2016

The Consequences of Disparate Policing: Evaluating Stop-and Frisk as a Modality of Urban Policing

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[forthcoming, 100 *Minnesota Law Review* – (2017)]

Abstract

Beginning in the 1990s, police departments in major American cities started aggressively deploying pedestrian stops and frisks in response to escalating violent crime rates. Today, high-volume use of "stop, question and frisk," or "SQF," is an acute point of friction between urban police and minority residents. In numerous cities, recent consent decrees or settlements have imposed Fourth Amendment and Equal Protections constraints on police. But do these constitutional rules adequately respond to the harms of SQF? This Article argues that the core moral objection to SQF does not track the Constitution's focus upon the evidentiary sufficiency of stops or the racial animus of individual officers. I develop instead a new account of the distinctive wrong of aggressive street policing that is not contingent on individual animus or fault. This alternative account turns on the manner in which such policing can reproduce social and racial stratification. To substantiate this, I present a detailed analysis of the costs and benefits of SQF, with careful attention to its ecological spillovers and dynamic, intergenerational effects. Having explained why constitutional law, given its narrow transactional frame, is disarmed from an effective response, I present the alternative lens that is constitutionally and legally available for diagnosing harmful forms of urban street policing. This draws from the disparate impact framework of Title VI of the 1964 Civil Rights Act and certain states' laws. While an imprecise fit, disparate impact is legally feasible and readily available. To show that it is workable, I sketch three lines of econometric analysis capable of identifying an especially troubling subclass of racial disparate impacts in urban street policing.

*. Frank and Bernice J. Greenberg Professor of Law, University of Chicago Law School. Disclosure: I am on the board of the ACLU of Illinois, and have been closely involved in their work on stop-and-frisk. This article, however, reflects solely my own views and is only based on publicly available information. My thanks to John Rappaport and David Sklansky for helpful comments and conversation.

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Introduction

Beginning in the 1990s, police departments in major American cities started aggressively deploying pedestrian stops and body searches in response to escalating violent crime rates.[1] The programmatic deployment of "stop and frisk" or "stop, question and frisk" ("SQF") in New York,[2] Chicago,[3] Philadelphia,[4] and other major cities[5] involved large numbers of street stops and frisks, often concentrated in a handful of minority neighborhoods. Given the volume of individuals stopped, SQF likely became the modal form of police-citizen contact for some residents. Between May and August 2014, for example, police in Chicago stopped more than 250,000 people—which translates as 93.6 stops per 1,000 inhabitants.[6] In Philadelphia, police have stopped between 215,000 and 253,000 people per year since 2009.[7] In Baltimore, the Department of Justice estimates, roughly 412,000 people were stopped in 2013.[8] At its peak in 2011, New York's SQF policy generated more than 685,724 stops per year.[9] Between 2004 and 2013, that city's inhabitants experienced roughly five million street stops.[10]

Given the sheer scale of this intrusion into citizens' daily lives, it is hardly surprising that SQF would provoke sharp controversy. Sharp-elbowed debate has ensued as to whether African-Americans and Hispanics are being inappropriately stopped and searched.[11] In addition to catalyzing a wider national argument about race and policing,[12] SQF has sparked large-scale public protests,[13] mayoral campaigns,[14] threats to sue,[15] and litigation itself. In the wake of legal

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[1] Tracey L. Meares, *The Law and Social Science of Stop and Frisk*, 10 ANN. REV. L. & SOC. SCI. 335, 337 (2014) [hereinafter "Meares, *Law and Social Science*"]

[2] *Id.* at 337; *see also* Floyd v. City of New York, 959 F. Supp. 2d 540, 589-94 (S.D.N.Y. 2013) (discussing early history of SQF in new York City).

[3] Elliott Ramos, *Poor data keeps Chicago's stop and frisk hidden from scrutiny*, WBEZ.org (Sept. 12, 2013) http://www.wbez.org/news/poor-data-keeps-chicagos-stop-and-frisk-hidden-scrutiny-108670 (describing use of stop and frisk in Chicago, but noting absence of sound record-keeping).

[4] *See, e.g.,* Erica Goode, *Philadelphia Defends Policy on Frisking, with Limits*, N.Y. TIMES, July 12, 2012, at A11.

[5] Laird Harrison, *Oakland Police Consultant Defends 'Stop, Ask and Frisk,'* KQED NEWS (Feb. 25, 2013, 9:38 AM), http:// blogs.kqed.org/newsfix/2013/02/25/oakland-police-consultant-defends-stop-ask-and-frisk. (discussing SQF policies in Los Angeles and Oakland).

[6] ACLU of Illinois, *Stop and Frisk in Chicago* 11 (March 2015), http://www.aclu-il.org/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf [hereinafter "*Stop and Frisk in Chicago*"]. Because many individuals were stopped more than once, the effect of the policy was even more concentrated.

[7] David Abrams, *The Law and Economics of Stop-and-Frisk*, 46 LOY. U. CHI. L.J. 369, 378 (2014).

[8] U.S. Dep't of Justice Civil Rights Division, *Investigation of Baltimore City Police Department* 23 (Aug, 10, 2016), https://www.justice.gov/opa/file/883366/download.

[9] N.Y. Civ. Liberties Union, Stop-and-Frisk 2012, at 3 (2013), *available at* http://www.nyclu.org/files/publications/2012_Report_NYCLU_0.pdf.

[10] Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in* Terry *Stops in Street Policing*, 82 U. CHI. L. REV. 51, 62 (2015).

[11] *See, e.g.,* Jeffrey A. Fagan et al., *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, *in* RACE, ETHNICITY, AND POLICING 309, 312-14 (Stephen K. Rice & Michael D. White eds., 2010) (documenting disparities in stops in the New York context); *Stop and Frisk in Chicago*, *supra* note 6, at 11 (same for Chicago).

[12] For a snapshot of that debate, see Julie Bloom et al., *Baton Rouge Shooting Jolts a Nation on Edg*e, N.Y. TIMES, Jul. 18, 2016, at A1.

[13] John Leland & Colin Moynihan, *Thousands March Silently to Protest Stop-and-Frisk Policies*, N.Y. TIMES, June 18, 2012, at A15.

[14] Khorri Atkinson, *Mayor de Blasio to Reform Stop-and-Frisk*, AMSTERDAM NEWS, Feb. 6, 2014, 12:50 AM, http:// amsterdamnews.com/news/2014/feb/06/mayor-de-blasio-reform-stop-and-frisk/.

challenges, settlements or consent decrees regulating the use of street stops have been reached in the past few years in several cities. In the last year or so, New York,[16] Chicago,[17] Philadelphia,[18] Cincinnati[19], New Orleans,[20] Seattle,[21] Baltimore,[22] Cleveland,[23] and Newark[24] all have all entered into such decrees. Two cities, Boston and Oakland, did not wait for litigation, but engaged expert consultants, who in both cases isolated evidence of racial discrimination in street policing.[25]

The debate over SQF is heated in part because of disagreement about how the core moral wrong of intensive street policing (if one exists) should be conceived. The legal framework employed by many of the aforementioned settlements and consent decrees is modeled on a body of black-letter constitutional doctrine that is relentlessly focused on the motivations and beliefs of specific, individual officers. For example, in New York, the case of *Floyd v New York* (which has yielded the only judicial decision on SQF) focused first on the Supreme Court's 1968 decision *Terry v. Ohio*, which held that officers need "reasonable articulable suspicion" of criminality to make a nonconsensual street-stop consistent with the Fourth Amendment.[26] Then, citing the Supreme Court's 1979 decision in *Personnel Administrator v. Feeney*, the *Floyd* court held that plaintiffs had to show that SQF not only had a racially disparate effect, but had been

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[15] Aamer Madhani, *Chicago police and ACLU agree to stop-and-frisk safeguards*, USA TODAY, Aug. 7, 2015, http://www.usatoday.com/story/news/2015/08/07/chicago-police-agree-reform-stop-and-frisk/31277041/.

[16] Floyd v. City of New York, 959 F. Supp. 2d 668, 676 (S.D.N.Y. 2013) (appointing a monitor and ordering broad systemic equitable relief).

[17] Investigatory Stop and Protective Pat Down Settlement Agreement, Aug, 5, 2015, http://www.aclu-il.org/wp-content/uploads/2015/08/2015-08-06-Investigatory-Stop-and-Protective-Pat-Down-Settlement-Agreeme.pdf [hereinafter "Chicago settlement"].

[18] Settlement Agreement, Class Certification, and Consent Decree at 4-5, *Bailey v. Philadelphia*, C.A. No. 10-5952 (E.D. Pa. 2010), http://www.aclupa.org/download_file/view_inline/744/198/ [hereinafter "Philadelphia Settlement"]

[19] In re Cincinnati Policing, No.-C-1-99-317 (April 11, 2002) (on file with author); *see also* In re Cincinnati Policing, 209 F.R.D. 395, 400 (S.D. Ohio 2002) (affirming settlement).

[20] United States v. City of New Orleans, Consent Decree Regarding the New Orleans Police Department, 2-12-cv-01924-SM-JCW (E.D. La. July 24, 2012) [hereinafter "New Orleans Decree"] (on file with author); United States v. City of New Orleans, 947 F. Supp. 2d 601, 614 (E.D. La.), *aff'd*, 731 F.3d 434 (5th Cir. 2013) (affirming consent decree).

[21] United States v. City of Seattle, Settlement Agreement and Stipulated [Proposed] Order of Resolution, No. 12-CV-1282 (W.D. Wa July 27, 2012) [hereinafter "Seattle settlement"] (on file with author); *see also* Mahoney v. Holder, 62 F. Supp. 3d 1215, 1218 (W.D. Wash. 2014) (describing settlement process).

[22] Agreement in Principle Between The United States and the City of Baltimore Regarding the Baltimore City Police Department, Aug. 10, 2-16, https://www.justice.gov/opa/file/883376/download [hereinafter "Baltimore Agreement"].

[23] Josh Saul, *America has a Stop and Frisk Problem: Just Look at Philadelphia*, NEWSWEEK, May 18, 2016, http://www.newsweek.com/2016/06/10/stop-and-frisk-philadelphia-crisis-reform-police-460951.html

[24] *Id.*

[25] *Strategies for Change: Research Initiatives and Recommendations To Improve Police-Community Relations in Oakland, Calif.*, (Jennifer L. Eberhardt, ed. June 20, 2016), https://sparq.stanford.edu/opd-reports [hereinafter "Oakland report"]; "Boston Police Commissioner Announces Field Interrogation and Observation (FIO) Study Results," Oct 8, 2014, http://bpdnews.com/news/2014/10/8/boston-police-commissioner-announces-field-interrogation-and-observation-fio-study-results (reporting some racial disparities in both stops and frisks).

