, roll down the window and give them whatever they ask. And if it's an unlawful order, there are systems set in place where that police officer will be held accountable for his actions.

. . . .

Every officer has a badge number, every car has a beat number Even detective vehicles have license plates.¹⁵⁹

CONCLUSION

The race-based police stop is a primary gateway to police killings, making the reduction of the number of race-based stops important to the project of narrowing African American exposure to police violence. This is not to say that most police killings occur in the context of the race-based police stop; but given the graphic video evidence of police violence against African Americans that has been circulating over the past decade, it seems reasonable to hold that many of them do, making the race-based police stop an important site of political and administrative contestation.

The orientation of the African American procedural habitus will help to determine if African Americans win this contest. This Essay challenges the notion that the conformist model represented in prominent versions of The Talk minimizes the probability of police violence. The conformist protocol lowers the cost of the race-based stop, incentivizing race-based police stops of African Americans. As a result, it may put the African American collective more at risk of being subject to police violence. An alternative African American procedural

¹⁵⁸ Nettles & Eng, *supra* note 105, at 4:34 (explaining that parents may not know what legal rights their children have). Another African American parent, speaking to *The New York Times*, shared that in relation to police stops and police violence, she wasn't sure what she could do to protect her son, but she didn't "want to teach him these black codes," presumably referring to unwritten rules as to how he should comport himself as an African American male in relation to police. Margaret Cheatham Williams & Jocie Juritz, *Why I Won't Teach My Son 'Black Codes,'* N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/2018/10/29/us/parenting-motherhood-son-black-codes.html>.

¹⁵⁹ Nettles & Eng, *supra* note 105.

habitus, one based upon administrative nonconformity, could prove instrumental in the effort to reduce police violence against African Americans over the long term. The nonconformist habitus would represent a bottom-up project in procedural justice by adding a transactional cost to the race-based stop that would make such stops less appealing to police.

In a larger sense, habituating nonconformity within the African American community would inspire a specific sense of hope; one that is not based on a distant civil rights discourse among social and political elites but on the systematic testimony, protest, and demands of the aggrieved. To cultivate this sort of agentic orientation we must first recognize the African American procedural habitus. The second step is to determine the costs of the conformist habitus and the benefits associated with the routine challenge of legal and moral police transgressions.