[26] Floyd v. City of New York, 959 F. Supp. 2d 540, 567 (S.D.N.Y. 2013) (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968). Separately, the Fourth Amendment requires that an officer "reasonably suspect that the person stopped is armed and dangerous" before conducting a protective pat-down, or frisk. *Id.* at 568 (citations omitted).

adopted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" certain racial groups.[27]

Other consent decrees and settlements are also crafted in the shadow of *Terry* and *Feeney*. The Seattle settlement is typical in commanding that the police department adopt a street-stop policy that "explicitly conform[s] to constitutional requirements, that officers be annually trained on "Fourth Amendment and related law," and that patrolling police act "free of unlawful bias."[28] Similarly, the Philadelphia settlement condemns "stops, frisks, or searches … made without the requisite reasonable suspicion" and envisages "policies and practices to ensure that stops and frisks are not conducted on the basis of the race or ethnic origin of the suspect, except where the law permits race or ethnic origin to be considered."[29] This individualist black-letter doctrine means that even absent litigation to a final judgment, courts and legal reform efforts have a narrow focus on discrete, interpersonal transactions. Similarly, the dominant economic model of racial bias in policing focuses on the identification of taste-based discrimination over and above statistical discrimination. [30]

This Article argues that SQF presents a normative challenge that is not well captured by the individualistic lens of *Terry* or *Feeney*, or the economic literature's focus on taste-based discrimination. The distinctive moral harm of SQF does not turn on racial animus per *Feeney*, or weak evidentiary predicates per *Terry* (although both might exist on the ground). It does not arise within the narrow, individualist "transactional frame" that currently dominates both law and economics.[31]

SQF today is defined by its large scale and "group-based" application.[32] Its distinctive moral wrong is inextricably related to this programmatic quality, not the happenstance of individual officers' motives.[33] The core of this wrong is structural. Accordingly, the welfarist analysis I propose in Part I is focused on the large-scale, programmatic use of SQF as obserbed in New York Chicago, and Philadelphia; I have no cavil with the retail use of Terry stops as an element of nonprogrammatic street policing. When operationalized at a large scale, however. SQF is a key link in the reproduction of social and racial stratification, typically with large regressive distributional effects and surprisingly little value-added as a crime control measure.

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[27] *Floyd*, 959 F. Supp. 2d at 662 (citing *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979)).
[28] Seattle settlement, *supra* note 21, at ¶¶ 140, 142 & 145.
[29] Philadelphia settlement, *supra* note 18, at 1 & 5.
[30] John Knowles, Nicola Persico, & Petra Todd, *Racial Bias in Motor Vehicle Searches: Theory and Evidenc*e, 109 J. POL. ECON. 203, 205 (2001).
[31] Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1313 (2002) ("Constitutional cases, like common-law ones, are typically conceptualized as discrete transactions in which government inflicts harm on some individual by making her worse off relative to some baseline position or, under equality rules, relative to some reference individual or group.").
[32] Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 821 (2011) (offering this description of New York City's policy). The dominant "individualism" of Equal Protection jurisprudence has long been subject to decisive and devastating critique. Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL & PUB. AFF. 107, 127 (1976).
[33] I use the term "moral wrong" to signal that my argument is not centrally normative, and not legal in nature. My analysis, presented in Part II, is consequentialist in nature. It is my view that the range of relevant consequences for an evaluation of public policy is capacious, and not limited to narrowly drawn monetizable harms. Recognizing the normative nature of any effort to identify salient costs and benefits, I flag in my analysis those costs or benefits that rest on a potentially contestable moral judgment.

More specifically, SQF should be understood as a historically situated innovation that responds to late twentieth-century urban pathologies in a way that perpetuates those pathologies. The call for SQF arose in important measure because local and state governments had helped foster minority neighborhoods entrenched in concentrated poverty and suffering from high violent-crime rates. Rather than addressing those underlying conditions, local and state policy-makers elected to respond with a policy that has limited crime-control benefits but large negative spillovers on disadvantaged neighborhoods. Viewed in a dynamic perspective, SQF catalyzes an entangled set of individual and neighborhood-level harms. Through mutually reinforcing interactions, these various harms reinforce the social and racial stratification that initially set the stage for massive street policing expenditures. Without a clear grasp of this ecological and dynamic context, current remedial interventions are likely go astray.

If in response to such ecological and dynamic dimensions, constitutional law is disarmed. Some other tool is needed. Consistent with a growing body of scholarship that resists the narrow transactional frame of current constitutional doctrine[34] and the dominant doctrinal focus on individual officials' fault,[35] I argue that our current doctrinal models for capturing the harms of aggressive policing are woefully inadequate. Instead, we need a more structural and capacious legal framework to encapsulate the core moral objections to SQF.

An alternative, more promising legal framework is a version of the *disparate impact* standard familiar from the employment discrimination[36] and fair housing contexts.[37] A disparate-impact framework is better able to account for the evidentiary problems involved in accounting for the diverse forms of discrimination manifested in a complex system characterized by a high decree of diffused discretion.[38] It is by no means perfect. It does not provide a proxy for the thorough evaluation of both costs and benefits presented in this Article. Rather, disparate impact isolates a subset of problematic cases in which SQF's heavy burden is asymmetrically positioned on minority communities, and demands a robust justification from the state for that potentially regressive, subordinating, and demoralizing situation. In this regard, it is better placed than either Fourth Amendment or Equal Protection doctrine to resist the exacerbation of racial hierarchies.[39] No theory of liability, however, will be a comprehensive panacea to a complex and entrenched phenomenon like concentrated, racialized poverty. Disparate impact liability for SQF captures

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[S] *See* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2051, 2057 (2016) (criticizing "criminal courts' transactional myopia" and their lack of "a holistic picture of how the criminal justice system operates").

[35] *See* Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*. 65 DUKE L.J. 1, 4 (2015) (arguing that "the Court has developed a gatekeeping rule of *fault* for individualized constitutional remedies"); Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 706 (2011) (same).

[36] *See* 42 U.S.C. §2000e-2(k)(1)(A) ("[A] complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."); *see also* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (allowing disparate impact under the 1964 version of Title VII). A disparate-impact theory of liability is also available under the Age Discrimination in Employment Act. Smith v. City of Jackson, 544 U.S. 228, 240 (2005.

[37] Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2513 (2015) (interpreting 42 U.S.C. §§ 3604(a) & 3605(a) to permit disparate impact liability).

[38] *Cf.* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 520-23 (2003) (discussing the evidentiary use of disparate impact liability).

[39] *Id.* at 523-24.

the instances in which the moral wrong of SQF is at its acme, and helps ensures that policing responses make matters no worse.

Disparate impact liability is overlooked because it has not been part of Equal Protection doctrine since the early 1970s.[40] Because of the Constitution-centered focus of much scholarship, it is easy to forget it is available. But a disparate-impact standard is available under both federal statutes that regulate local police departments[41] and also (in California[42] and Illinois[43]) state law. The Chicago settlement and the New Orleans settlement invoke some of these disparate-impact rules as guiding authorizations.[44] Nevertheless, neither elaborates upon their bare-bone references. As a result, the analytic and practical advantages of a disparate-impact lens for police remain underappreciated. The theoretical questions raised by its translation to the policing context also remain poorly understood.

My final aim, therefore, is to show how disparate impact can serve as a lens for analyzing street policing in practice. To that end, I consider how disparate racial impacts might be sifted from the granular policing data increasing being collected by large police departments as a result of settlements and consent decrees.[45] Specifically I sketch three tractable empirical strategies for identifying disparate impact in street stop-related policies. *First*, deployment-related disparities between beats or districts within a jurisdiction can be measured to ascertain whether a muncipality's *overall* distribution of policing resources can be justified on race-neutral grounds.[46] *Second*, within a given beat or district, disparities in how stops are allocated among different ethnic and racial groups can be evaluated.[47] *Finally*, at the level of given officers,

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[40] *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional Solely because it has a racially disproportionate impact."). Prior to *Davis*, disparate impact was an important element of the constitutional doctrine in this domain. Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 13-16 (2013) [hereinafter Siegel, *Equality Divided*"] (collecting cases).

[41] Title VI of the Civil Rights Act of 1964 and its implementing regulations apply to police departments that receive federal funds. 42 U.S.C. §2000d "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); *see also* 28 C.F.R. §41.101 et seq. (implementing regulations). The Safe Streets Act also prohibits local police action with a racially disparate impact. 42 U.S.C.A. § 3789d ("No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this chapter."); see also 28 C.F.R. §42.203 (implementing regulations).

[42] West's Ann. Cal. Gov. Code §11135; Cal. Code Regs. tit. 22, §§ 98101(c) & (i).

[43] 740 Ill. Comp. Stat. Ann. 23/5 (a)(1).

[44] Chicago Settlement, *supra* note 17, at 6; New Orleans settlement, supra note 19, at 2.

[45] David A. Harris, *Across the Hudson: Taking the Stop and Frisk Debate Beyond New York City*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 853, 863 (2013).

[46] On the role of larger policy in shaping street-level outcomes, Shannon Portillo & Danielle S. Rudes, *Construction of Justice at the Street Level*, 10 ANN. REV. L. & SOC. SCI. 321, 331 (2014) ("When police routinize stop and frisk policies, and … ration services, attempt to control uncertainty, husband worker resources, and manage consequences of routines, they do so within the confines of existing policy.").

[47] Precinct or beat-level effects can be captured through multilevel modeling techniques in which data on stops is structured so that individual racial groups are nested within precincts. For examples of this approach, see Expert Report of Dr. Jeffrey Fagan at 40, *Floyd v. City of New York*, 813 F. Supp. 2d 417 (S.D.N.Y. 2011), available at https://ccrjustice.org/sites/default/files/assets/files/Expert_Report_JeffreyFagan.pdf [hereinafter "Fagan Report"]; Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop and Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813, 817-18 (2007).

disparities in the quantum of suspicion deployed for whites and nonwhites can be assessed by a range of tools.[48] By aggregating and contrasting disparities at different levels, the empirical toolkit I sketch enables a better understanding of the causes and extent of SQF's disparate impact. That understanding in turn can serve as a foundation for more targeted, less disruptive, and more effective equitable remedial interventions.

These empirical approaches, moreover, enable disparate impact's translation to the policing context while avoiding the constitutional and practical problems encountered in the employment discrimination context. For each empirical approach posited, I therefore consider the range of exculpatory justifications that might be offered to diffuse a prima facie finding of racial disparity.[49] I further respond to weaknesses apparent from disparate impact's application to other contexts. In the employment discrimination context, for example, there has been disagreement about how to identify business justifications that can justify racial disparities,[50] and the magnitude of ultimate disparities required for liability.[51] The use of disparate impact in the employment context has also generated worries about the doctrine's constitutionality[52] and its efficacy in promoting structural policy change.[53] In translating disparate impact to the policing context, I consider and reject each of these reasons as a reason for abandoning the translation.

The possibility of disparate impact as a template for rethinking urban policing has yet to be explored in any detail, although an earlier article by David Sklansky and colleagues touches on the question.[54] But my analysis aligns with penetrating work by Tracey Meares, Jeffrey Fagan, and Amanda Geller, all of whom emphasize that SQF is a distinctive mode of urban policing that cannot be analyzed in terms of discrete interactions, because "programmatic stops are imposed from the top down" at a massive scale.[55] Furthermore I echo Richard Bank's worry

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[48] Sharad Goel, Justin M. Rao, & Ravi Shroff, *Precinct or Prejudice? Understanding racial Disparities in New York City's Stop-and-Frisk Policy*, 100 Ann. App. Stat. 365); *see also* Sharad Goel et al., *Combatting Police Discrimination in the Age of Big Data*, -- NEW CRIM L. REV. --, at 5 (Feb. 12, 2016), https://5harad.com/papers/policing-the-police.pdf.

[49] *See* Abrams, *supra* note 7, at 375 (discussing potential justifications).

[50] The availability of employer justifications has been the subject of dispute both on the Supreme Court and in Congress. *Compare* Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 659 (1989) (describing a relatively lenient standard for business justifications, *with id.* at 671-72 (Stevens, J., dissenting) (advocating a more demanding standard); see also 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012) (requiring that an employer "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"); Michael Selmi, *The Supreme Court's Surprising and Strategic Response to the Civil Rights Act of 1991*, 46 WAKE FOREST L. REV. 281, 287-89 (2011) (describing disagreements legislators and President George H.W. Bush on this topic).

[51] On disputes over the threshold disparity for liability, see Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523, 573 (1991) (noting that "four-fifths ($^4/_5$) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence," but also collecting dissenting views).

[52] *Ricci v. DeStefano,* 557 U.S. 557, 595-96 (2009) (Scalia, J., concurring) ("[T]he war between disparate impact and equal protection will be waged sooner or later [so] … "it behooves us now to begin thinking about how--and on what terms--to make peace between them.").

[53] Michael Selmi, *Was the Disparate Impact Theory A Mistake?*, 53 UCLA L. REV. 701, 706 (2006) (noting that "disparate impact theory has produced less change than typically assumed"); *accord* George Rutherglen, *Abolition in a Different Voice*, 78 VA. L. REV. 1463, 1476 (1992).

[54] Sharad Goel et al. *Combatting Police Discrimination in an Age of Big Data*, -- NEW CRIM. L. REV. – (forthcoming 2016).

[55] Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk As A Program, Not an Incident*, 82 U. CHI. L. REV. 159, 162-63 (2015) [hereinafter "Meares, *Programming Errors*"]; Fagan &

about the "potential inadequacy as a policy framework" of much constitutional doctrine," although my diagnosis and response differ from his.[56] By contrast, my analysis diverges sharply from the large literature on "racial profiling,"[57] which more narrowly focuses on intentional animus or the purposive use of race as a criterion in enforcement decisions.[58] My approach does not focus on individual fault or bad intent. Instead, my concern is with the interaction between a specific kind of common policing strategy and larger social dynamics of racial segmentation and stratification.[59]

The argument proceeds in three steps. In Part I, I provide a thick, empirically robust account of SQF as a distinctive modality of urban policing highlighting the dynamic negative effects of SQF upon minority communities in concentrated urban poverty. Part II turns to the constitutional doctrine developed pursuant to the Fourth Amendment and the Equal Protection Clause to regulate such policing. Using *Terry* and *Feeney* as focal points, I demonstrate that constitutional doctrine systematically fails to account for the harms that flow from SQF. The gap reveals inconsistencies and internal contradictions within the doctrine. Having rejected the default framework for legal analysis of SQF, I sketch in Part III an alternative lens of disparate impact. Concluding, I illustrate three empirical strategies that might be used to determine whether remedial intervention is warranted. In so doing, I hope to show that disparate impact is a practicable and plausible approach for courts and other supervisory bodies.

I. The Costs and Benefits of Stop-and-Frisk Policing

To evaluate stop-and-frisk as a way of eliciting public order requires an understanding of its costs and benefits in historical and social context. This Part therefore first offers a definition of SQF as a historically situated strategy employed by urban police forces, and then develops a careful tally of its pros and cons. Some courts have analyzed SQF in terms of costs while

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Geller, *supra* note 10, at 61 ("Stop-and-frisk as envisioned by the *Terry* Court was largely a set of distinct "retail" transactions, characterized by individualization, material or visual indicia, and specificity. But the current "wholesale" practice is quite different from the vision of the *Terry* Court.").

[56] R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 574 (2003).

[57] Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 884 n.2 (2015) (collecting the large legal scholarly literature on racial profiling).

[58] *See, e.g.,* Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 664-65 (2002) ("As we use the term, "racial profiling" occurs when a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person's racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating."; Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1415 (2002) (using the term "racial profiling" to mean police action taken "because the officer believes that members of that person's racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating"); R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1080 (2001) (focusing on the use of "[s]uspect description reliance, like racial profiling, [as] both useful and racially discriminatory."). Outside the legal academy, racial profiling is also defined in criminological, economic, and normative terms. Robin S. Engel, A *Critique of the 'Outcome Test' in Racial Profiling Research*, 25 JUST. Q. 1, 6 (2008) (summarizing different approaches). My analysis of SQF overlaps with Engel's "economic" and "normative models. Id.

[59] The "disparate impact" analysis defines its central analytic focus in terms of "purposeful" discrimination, rather than differential effects. J. Mitchell Pickerill, Clayton Mosher & Travis Pratt, *Search and Seizure, Racial Profiling, and Traffic Stops: A Disparate Impact Framework*, 31 LAW & POL'Y 1.5 (2009). This is not how the term is used in the legal scholarship, and I do not follow that definition.

bracketing benefits.[60] I disagree with this approach. Appreciation of the distinctive wrong of SQF demands a comprehensive understanding of justifications, criticisms, but also benefits, all nested in a ecological and dynamic context.

A. Defining Stop and Frisk ("SQF")

Stop, question, and frisk, or SQF, is an urban policing measure that involves the large-scale deployment of officers in public spaces (*e.g.*, sidewalks, alleys, the communal outdoor spaces of public housing) tasked with conducting frequent investigative stops. Under a line of cases beginning with *Terry v. Ohio*,[61] an officer is entitled to make a "brief" nonconsensual "investigatory stop" if she has "reasonable articulable suspicion" that a crime either has occurred or is about to occur.[62] Separately, if the officer has a further reasonable articulable suspicion that the person stopped is "armed and presently dangerous to the officer or to others,' she may conducted a "limited protective search" for weapons.[63] Reasonable articulable suspicion is a less demanding standard than probable cause, but still requires "a minimal level of objective justification"[64] In addition to a stop and a frisk, officers may take further actions ranging from a verbal caution or a citation, or an arrest. Arrests vary widely in character. They might be discretionary or mandatory.[65] They may be based on conduct or evidence discovered by the officer during the stop, or they might be predicated on an outstanding warrant revealed when a person's name is cross-referenced with state, local, or federal databases.

The jurisprudence of *Terry* stops and frisks relentlessly focuses on discrete transactions between specific officers and specific defendants. But this is misleading.[66] SQF is a policy that operates at scale. Not tens or hundreds of individuals but tens or hundreds of thousands are arrested over the course of months. In New York, for example, there were 313,047 documented stops in 2004 and 576,394 stops in 2009.[67] In Philadelphia, a city with one-fifth New York's population, there were more than 200,000 stops each of the last three years, despite the existence

[60] *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013) "(This Court's mandate is solely to judge the *constitutionality* of police behavior, *not* its effectiveness as a law enforcement tool....").
[61] 392 U.S. 1 (1968). The *Terry* Court did not provide the canonical formulation of the Fourth Amendment standard, but instead more ambiguously asked whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?'" *Id.* at 21-22.
[62] Illinois v. Wardlow, 528 U.S. 119, 123 (2000). The earliest use of the phrase "reasonable, articulable suspicion" is twelve years after *Terry* in *Brown v. Texas*, and in that context is an (unattributed) quotation from the state's brief. 443 U.S. 47, 51 (1979). The phrase is used as law of the case first in *Florida v. Royer*, 460 U.S. 491, 502 (1983)
[63] Adams v. Williams, 407 U.S. 143, 146 (1972) (citing Terry, 392 U.S. at 24).
[64] *Wardlow*, 528 U.S. at 123; see also *United States v. Sokolow,* 490 U.S. 1, 7 (1989).
[65] The standard view in criminology is that arrests are a highly discretionary decision because they are dispersed, somewhat aleatory in timing, and hence hard to supervise. Geoffrey P. Alpert et al., *Police Suspicion and Discretionary Decision Making During Citizen Stops*, 43 CRIMINOLOGY 407, 408 (2005); *accord* Eisha Jain, *Arrests As Regulation*, 67 STAN. L. REV. 809, 817 (2015). Even where law imposes a duty on officers to make an arrest (e.g., in domestic violence cases), officers as a practical matter maintain a measure of discretion as to what to do.
[66] Meares, Programming Errors, *supra* note 55, at 175.
[67] Fagan Expert Report, *supra* note 47, at 18-19; *see also supra text* accompanying notes 6 to 10 (citing stop rates in New York and Chicago).

of a court-supervised consent decree.[68] The analysis in this section is focused on SQF as deployed en masse.

SQF has similarities to, and can overlap somewhat with, the strategy of "broken windows" or "quality of life" policing.[69] But the tactics are distinct. Whereas broken windows policing relies on arrests "to remove undesirable persons from a neighborhood,"[70] SQF tends to involve a relatively low rate of arrests.[71] SQF tends to be a direct response to violent crime, and not a prophylactic response to the possibility that the sight of "broken windows" will induce escalating forms of disorder.[72]

One more detail is essential to my functional definition of SQF: Within a city, SQF is typically employed with greatest intensity on a small subset of neighborhoods.[73] Typically, its deployment is highest in neighborhoods characterized by "concentrated poverty" where crime rates tend to be higher than in other parts of the city.[74] In Chicago, for example, one study of stops in 2014 found 266 people per 1,000 in the African-American neighborhood of Englewood and 43 per 1,000 in the white neighborhood of Lincoln/Foster.[75] SQF also tends to be concentrated upon minority—i.e., African-American and Hispanic--neighborhoods. Hence, the district court in *Floyd* found that the racial composition of a neighborhood was a better predictor of the density of stops than its lagged crime rate.[76] And at the height of New York's SQF, an African-American resident of New York City had a 92 percent chance of being stopped in a single year period.[77] SQF, in short, is not just a high-frequency policing strategy, it is also a highly geographically concentrated one in minority (African-American and Hispanic)

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[68] Plaintiffs' fifth report to Court and Monitor on Stop and Frisk Practices, in *United States v. Bailey*, No. 10-5952, at 20 (2015), https://www.aclupa.org/download_file/view_inline/2230/198/.

[69] Amanda Geller, *The Process Is Still the Punishment: Low-Level Arrests in the Broken Windows Era*, 37 Cardozo L. Rev. 1025, 1029 (2016) (distinguishing the two approaches); *accord* Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk"*, 94 B.U. L. REV. 1495, 1504 (2014).

[70] George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, Atlantic (Mar. 1982), http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465.

[71] Geller, *supra* note 69, at 1032 (noting, based on New York data, that "relatively few street stops lead to arrest"). That said, "broken windows" policing, and a concomitant rise in the rate of arrests tends to be geographically collocated with SQF.

[72] *See* Kelling & Wilson, *supra* note 70. A decisive critique is offered in BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 166-80 (2001).

[73] David Weisburd, Cody W. Telep & Brian A. Lawton, *Could Innovations in Policing Have Contributed to the New York City Crime Drop Even in a Period of Declining Police Strength? The Case of Stop, Question and Frisk as a Hot Spots Policing Strategy,* 31 JUST. Q. 129 (2014) (finding that a majority of stops in New York occurred at just 5 percent of intersections).

[74] For empirical evidence, see Ruth D. Peterson & Lauren J. Krivo, *Macrostructural Analyses of Race, Ethnicity, and Violent Crime: Recent Lessons and New Directions for Research*, 31 ANN. REV. SOC. 331, 347-52 (2005); Ronald C. Kramer, *Poverty, Inequality, and Youth Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 123, 124-25 (2000).

[75] *Stop and Frisk in Chicago*, *supra* note 6, at 9.

[76] Floyd v. City of New York, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013); Fagan Expert Report, *supra* note 47, at 3-4 (explaining neighborhood differences).

[77] AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 41 (2014).

neighborhoods. So even if it entails a low rate of arrest, it is likely that SQF at least contributes to the exceeding high rates of minority arrest in the United States.[78]

In sum, SQF is best understood as the large-scale use of *Terry* stops in predominantly black and Hispanic urban neighborhoods in response to violent crime. Its architects are cognizant, and embrace, this racial symmetry.[79] But rather than dwelling on whether their views should be ranked as invidious discrimination, I engage in a more consequentialist inquiry: I consider the gains and the harms from SQF. These, I contend, must be understood in light of geographic and historical context to be appreciated properly. It is the benefits of SQF that I focus upon first, before considering costs.

B. The Crime-Control Benefits of SQF in Context

1. The Case for SQF

Aggressive use of street stops at a high volume has a long historical pedigree.[80] By 1969, they had become so endemic that the Kerner Commission, established by President Johnson to investigate the 1967 urban riots, singled out excessive investigate stop, and the "wholesale harassment by certain elements of the police community of which minority groups, particularly Negros, frequently complain."[81] Today's fires are echoes of yesterday's conflagrations.

SQF in its modern form is a direct response to an uptick of violent crime in the 1980s collocated with what William Julius Wilson called the persistence of "ghetto poverty."[82] The

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[78] In expectation, about forty-nine percent of black men and forty-four percent of Latino men will be arrested by age twenty-three. Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 478 (2014).

[79] *See, e.g.,* Shane Dixon Kavanaugh, *Commissioner Kelly Says Almost 75% of Violent Crime Committed by African-Americans*, N.Y. DAILY NEWS, May 2, 2013, http://www.nydailynews.com/new-york/commissioner-kelly-defends-stop-and-frisk-targeting-african-americans-article-1.1332840#ixzz2UiHaXcKt; Azi Paybarah, *Ray Kelly: By the Department's Count African-Americans are Being Understopped*, POLITICO, May 2, 2013, http://www.politico.com/states/new-york/city-hall/story/2013/05/ray-kelly-by-the-departments-count-african-americans-are-being-understopped-000000; Ray Kelly, *The NYPD: Guilty of Saving 7,383 Lives*, WALL ST. J., July 22, 2013, http://www.wsj.com/articles/SB10001424127887324448104578616333588719320; *see also* Heather McDonald, *How to Increase the Crime Rate Nationwide*, WALL ST. J., June 11, 2013, http://www.wsj.com/articles/SB10001424127887324063304578525850909628878 (defending racially disparate street policing on the ground that "the preponderance of crime perpetrators, and victims, in New York are also minorities").

[80] The earliest programmatic use of SQF I have been able to identify occurred in Cincinnati's Avondale neighborhood in 1958. Alex Elkins, *The Origins of Stop-and-Frisk*, JACOBIN, May 2015. It was subsequently used in cities such as San Francisco in the 1960s. CHRISTOPHER LOWEN AGEE, THE STREETS OF SAN FRANCISCO: POLICING AND THE CREATION OF A COSMOPOLITAN LIBERAL POLITICS, 1950-1972, at 35-39 (2014). During most of the twentieth century, however the use of street patrols was in the decline. Eric H. Monkkonen, *History of Urban Policing*, 15 CRIME & JUST. 547, 554 (1992). Up to the 1960s, policing as "primarily reactive," an orientation modified by the rise of community policing. James J, Willis, *A Recent History of Police*, *in* THE OXFORD HANDBOOK OF POLICE AND POLICING (Michael D. Reisig & Robert J. Kane, eds. 2014). A 1966 study of Chicago police, for example, found they spent one percent of their time actively stopping point, 14 percent reacting to the public's calls, and 85 percent on unstructured random patrols. Lawrence W. Sherman, *The Rise of Evidence-Based Policing: Targeting, Testing, and Tracking*, 42 CRIM & JUST. 377, 378 (2013).

[81] REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 143-44, 302-03 (1968).

[82] WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 12 (1996).

political sponsors of the policy consistently identified violent crime control as its core aim.[83] Because violent crime is disproportionately committed by African-Americans, and concentrated in black neighborhood, they argued, it is no surprise that SQF focuses on those predominantly minority neighborhoods. Rather than proof of anti-minority animus, the use of SQF is on this view evidence that police are exerting special efforts to protect minorities from crime. The persuasive force of this argument from crime-control is the subject of this section, while the tally of SQF's costs is addressed in the following section.

The genesis of this argument for SQF's benefits traced back to the early 1990s. In 1994, the sociologist James Q. Wilson published an influential opinion piece in the *New York Times* entitled "Just Take Away their Guns," which captured the distinctive appeal of SQF.[84] Wilson argued for the aggressive use of *Terry* stops as a means to "reduce the number of people who carry guns unlawfully, especially in places -- on streets, in taverns -- where the mere presence of a gun can increase the hazards we all face."[85] His call responded directly to a very real crisis of law and order. At the time, New York City was suffering from a high homicide rate.[86] Of the 1951 murders that occurred in New York in 1993, the year ending as Wilson wrote, more than 1,500 were committed by firearm.[87]

Wilson's call for aggressive street policing as a prophylaxis for gun voice found a measure of empirical support the following year. In 1995, the criminologist Lawrence Sherman and colleagues published the results of a quasi-experiment conducted for 29 weeks in Kansas City of gun-based, intensive street-policing, and found an astonishing 49 percent decline in gun crimes without any spillover to neighboring areas.[88]

Results of this kind prompted "[s]everal cities to "rush[] to follow the Kansas City model …"[89] by seizing upon SQF as a tool for lowering violent crime rates. The earliest adopter of SQF, New York City, seems to have begun aggressive use of *Terry* stops (as distinct from 'broken windows' policing) around 1994. A parallel aggressive use of stops in Philadelphia came to public attention in 2000, after a scandal involving hundreds of unlawful arrests, searches, and prosecutions in the 39th Police District led to the disclosure of incident reports showing a high rate of illegal stops.[90] In the early 1990s, constitutional litigation over Chicago's 'gang loitering' ordinance in part hinged on the 42,000 stops executed under that measure over three years.[91] The

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[83] Leo Eisenstein & Laura Gottesdiener, *Why Michael Bloomberg is Wrong About Stop-and-Frisk*, ROLLING STONE, May 22, 2013, http:// www.rollingstone.com/politics/news/why-michael-bloomberg-is-wrong-about-stop-and-frisk-20130522 ("Mayor Michael Bloomberg and Police Commissioner Ray Kelly have dismissed these concerns, claiming that stop-and-frisk has dramatically reduced the city's murder rate.").
[84] James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES, March 20, 1994.
[85] *Id.*
[86] Benjamin Bowling, *The Rise and Fall of New York Murder*, 39 BRIT. J. CRIMINOLOGY 531, 534 (1999).
[87] *Id.* at 534-35.
[88] Lawrence W. Sherman & D.P. Rogan, *Effects of gun seizures on gun violence: "Hot spots" patrols in Kansas City*, 12 JUST. Q. 445, 445-73 (1995).
[89] Meares, *Law and Social Science*, *supra* note 1, at 340; Bellin, *supra* note 69, at 1505 ("[T]he NYPD uses stop and frisk to find guns and deter gun-carrying ….").
[90] Complaint in Bailey v. City of Philadelphia, C.A. No. 10-5952, at ¶¶ 83-84 (E.D. Pa. 2010), https://www.aclupa.org/download_file/view_inline/669/198/.
[91] City of Chicago v. Morales, 527 U.S. 41, 49 (1999). Ten years earlier, another class action alleged that Chicago police would improperly "arrest, … charge and … detain … persons for disorderly conduct … with no intent to

Chicago Police Department's limited collection of information about its stops and frisks meant that it was not until 2015 that data emerged showing that the city's SQF intensity had exceeded its usage patterns of the 1990s (and, incidentally, also overshot New York City's stop rates).[92]

Crucially, the policing strategy endorsed by Wilson, and implicitly supported by the Kansas City evidence, does not lend itself to uniform application across entire cities. Violent crime in urban contexts has long been closely correlated with a subset of geographic areas typically characterized by concentrated poverty.[93] In turn, concentrated urban poverty, both in the 1990s and today, is not evenly spread across racial ethnic groups. Rather, it is a disproportionately minority phenomenon.[94] Not only impoverished African-Americans, but also black middle-class cohorts are disproportionately represented in extremely poor urban neighborhoods.[95] One side effect of this is that urban violent crime impacts minority groups more grievously than non-minority groups.[96] In 1993, the year before Wilson wrote, the African-American homicide victimization rate per 100,000 population was 47.0, while the white rate was 6.4.[97] From the perspective of its political sponsors, SQF has to train upon African-American and Hispanic neighborhoods not because of some theory of race and crime, but because that is where the murders—*the murders of minority citizens*—are happening.[98]

If American cities were in progress toward meaningful racial integration, this nexus between policing and race might be expected to have waned by today. But despite increasing

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prosecute such charges in court." *Thompson v. City of Chicago*, 104 F.R.D. 404, 404 (N.D. Ill. 1984). 1000,000 people were arrested in these operations. *Stop and Frisk in Chicago*, *supra* note 6, at 5.

[92] *Stop and Frisk in Chicago*, *supra* note 6, at 6, 10.

[93] There is an enormous empirical literature to this effect. A useful summary is Janet J. Lauritzen & Robert J. Sampson, *Minorities, Crime, and Criminal Justice*, *in* THE HANDBOOK OF CRIME AND PUNISHMENT 58, 65-70 (Michael Tonry ed., 1998); Peterson & Krivo, *supra* note 78, at 347-52; Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCI. 918, 923-24 (1997).

[94] *See* Glenn Firebaugh and Chad R. Farrell*, Still Large, but Narrowing: The Sizable Decline in Racial Neighborhood Inequality in Metropolitan America, 1980–2010*, 53 DEMOGRAPHY 139 (2016) (analyzing data from 1980 to 2010, and finding that "greater concentration of blacks and Hispanics in poorer-than-average neighborhoods" in urban contexts); *see also* ROBERT J. SAMPSON, GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT (2012) (describing racial character of concentrated poverty in Chicago). For the correlations between poverty, crime, and racial segregation, see Edward S. Shihadeh & Nicole Flynn, *Segregation and Crime: The Effect of Black Social Isolation on the Rates of Black Urban Violence*, 74 Soc. Forces 1325, 1345 (1996) (finding that "segregation is a major predictor of the rates of homicide and robbery among blacks").

[95] Lincoln Quillian, *Segregation and Poverty Concentration: The Role of Three Segregations*, 77 AM. SOC. REV. 354, 354-55 (2012) (finding that black poverty concentration stems from the complex interaction of racial segregation, poverty-status segregation within race, and segregation of blacks from high- and middle-income members of other racial groups).

[96] Jeffrey Fagan and Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 474 (2000) ("In urban areas, many poor people of color live in conditions of residential segregation, concentrated poverty, and unemployment that predict the breakdown of community social processes, which in turn predict elevated crime rates." (footnote omitted)).

[97] FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 10 fig.1.5 (2007).

[98] *See, e.g.,* Floyd v. City of New York, 959 F. Supp. 2d 540, 591 (S.D.N.Y. 2013) (describing defendant's argument that "the apparently disproportionate stopping of blacks and Hispanics can be explained on race-neutral grounds by police deployment to high crime areas, and by racial differences in crime rates").

ethnic and racial diversity within cities, urban racial segregation endures.[99] As many American cities today are as "hypersegregated" today as were in 1970.[100] The experience of residential segregation moreover, has remained especially stable for African-Americans regardless of class. The proportion of African-American areas lacking racial diversity "remained stubbornly set at around 8.6 percent" throughout the 1990s.[101] Even "relatively advantaged" black neighborhoods "continue to be unique in the degree to which they are spatially linked with communities of severe concentrated disadvantage."[102]

The argument in favor of SQF, in short, rests on its ability to mitigate the costs of violent crime particularly associated with urban minority-dominated neighborhoods. To the extent that areas of concentrated poverty persist in cities, and to the extent they are predominantly black or Hispanic, SQF might even be viewed as a form of affirmative action. It is a positive subsidy to impoverished minority communities, a surplus provision of the public good of policing. In former New York police commissioner Ray Kelly's words, the real problem with urban policing is then that "African-Americans are being understopped" in light of the violent crime experienced by black communities.[103]

2. The Difficulties of SQF as Violent Crime Control

The benefits of SQF, however, are more qualified than its advocates suggest. I focus here on how those benefits are properly characterized before turning to the policy's costs. Focusing solely upon SQF's suppression of violent crime, there are both reasons for skepticism of the magnitude of the ensuing benefit, and grounds for treating the benefits as morally problematic. These concerns, I stress, bear on SQF's efficacy, not the moral urgency of addressing the hecatomb of contemporary urban homicide.

I highlight four grounds for concern. *First*, the evidence for an absolute crime-control effect from SQF is surprisingly fragile. Second, the evidence of a marginal effect from SQF in comparison to other methods is nonexistent. What evidence exists suggests many of the crime-control benefits of SQF might be obtained without its aggregate, racially disparate aspect. Third, and relatedly, the claim that SQF disproportionately benefits African-Americans rests on complex and controversial assumptions. Finally, even assuming firm evidence of large crime-control gains from SQF, there is a normative objection to the state taking credit for those benefits

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[99] *See* John R. Logan, Brian J. Stults, & Reynolds Farley*, Segregation of Minorities in the Metropolis: Two Decades of Change*, 41 DEMOGRAPHY, 1, 7 (2004) (finding that despite modest declines in racial segregation, blacks remain "substantially more" segregated from whites than Hispanics or Asians).

[100] Douglas S. Massey and Jonathan Tannen, *A Research Note on Trends in Black Hypersegregation*, 23 DEMOGRAPHY 1025, 1027 (2015).

[101] Steven R. Holloway, Richard Wright & Mark Ellis, *The Racially Fragmented City? Neighborhood Racial Segregation and Diversity Jointly Considered*, 64 PROF. GEOGRAPHER 63, 69-70 (2012).

[102] Patrick Sharkey, *Spatial segmentation and the black middle class*, 119 AM. J. SOC. 903, 905-06 (2014).

[103] *See* sources cited in *supra* note 79. For scholarly defenses of SQF and its effect on violent crime, see, *e.g.*, David Rudovsky & Lawrence Rosenthal, *The Constitutionality of Stop-and-Frisk in New York City*, 162 U. PA. L. REV. ONLINE 117, 141 (2013) (describing Rosenthal's endorsement of SQF on public safety grounds); Bellin, *supra* note 69, at 1538 ("[A] high volume of arbitrary frisks is essential to effectively deterring gun possession"). Bellin's position, however, is more nuanced and careful than Rosenthal's concludes that SQF is not narrowly tailored as required by the application of strict scrutiny under Equal Protection doctrine. Bellin, *supra* note 69, at 1546.

when the governmental entities responsible for SQF also contributed to minority segregation into neighborhoods of concentrated poverty.

First, notwithstanding Sherman's Kansas City study, "it is very difficult to connect [SQF] to any crime reduction."[104] Two subsequent efforts at replicating the former study, in Indianapolis and Pittsburgh, have produced ambivalent results.[105] The Indianapolis study, for example, found that homicide rates decreased in one of two treatment areas, but remained unchanged in the other.[106] Its authors concluded that the "present state of knowledge does not allow us to answer the theoretical questions of what produced the effects in Kansas City."[107] A meta-analysis of six policing experiments involving increased police patrols in North and South America reexamined the Pittsburgh data, and suggested that while the study had found a statistically significant reduction in gun violence, alternative specifications "strongly sugges[t] the estimated drop in shots-fired incidents was due at least in part to a preintervention trend, a seasonal pattern, or chance."[108] Nevertheless, the authors of the meta-study found themselves ultimately "generally favorable" to the method pioneered in Kansas City, but raised concerns about whether the results of Sherman's experiment could be scaled up beyond the level of smaller neighborhoods.[109]

In an operational context, SQF fares less well. Rigorous empirical studies of SQF's post-1994 deployment are rare. Existing results, though, provide sparse support for its crime-control effects. For example, a study of the effects of SQF on burglary and robbery rates in New York between 2003 and 2010 found "few significant effects."[110] Another quantitative study of New York found that "the number of shooting incidents was virtually unchanged during the years in which stops and frisks grew at an extraordinary rate," suggesting that it was "extremely unlikely that these stops could have reduced the homicide rate by reducing gun ownership or carrying."[111] The most detailed and comprehensive study of overall trends in recent crime rates in New York, by Franklin Zimring, also concluded that in the New York City context, "there is no way to separately measure the value added by aggressive intervention in New York City."[112] Zimring himself seems of two minds about SQF. On the one hand, he identifies "aggressive[e]" measures such as hot-spot policing, the elimination of open-air drug markets, and firearm reduction as

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[104] Meares, *Law and Social Science*, *supra* note 1, at 345.

[105] CHARLES EPP, STEVEN MAYNARD-MOODY, & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 32-33 (2014) (describing and discussing both studies).

[106] Edmund F. McGarrell, Steven Chermal, & Alexander Weiss, *Reducing Firearms Violence through Directed Police Patrol*, 1 CRIMINOLOGY & PUB. POL. 119, 143-44 (2001).

[107] *Id.* at 145.

[108] Christopher S. Koper & Evan Mayo-Wilson, *Police crackdowns on illegal gun carrying: A systemic review of their impact on gun crime*, 2 J. EXP. CRIMINOLOGY 227, 245-46 (2006).

[109] *Id.* at 248-49.

[110] Richard Rosenfeld & Robert Fornango, *The Impact of Police Stops on Precinct Robbery and Burglary Rates in New York City, 2003-2010,* 31 JUST. Q. 1. 1-2 (2012). Rosenberg and Robert Fornango persuasively argue that that a 2008 study that did find a negative relation between SQF and crime was methodologically flawed because it failed to include precinct-level socioeconomic effects or year fixed effects. *Id.* at 103.

[111] David F. Greenberg, *Studying New York City's Crime Decline: Methodological Issues,* 31 JUST. Q. 154, 181-82 (2012); *accord* Jeffrey A. Fagan et al., *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, *in* RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS 309 (Stephen K. Rice & Michael D. White eds., 2010) .

[112] FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL 148-49 (2012) [hereinafter "ZIMRING, CITY THAT BECAME SAFE"].

"probably" successful.[113] On the other hand, he is more confident that "data driven crime mapping and patrol strategy management" and the hiring of police officers did likely have large and negative effects on crime rates.[114] At the very best, Zimring's evidence leaves open the possibility that SQF had some role to play in crime reduction. It casts no light on the magnitude of that role, or whether the same gains in public order might have been achieved through alternate means.

Another potential means of examining SQF's impact is to examine the aftermath of the policy's unexpected discontinuance. But there has also been no detailed study of what happened after the New York City Police Department reduced the number of stops dramatically in 2013. In the three years after that decline began, however, murder rates have remained "essentially flat."[115] In Chicago, a more complicated story obtains. A sharp rise in murder and decline in arrests followed the December 2015 release of long-suppressed video footage of a fatal police shooting provoked sharp public outcry against Chicago Police Department[116] Immediately thereafter, in January 2016, changes to how stops and frisks are recorded—but no change to *operational* policy—went into effect. Given that the highly critical public reaction to the video likely had a significant effect on multiple aspects of police behavior, it is hard to disentangle any discrete effect from changes in SQF policy.

The empirical case for a crime-control benefit from SQF, in short, does not stand on strong foundations.[117] The weakness of its evidentiary predicate contrasts with strong evidence for other kinds of reform, including the deployment of more officers and the use of more data-driven approaches. While there is some empirical support for an effect in small-scale experiments (although the degree of such support has been challenged[118]), there is no existing evidence that this effect can be replicated at a citywide level. More than forty years after Wilson's initial intervention, therefore, SQF remains largely predicated on a well-intentioned guess about the effect of intensive street stops on violent crime levels.

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[113] *Id.* at 145.

[114] *Id.* at 147-48. I am grateful to John Rappaport for discussion on this point.

[115] Toni Monkovic, *Ted Cruz Was Wrong on Murders in New York, but Perception Is Hard to Shake*, N.Y. TIMES, Apr. 21, 2016, http://www.nytimes.com/2016/04/22/upshot/ted-cruz-was-wrong-on-murders-in-new-york-but-perception-is-hard-to-shake.html.

[116] Rob Arthur & Jeff Asher, *Gun Violence Spiked — And Arrests Declined — In Chicago Right After The Laquan McDonald Video Release*, FIVETHIRTYEIGHT, April 11, 2016, http://fivethirtyeight.com/features/gun-violence-spiked-and-arrests-declined-in-chicago-right-after-the-laquan-mcdonald-video-release/.

[117] At least one commentator cites a 2006 study of a multi-pronged anti-narcotics strategy in New York City public housing as evidence of the efficacy of SQF. Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U.L. REV. 1187, 1251, n.295 (2015). But the study in question involved a program that "combined several strategies in a comprehensive design to prevent and control drug use: police enforcement, drug treatment, drug prevention, coordination of services with health and social service agencies, and development of the social infrastructure of formal and informal supervision groups in the housing authorities." Jeffrey Fagan, Garth Davies & Jan Holland, *The Paradox of the Drug Elimination Program in New York City Public Housing*, 13 Geo. J. Poverty L. & Pol'y 415, 417 (2006). It is not clear this sort of multi-pronged effort, in which the effects of one policy might be contingent on the manner in which another is operationalized, can be used as a basis for drawing inferences about SQF.

[118] EPP, MAYNARD-MOODY, & HAIDER-MARKEL, *supra* note 105, at 153-54 ("Nor is it clear that investigatory stops help reduce the crime rate ….").

Second, econometric studies of SQF's effect on crime of the kind discussed above aim to isolate the marginal effect of the policy after controlling for all other relevant variables. In effect, they hold all else constant and then search for an effect of SQF on crime rates. But the assumption that 'all else remains constant' is an obvious artifice. A police force that foregoes SQF is likely to employ an alternative policing strategy that does not involve nonconsensual interventions or facially racial disparities in treatment. The marginal negative effect on crime-control of shifting from SQF to an alternative modality of policing is likely to be smaller than the absolute effect of simply foregoing SQF entirely. A police force that chooses to forego SQF can redeploy the substantial personnel resources it demands for other uses.

There are, moreover, other modalities of policing that are positively associated with crime control in rigorous empirical studies. Consider, for example, the robust empirical literature on "hot-spot policing," a technique that has some parallels with SQF, but can be distinguished. Hot-spot policing involves "the application of police interventions at very small geographic units of analysis."[119] An impressive range of studies and meta-studies has demonstrated that the highly localized deployment of officers has a meaningful and statistically significant effect on crime rates.[120]

Hot-spot policing and SQF have some similarities, but their differences are critical. First, there is a question of scale. SQF (as I use the term) involves tens or hundreds of thousands of arrests. Hot-spot policing does not require similarly massive deployments. Hence, the one study of an existing SQF policy to consider the question concluded that deployments tended to occur across areas that were too large to be characterized as "hot spots" as that term is technically used.[121] Hence, even if the distinction in scale between SQF and hot-spot policing is hard to quantify, in practice it seems easy enough to draw.[122] Second, hot-spot policing does not require stops, let alone frisks or arrests as a central element. There is evidence that "increased police presence alone" dampens crime rates, but the "strongest" impact is associated with "situational prevention" strategies, which "disrupt situational dynamics that allow crime to occur," for example by "razing abandoned buildings."[123] One study of street stops at "microgeographic" hot spots examined in one week increments in New York generated reductions in crime, but

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[119] ANTHONY A. BRAGA & DAVID L. WEISBURD, POLICING PROBLEM PLACES 9 (2010). More generally, proactive policing of various kinds (not necessarily involving stops) is also associated with crime-control effects. Charis E. Kubrin et al., *Proactive Policing and Robbery Rates Across U.S. Cities*, 48 CRIMINOLOGY 57, 62 (2010).

[120] Cody W. Telep and David Weisburd, *What is Known About the Effectiveness of Police Practices in Reducing Crime and Disorder?*, 15 POLICE Q. 331, 333-34 (2012) ("The evidence for hot-spot policing is particularly strong ….''). For exemplary studies using randomized and controlled experiments, see Anthony A. Braga & Brenda J. Bond, *Policing Crime and Disorder Hot Spots: A Randomized Controlled Trial*, 46 CRIMINOLOGY 577 (2008); Anthony Braga et al., *Problem-Oriented Policing in Violent Crime Places: A Randomized Control Experiment*, 37 Criminology 541 (1999).

[121] Fagan & Geller, *supra* note 10, at 79-80. This factor can also be used in inapposite and illogical ways. *Id.* at 85 (noting that "High Crime Area" was often provided as a justification for stops in public housing putatively targeting trespassers, but without any explanation of why the suspicion of trespass arose).

[122] In Part I.B infra, I develop a catalog of costs associated with SQF. Many of these costs flow from the sheer volume and concentration of stops. Because hot-spot policing is more focused, many of these criticisms do not apply to it. This is another reason to distinguish hot-spot policing and SFQ qua urban policing strategies.

[123] Telep & Weisbburd, *supra* note 120, at 333-34l; *accord* Braga & Bond, *supra* note 120, at 599 (reported results from a controlled, randomized study in Lowell, MA, and suggesting that the strongest crime-prevention benefits were driven by situational strategies that attempted to modify the criminal opportunity structure at crime and disorder hot-spot locations").

cautioned that "evidence suggests that crime prevention can be achieved without resorting to an unrestricted SQF policy."[124] In this New York data, moreover, SQF was pursued "at the expense" of other strategies, leaving open questions about the "potential of other policing strategies."[125]

Hot spot policing plainly requires more officers. It is important to emphasize that my argument here solely concerns the style of policing, and not the sheer volume of officers deployed.[126] But increasing stops or arrests, by contrast, do not appear to be a necessary component of hot-spot policing. Indeed, in one leading study, the authors noted approvingly that officers in the treatment condition (i.e., engaged in hot-spot policing) were not evaluated on their stop count, but rather were held "accountable for reducing citizen calls for service and for ameliorating social and physical incivilities in targeted hot-spot areas."[127] A recent metaanalysis of 19 studies of hot-spot policing separately examined the effects of two distinct versions of that policy that involved either increasing the volume of traditional policing or using a problem-solving approach.[128] Three of eight studies or the traditional policing model found small positive effects on crime reduction. But the overall mean effect size of problem-oriented hot spot policing was twice the effect size of the traditional policing model.[129] It would seem that the choice to simply increase traditional policing activities at hot spots is dominated in practice by problem-solving measures.

The contrast between SQF and hot-spot policing usefully underscore a more general point: Policing is not a single, undifferentiated public good. Rather, policing takes several forms, pursuing diverse ends of crime-control, order-maintenance, and social provision, with divergent tools.[130] Police forces now engaged in SQF have at other times, employed other, quite different approaches, which focus instead on service provision[131] or community relations[132] as well as prophylactic street policing. Some of these policies aim to reduce crime; others, such as community policing, seek to "build[] a reservoir of public support" to tap in moments of strain.[133] These different services can be bundled in different ways. In at least some of the jurisdictions in which SQF is employed, neighborhoods subject to aggressive street policing do

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[124] David Weisburd et al., *Do Stop, Question and Frisk Practices Deter Crime? Evidence at Microunits of Space and Time*, 15 CRIMINOLOGY & PUB. POL. 31, 48-49 (2015); *id.* at 47 (noting that in their estimate high-volume use of SFQ would produce "only a 2% decline in crime," which they characterize as "relatively small").
[125] *Id.* at 49-50.
[126] *Cf.* Steven D. Levitt, *Using electoral cycles in police hiring to estimate the effects of police on crime: Reply*, 92 AM. ECON. REV. 1244, 1244 (2002) (presenting evidence of a "large negative impact of police on crime").
[127] Braga & Bond, *supra* note 120, at 599.
[128] Anthony A. Braga et al. *The Effects of Hot Spot Policing on Crime: An Updated Systemic Review and Meta-Analysis*, 31 JUST. Q. 633, 640 (2014).
[129] *Id.* at 656.
[130] For an excellent survey of diverse views on the police function, see THE FUTURE OF POLICE (Jennifer Brown, ed. 2014).
[131] JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES 200-26 (1968) (describing a "service style" of policing).
[132] *See, e.g.,* Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593, 1598 (2002) (describing an effort by police in Chicago to build relations with African-American churches).
[133] WESLEY G. SKOGAN, POLICE AND COMMUNITY IN CHICAGO: A TALE OF THREE CITIES 247 (2006) (discussing community policing in Chicago in the early 1990s).

not necessarily receive high levels of other policing services.[134] In Chicago, for example, African-American and Hispanic neighborhoods are subject to SQF on the one hand, but on the other hand experience substantially longer delays than nonminority neighborhoods when seeking police aid via 911 calls.[135] Policing is thus both under-supplied and over-provided simultaneously.

Defenders of SQF therefore may well mislead when they equate SQF with a police force "focus[ing] its resources where people most need protection."[136] Rather, it is both possible—and in fact often seems to be the case—that SQF is accompanied by serious deficiencies in other parts of the bundle of police services. Estimation of the margin costs of ending SQF must therefore account for the possibility of variance across these other elements of the police function.

Third, the assumption of SQF's advocates, particular in New York, has been that its benefits accrue to the minority residents of high crime neighborhoods more than they accrue to residents of low-crime neighborhoods.[137] It is this assumption that might point toward a profitable comparison between SQF and affirmative action: Both are policies that disproportionately benefit African-American and Hispanic minorities. But consider another possibility: Since the 1960s, the fear of crime has been a concern that has powerfully mobilized white electorates.[138] It may be that among the gains of SQF is a reduction in the fear of crime,[139] and that this gain is diffused among the wider urban population. The latter, of course, is typically much larger than the urban subpopulation subject to SQF.

Even assuming there is a substantial marginal crime-control gain in substituting SQF for the next-best policy,[140] it is necessarily the case that whereas (predominantly minority) residents of impoverished neighborhoods experience both costs and benefits, whereas (predominantly white) non-residents of other neighborhoods experience only benefits (albeit in expectation at a much lower rate). There are also likely to be many more white non-residents of targeted areas than minority non-residents. The former benefit from being able to access more of the city—a benefit that the latter do not obtain—as well as from a reduced fear of crime. Depending on the magnitude of these various costs and benefits for different racial groups, it is quite possible that the adoption of SQF might create larger net benefits for

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[134] ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 41-42 (2010) (noting disparate access to public-order resources in cities such as Los Angeles).
[135] Central Austin Neighborhood Ass'n v. City of Chicago, 2013 Il App. (1st 123041, ¶ 4 (Nov. 13, 2013) (describing longer wait times for 911 calls in minority neighborhoods).
[136] McDonald, *supra* note 79.
[137] *See* sources cited *supra* in note 79.
[138] *See* Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230, 235 (2007); *see also* Dennis D. Loo & Ruth-Ellen, *Polls, Politics, and Crime: The 'Law and Order' Issue of the 1960s*, 5 WEST. CRIMINOLOGY REV. 50, 50 (2004) (discussing origins of public concerns about crime in the 1960s).
[139] Jonathan P. Jackson, *A Psychological Perspective on Vulnerability in the Fear of Crime*, 15 PSYCHOL. CRIME & L. 365 (2009).
[140] *But see supra* text accompanying notes 119 to 127 (suggesting that hot spot policing is better supported empirically as a crime-control measure than SQF).

the class of white nonresidents as a whole than for the class of minority residents of highly policed neighborhoods—*even without accounting for the potential costs of SQF*.[141]

The claim that SQF disproportionately benefits minorities is an important part of the moral case in favor of the policy. Closer examination of the assumptions underlying the claim, however, uncovers its fragility. It is hardly clear that—even bracketing the costs of SQF—it is true that a disproportionate share of the social benefits of SQF run to minority communities. Much depends on the welfare effects from crime reductions and from mitigation of crime-related fears.

The fourth and final reason for skepticism of the positive case for SQF based on its crime-control effects is not based on empirical data or calculations of welfarist consequences. Rather, it is moral in nature, and depends on a distinctive and likely controversial moral logic: the idea that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."[142] Applying that concededly raw intuition to the case of SQF reveals the following line of argument: The problem of violent crime to which SQF responds flows from the existence of neighborhoods of concentrated (and racialized) poverty. Although there are many forces molding the latter, governmental actors at the state and local level have a large share of responsibility. Those same governmental bodies (if not the exact same politicians[143]) also adopted SQF. Having exposed minority communities to the harm of high violent crime rates, governmental bodies cannot then "take advantage" of this wrong to seek a measure of legal and policy leeway that they otherwise would not have. At a minimum, they should elect the policing strategy that imposes the *minimum* burden on minority communities that *as a result of persisting state policy* have been subjected to concentrated poverty and high crime rates.

The threshold premise of this argument—that states and localities bear a measure of responsibility for concentrated, minority poverty—has substantial support in the historical and empirical literature. To be sure, "macrostructural" forces such as the deindustrialization of central cities and the exit of some middle-class and wealth African-Americans have driven the growth of concentrated, racialized poverty.[144] But these forces have been magnified by

[141] What if African-American residents subject to SQF do not benefit from the policy and do not support it? If SQF nonetheless mitigates white fear of crime, the policy will have an unmitigated regressive distributive effect. Steven N. Durlauf. *Assessing Racial Profiling*, 116 ECON. J. F402, F412 (2006).
[142] Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889).
[143] In Chicago, the argument might well be personalized given the lengthy tenure of Richard M. Daley in office.
[144] Robert J. Sampson & William Julius Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, *in* CRIME AND INEQUALITY 37, 42 (John Hagan & Ruth D. Peterson eds., 1995). More recently, the financial crisis has deepened the effect of segregation. Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 634 (2010) ("[T] he housing boom and the immense profits it generated frequently came at the expense of poor minorities living in central cities and inner suburbs who were targeted by specialized mortgage brokers and affiliates of national banks and subjected to discriminatory lending practices."). The best historical case-study is Thomas Sugrue's magnificent history of post-war Detroit, THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT (1996).

"deliberate policy decisions to concentrate minorities and the poor in public housing."[145] In Chicago, for example, alderman and the mayor thwarted efforts from the 1940s onward to disperse African-Americans outside traditionally black neighborhoods.[146] Across the country, zoning restrictions and permitting requirements have been extensively deployed to perpetuate racially "exclusionary" residential patterns.[147]

The implications of state involvement in the creation of concentrated racialized poverty depend on the sort of moral fault one attributes to a collective entity such as a municipality, the precise mix of state action and private actions responsible for residential segregation, and the extent to which any historical responsibility is mitigated by the passage of time and the burdens that remediation would impose on innocent third-parties.[148] I do not aim to resolve that complex suite of questions here. Rather, my more limited claim is that a city's claims on behalf of SQF must at a minimum be contextualized by its historical responsibility for the burdens imposed by concentrated poverty, particularly on the racial minorities whose efforts to move beyond that condition in search of employment and educational opportunities have so often been thwarted.[149] At an absolute minimum, it would seem appropriate to demand a heightened burden of proof for claims about the benefits of disparate crime-control measures tendered by the very entity responsible for racial segregation. At a minimum, the institutional author of racial segregation should do no further harm to minorities when it addresses the costs of such segregation. Having created the problem that SQF is intended to address, municipalities have no entitlement to a benefit of empirical doubt. More ambitiously, cities' partial culpability for the underlying condition of concentrated poverty might justify special efforts to ensure that no policy response to crime imposed a disproportionate share of costs on the legatees of historical discrimination, or that denied them a disproportionate share of its benefits.

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This section has examined the crime-control benefits of SQF. The evidence for those is surprisingly fragile. The case for thinking SQF has marginal benefits in comparison to a next-

[145] Sampson & Wilson, *supra* note 144, at 43; *see generally* Erika K. Wilson, *Leveling Localism and Racial Inequality Through the No Child Left Behind Act Public Choice Provision*, 44 U. MICH. L.J. REFORM 625, 649-51 (2011) (analyzing the ways in which explicit government policies caused racial residential segregation in the suburbs and urban cities).. Such policies also existed at the federal level. *See* DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993). For a recent accounting in the legal scholarship, see Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1955–56 (2015) (discussing the role of the Federal Housing Authority in fostering urban racial segregation).

[146] *See* ARNOLD HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO 1940-1960, *at* 23-24, 64-68, 222-23 (1983) (discussing political resistance to the diffusion of public housing, motivated by opposition to racial integration); *accord* D. BRADFORD HUNT, BLUEPRINT FOR DISASTER: THE UNRAVELING OF CHICAGO PUBLIC HOUSING 85-86 (2009). Private violence also played a large role in Chicago. HIRSCH, *supra*, at 217-18.

[147] *See, e.g.,* Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L.J. 877, 888-89 (2006); Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L.J. 1667, 1667-73 (2013).

[148] An additional complication arises if a municipality that adopts SQF simultaneously pursues policies that either entrench or preserve concentrated minority poverty.

[149] On the difficulty of African-American exit from concentrated poverty via economic improvement, see MARY PATILLO-MCCOY, BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS 24-27 (1999).

best policy option such as hot-spot policing is even more shaky. Accounting for the fear of crime, moreover, suggests that defenses of SQF as a form of affirmative action may well fail. Finally, an analysis based on the state's historical responsibilities for the underlying conditions that motivate SQF suggests a need to view the state's celebration of the policy's benefits with a measure of skepticism.

C. The Ecological and Dynamic Costs of SQF

This section turns from SQF's putative benefits to its costs. In my view, SQF has an intertwined set of individual and collective costs that largely (but not exclusively) sound in an equality-related rather than a Fourth Amendment register. My starting assumption is that SQF's costs, no less than its benefits, cannot be understood detached from the historical origins of concentrated poverty. Nor can they be evaluated without thinking carefully about the ways in which SQF might perpetuate the underlying conditions of social and racial stratification into concentrated poverty. In short, rather than analyzing racial discrimination as a "single-point outcome," I endorse the dominant emphasis in recent sociological scholarship on "modeling discrimination as a process" [150] rather than a discrete action or outcome.

I identify eight pathways by which SQF can impose harms on individuals and communities defined by race. I began my analysis of costs by focusing on the immediate encounter between police and an individual. Having documented costs in that context, I then widen my lens to capture a diverse array of adverse spillovers from that immediate encounter, not only to the individual, but also for his or her social network, and (for racial minorities) his or her larger racial cohort. The latter effects of SQF, it should be noted, diffuse through social networks and families.[151] Several critically depend upon "vicious circles", or positive feedback mechanisms that entangle individual and neighborhood-level effects,[152] often with regressive distributive consequences. More generally, it is plausible to view all eight causal pathways as intertwined and, to an extent, mutually reinforcing.

First, the Supreme Court in *Terry* recognized that even brief stops and frisks have immediate and substantial costs. Chief Justice Warren described even a temporary police stop as "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."[153] In subsequent cases, however, the Court has tended to downplay the direct psychological and dignitary costs of being stopped.[154]

But ethnographic data and qualitative studies demonstrate that Chief Justice Warren's initial intuition was correct. The immediate toll of a nonconsensual police intrusion—even absent physical content or formal consequence—is quite substantial. Perhaps the best evidence

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[150] Devah Pager and Hannah Shepherd, *The Sociology of Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 188 (2008).
[151] Because not all have been rigorously empirically tested, I will carefully identify what data obtains respecting each pathway. Where data is absent, I will offer (with appropriate caveats) reasoned hypotheses.
[152] Mitchell Duneier argues that "the black ghetto has been the site of vicious circles in which space plays a distinctive role." MITCHELL DUNEIER, GHETTO: THE INVENTION OF A PLACE: THE HISTORY OF AN IDEA 223 (2016). I stress the role of neighborhood rather than 'space' in the following.
[153] 392 U.S. 1, 16-17 (1968).
[154] Carol S. Steiker, Terry *Unbound*, 82 MISS. L.J. 329, 338-39 (2013).

derives from a recent survey of 1,200 young men in New York. This found that contact with the police (primarily in the form of *Terry* stops) was consistently associated with persisting "stigma, trauma, anxiety and depression."[155] On reflection, it should be no surprise that these effects flow from a *Terry* stop. The latter is an unexpected encounter with heavily armed police, typically characterized by a sense of utter helplessness and s sharp fear of violence and deadly force.[156] This fear may be amplified by a worry of more prolonged detention, a real concern in a jurisdiction where police have arrest quotas to fill.[157] This psychological toll is not immediately visible. It may be shameful even to admit. These are, perhaps, the least troubling explanations for why such costs have largely fallen out of judicial accounts of SQF.

Second, a different, racial asymmetry afflicts judicial consideration of the risks of bodily harm attendant on a *Terry* stop. On the one hand, the Court has punctiliously attended to the risk of bodily harm to officers during a stop.[158] On the other hand, the Court has been largely silent about the possibility that *Terry* stops expose the individual subject to police attention to a substantial risk of physical violence.[159] Nor has it accounted for the possibility that these risks will be positively correlated with minority status. Recent empirical work by Roland Fryer using the *Terry* stop-related records of New York's police found "large racial differences" in police use of "non-lethal force," including slapping, grabbing, and pushing individuals into a wall or onto the ground.[160] Even assuming perfectly compliant behavior, African-Americans were 21 percent more likely to experience force than whites.[161] Given such large differentials in the use of force, it would hardly be surprising if a large proportion of the innocent minority residents of high-crime neighborhood who are stopped and frisked objected to aggressive SQF even if it had public safety benefits that diffused to their benefit.[162]

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[155] Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321 (2014).

[156] For a vivid account of the associated dignitary harms, see Nicholas K. Pert, *Why Is the N.Y.P.D. After Me?*, N.Y. TIMES, Dec. 17, 2011, http://www.nytimes.com/2011/12/18/ opinion/sunday/young-black-and-frisked-by-the-nypd.html ("Essentially, I incorporated into my daily life the sense that I might find myself up against a wall or on the ground with an officer's gun at my head.").

[157] This may have been the case in New York. Joseph Goldstein, *Stop-and-Frisk Trial Turns to Claim of Arrest Quotas*, N.Y. TIMES (Mar. 20, 2013), http://www.nytimes.com/2013/03/21/nyregion/stop-and-frisk-trial-focuses-on-claim-of-arrest-quotas.html (describing evidence that police officers were told to meet quotas).

[158] *See, e.g.,* Maryland v. Wilson, 519 U.S. 408, 415 (1997) (stressing the risk of harm to officers while characterizes the cost to those under the control of the officers of being physically moved as "minimal").

[159] The Fourth Amendment provides limited protection from non-deadly force. The Court employs a loose standard to review excessive non-deadly force claims. Graham v. Connor, 490 U.S. 386, 395-96 (1989). The "indeterminacy" of the standard undermines the risk of ex post liability under 42 U.S.C. §1983 or *Bivens*, both of which require a "clear" legal rule to be violated Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1140-41 (2008). Since *Graham* does not supply a "clear" rule, there is rarely tort liability for excessive non-deadly force. *Id.*

[160] Roland G. Fryer, Jr, *An Empirical Analysis of Racial Differences in Police Uses of Force* 3 (July 2016), http://scholar.harvard.edu/files/fryer/files/main-july_2016.pdf. Earlier work for increasing usage of disproportionate police force in minority neighborhoods, particularly when that minority was perceived as a demographic threat to a majority. Robert J. Kane, *The Social Ecology of Police Misconduct*, 40 CRIMINOLOGY 867, 867, 887-88 (2002) (discussing distributions of police force in New York City between the 1970s and the 1990s).

[161] Fryer, *supra* note 160, at 31.

[162] *See infra* text accompanying notes 299 to 302 (addressing the argument that SQF is justified because of minority community support).

Third, the effects of *Terry* stops on the individuals directly subject to police attention do not expire when their participants part ways. Rather, negative experiences with the police breed cynicism about the law, an unwillingness to invoke the police's aid, and a diminished proclivity to comply with the law or cooperate with legal authorities. The connections between negative police treatment and strongly aversive views of the police are empirically well grounded, albeit not in contexts where SQF has been implemented.[163] But studies from the specific cities at issue here demonstrate vividly that both intensive street policing has lingering effects on the dispositions and beliefs of the population at issue.

For instance, a recent qualitative study of young men living in three high-crime neighborhoods in Philadelphia found that less than 10 percent were willing to call the police "in any circumstances," in part because many had themselves had negative experiences with the police in the past.[164] Tellingly, the same study also found resentment directed at police because of their failure to respond to 911 calls in a timely fashion.[165] Police, that is, not seen reflexively in a negative light: It is intrusive and disrespectful treatment, coupled with a failure to provide noncoercive public-safety, that elicit negative perceptions of the police. This study, however, focused on *negative* experiences of police, rather than the mere fact of being stopped. Although the Philadelphia study suggests that young men in particular perceive police contact generally as negative, it does not test for different effects of *any* police contact.[166] In contrast, a recent study in New York, examining young subjects in areas affected by SQF, found that increasing experience of stops (whether negative or positive experiences) diminished perceptions of police legitimacy.[167] A larger body of empirical findings from the United States and beyond

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[163] Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY, 253, 276-78 (2004) ("To effectively deal with racial distrust of the police in the minority community it is important to regulate not only the selection of the people whom the police stop, but also the manner in which they conduct stops as well."). Sherry Colb has raised the concern that such "targeting harm" is unlikely to arise because individuals stopped do not know the police's motivations. Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1500 (1996). After Colb made this argument, Epp and colleagues demonstrated that minority motorists subject vehicular stops based on minor regulatory offense are quite aware of the fact that they have been stopped when a similarly situated white motorists would not have been stopped, and make strong negative judgments of the police as a result. EPP, MAYNARD-MOODY, & HAIDER-MARKEL, *supra* note 105, at 117-18.

[164] Patrick Carr, Laura Napolitano, & Jessica Keating, *We Never Call the Cops and Here Is Why: A Qualitative Examination of Legal Cynicism in Three Philadelphia Neighborhoods*, 45 CRIMINOLOGY 445, (2007). A parallel result was obtained in a study in St. Louis. Rod K. Brunson, *Police Don't Like Black People: African-American Young Men's Accumulated Police Experiences*, 6 CRIMINOLOGY & PUB. POL'Y 71, 71-72 (2007).

[165] Carr, Napolitano, & Keating, *supra* note 164, at 459; *accord* Robert Sampson & Dawn Jelgum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 LAW & SOC'Y REV. 777, 793 (1998) (finding "perceptions of injustice and alienation from police" in Chicago neighborhoods of concentrated poverty, but rejecting the hypothesis that this stems from a "black subculture of deviance"). Alice Goffman's recent ethnography of impoverished Philadelphia confirms this. ALICE GOFFMAN, ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY (2014).

[166] A recent study in St. Louis, MO, using a quantitative methodology, similarly found that "two-thirds of the young men [in the study] said the police are almost never easy to talk to, nearly half said the police are almost never polite." Rod K. Brunson & Jody Miller, *Young Black Men and Urban Policing in the United States*, 46 BRIT. J. CRIMINOLOGY 613, 622 (2006). These results suggest that it cannot be assumed that most stops are perceived as positive or neutral.

[167] Tom Tyler, Jeff Fagan, & Amanda Geller, *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization*, 11 J. EMP. L. STUD. 751, 772, figs 3 & 4 (2014).

demonstrates that diminished police legitimacy is associated with a diminished disposition to follow the law and a lesser willingness to cooperate with police.[168]

Relatedly, a high volume of stops concentrated in a specific geographically locale can create a vicious-circle feedback loop that works from individual legal cynicism to increased collective victimization, and back again. When SQF is *perceived* as being distributed on racial grounds (perhaps because African-Americans and Hispanics are *in fact* at a much greater a risk of being stopped than whites[169]), cynicism about the law and police is likely to be sharpened in minority communities. At the margin, violations of the law become more frequent.[170] As the expected risk of being victimized rises, therefore, it seems that residents of heavily policed areas become less willing to proactively reach out to police. This further lowers the expected cost of criminality, rather than alleviating it as SQF's advocates hoped.[171] More crime in turn leads to more aggressive SQF, which starts the cycle anew. A version of this dynamic has been termed the "Ferguson effect," a term that captures the possibility that high-visibility instances of police misconduct lead to increases in crime because of reduced confidence in police or because of increased risk-averseness on police's part. Evidence for the Ferguson effect, however, is weak and confined to certain crimes in certain cities.[172] If further evidence were to emerge of such an effect, it would nevertheless strength the argument developed here.

Fourth is another vicious circle related to legal cynicism: If minorities have consistently negative views of the police, and respond to stops accordingly, police may come to anticipate more resistance from those minorities. Shared police expectations of a greater risk of African-American violence in response to a police stop is one potential explanation for the higher rates of force for black suspects that Fryer finds in the New York SQF data.[173] Appearances, in this way, influence realities.[174] The perception of racial disproportionality in stops hence influences individual residents' behavior, which in the aggregate creates racial differences in violence by

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[168] For a summary of research into police legitimacy, see Stephen J. Schulhofer et. al., *American Policing at A Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. Crim. L. & Criminology 335, 338 (2011) ("[C]ompliance with the law and willingness to cooperate with enforcement efforts are primarily shaped not by the threat of force or the fear of consequences, but rather by the strength of citizens' beliefs that law enforcement agencies are legitimate.").

[169] *See* EPP, MAYNARD-MOODY, & HAIDER-MARKEL, *supra* note 105, at 117 ("African-Americans and Latinos have developed and share with each other an extensive body of knowledge about police behavior and police stops."); *accord* VICTOR M. RIOS, PUNISHED, POLICING THE LOVES OF BLACK AND LATINO BOYS 54-57 (2011).

[170] *See* William J. Stuntz, Terry*'s Impossibility*, 72 ST. JOHN'S L. REV. 1213, 1217 (1998) ("If the police and, through them, the criminal justice system, come to be seen as illegitimate, the norms of law-abiding behavior could unravel, with the streets becoming less safe, not more so.")

[171] *See* Robert J. Sampson, *When Things Aren't What They Seem: Context and Cognition in Appearance-Based Regulation*, 125 HARV. L. REV. F. 97, 105 (2012) ("In communities with high levels of intersubjectively shared cynicism of police misbehavior and the perceived irrelevance of legal rules, violence is higher.").

[172] The best study of which I am aware is David C. Pyrooz, et al., *Was there a Ferguson Effect in large U.S. cities?*, 46 J. CRIM. JUST. 1, 7-8 (2016) (finding an effect only for homicide and robbery, and only in cities with large impoverished minority communities).

[173] Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1321-28 (2002) (finding subjects, instructed to act as officers, were quicker to use force against blacks than whites).

[174] This is an instance of what Adam Samaha calls "[a]ppearance driving reality." Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1577 (2012).

police. This of course merely strengthens minorities' negative expectations of police.[175] Hence, large racial disparities in the physical harms associated with SQF can be reconciled with the "nearly uniform support for the principle of equal treatment" found in polling data.[176]

Fifth, just as legal cynicism leads to higher victimization rates, so too can the carceral consequences of SQF. "[M]ore punitive police enforcement and parole surveillance" leads to a higher frequency of repeat admissions from a given neighborhood, which "begets more incarceration," which in turn begets more crime.[177] To the extent SQF does not result in arrests, of course, this dynamic is blunted.

Sixth, SQF might solidify stereotypical assumptions about the correlation of race and criminality. Where the neighborhoods targeted for SQF are predominantly African-American and Hispanic, SQF is likely to strength the widely shared perception of a connection between race and crime.[178] Careful empirical studies have demonstrated that the racial identity of a neighborhood's inhabitants already provides a cue for people's estimates of its disorderly character[179] and its crime rate.[180] SQF, especially when explicitly justified on the basis of black criminality, works as an official imprimatur upon this popular stereotype. And by instantiating state policy on the basis of that spurious correlation, it deepens and ratifies racial stereotypes that long predate any known disparity in crime rates, and that depend not on empirics, but rather on profound (and invidious) assumptions about racial differences.[181] Empirical evidence already suggests that suspects with darker skin pigmentation are likely to identified as criminal[182] and punished more severely[183] than similarly situated lighter-toned suspects. It may also be that the tighter perceived correlation between race and criminality reinforces residential segregation, by "mark[ing] off 'black' from 'white' neighborhoods."[184]

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[175] The expert report in the New York litigation gestures at this dynamic when it explains why propensity score matching is infeasible as a measure of testing for discriminatory motives. Fagan Report, *supra* note 48, at 97-98.
[176] Lincoln Quillian, *New Approaches to Understanding Racial Prejudice and Discrimination*, 32 ANN. REV. SOC. 299, 308 (2006).
[177] Jeffrey Fagan, Valerie West & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods,* 30 FORDHAM URB. L.J. 1551, 1554 (2003).
[178] *See* KHALIL GIBRAN MUHAMMAD, THE *CONDEMNATION OF BLACKNESS*: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010) (exploring the ways in which at the beginning of the twentieth century, policymakers in Northern cities began linking crime to African-Americans on the basis of genetic and predispositional arguments).
[179] Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of "Broken Windows*," 67 SOC. PSYCHOL. Q. 319, 319-20 (2004) (finding that perceptions of disorder in a neighborhood were better predicted by the racial composition of a neighborhood than by actual disorder).
[180] Lincoln Quillian & Devah Pager, *Black neighbors, higher crime? The role of racial stereotypes*. 107 AM. J. SOC. 717, 718 (2001) (finding "that the percentage of a neighborhood's black population, particularly you black men, is significantly associated with perceptions of the severity of a neighborhood's crime problems").
[181] Annabelle Lever makes the related and important point that race-based policing often "reflects racist attitudes, institutions and habits while obscuring its contribution to them." Annabelle Lever, *Why Racial Profiling is Hard to Justify: A Response to Risse and Zechkauser*, 33 PHIL. & PUB. AFF. 94, 97 (2005) (emphases omitted).
[182] Travis Dixon & Keith Maddox, *Skin Tone, Crime News, and Social Reality Judgments: Priming the Stereotype of the Dark and Dangerous Black Criminal*, 35 J. APP. SOC. PSYCH. 1555, 1555-56 (2005).
[183] Jennifer L. Hochschild & Vesla Mae Weaver, *The Skin Color Paradox and the American Racial Order*, 86 SOC. FORCES 643, 644, (2007).
[184] ANDERSON, *supra* note 134, at 42.

Seventh, another probable (if untested) effect of SQF is a dampening of civil participation by residents of affected neighborhoods in ways that, over time, conduce to diminished collective political power. Important recent work has demonstrated empirically that contact with the criminal justice system, including nonconsensual stops, has a substantial and statistically significant effect on trust in government.[185] In one national sample, "[t]he probability of voting declined by 8 percent for those who have been stopped."[186] Once again, there is a potent vicious circle in operation here: SQF is a form of policing that allocates most of its costs to minorities living in concentrated poverty. But the downstream effect of a high stop rate is that roughly one in ten of those subjected to SQF become less likely to vote. Like felon disenfranchisement laws, SQF thus has the effect of sapping low-income minority communities' influence on public policy and distributions of public goods,[187] even as it purports to empower those communities.

Eighth, and finally is yet another potential aggregate effect—this time upon the level of "collective efficacy" within a neighborhood. Developed by the Harvard sociologist Robert Sampson, the concept of collective efficacy involves "the linkage of mutual trust and the shared willingness to intervene."[188] In repeated studies, high levels of collective efficacy have been found to boost "neighborhoods[' ability] to realize the common values of residents and maintain effective social controls is a major source of neighborhood variation in violence" and in particular homicide.[189] Although there is no study of the effect of SQF on levels of collective efficacy, there is little reason to think it will be positive. If contact with the police breeds legal cynicism, intracommunal violence, anxiety, and an unwillingness to engage politically, it is hard to see how it could foster collective efficacy. If that is so, SQF suppresses a key determinant of public safety within neighborhoods.

Many of these eight effects likely endure across generations. Most impoverished African-American youth, as well as a "significant" proportion of middle-income ones, live in urban neighborhoods of concentrated poverty of the kind subject to SQF.[190] SQF is pivotal in the formation of many minority children's understandings of their status and possibilities in America, an effect that is compounded because one in four black children already experiences

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[185] LERMAN & WEAVER, *supra* note 77, at 150-51 (presenting a range of tests of trust in government).
[186] *Id*. at 222-23. In a separate article, Lerman and Weaver find parallel results in a New York sample. Amy E. Lerman & Vesla M. Weaver, *Staying Out of Sight? Concentrated Policing and Local Political Action*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 202, 205 (2014) (finding in a study of New York "witnessing stops that occur with little justification and that feature physical force can make people feel occupied and powerless, and can incentivize disengagement with government").
[187] Todd Clear, *The Effect of High Imprisonment Rates on Communities*, 37 CRIM. & JUST. 97, 116 (2008).
[188] Robert J. Sampson, *Neighborhood effects, causal mechanisms, and the social structure of the city*, *in* ANALYTIC SOCIOLOGY AND SOCIAL MECHANISMS 227, 232 (P. Demeulenare, ed., 2011).
[189] Sampson, Raudenbush & Earls, *supra* note 93, at 918; Jeffrey D. Morenoff, Robert J. Sampson, & Stephen W. Raudenbush, *Neighborhood Inequality, Collective Efficacy, and the Spatial Dynamics of Urban Violence*, 39 CRIMINOLOGY 517, 551 (2001) (finding that measures of lower collective efficacy in a neighborhood independently predict increased homicide risk); Robert J. Sampson, Jeffrey D. Morenoff & Thomas Gannon-Rowley, *Assessing 'Neighborhood Effects': Social Processes and New Directions in Research*, 28 ANN. REV. SOC. 443, 457 (2002) (same).
[190] Orlando Patterson, *The Social and Cultural Matrix of Black Youth*, *in* THE CULTURAL MATRIX: UNDERSTANDING BLACK YOUTH 45, 47 (O. Patterson & Ethan Fosse, eds., 2015).

parental incarceration.[191] To think that SQF's structural harms will be transient, therefore, is rather optimistic.

This is a long list. Its items, though, should not be viewed in isolation. All of these pathways generate costs concentrated on the minority individuals and communities in which SQF is imposed. Impoverished minority individuals, and through them their communities, become more demoralized, alienated, anxious, crime-ridden, and politically powerless. The net effect of SQF's eight costs, therefore, is singular: It is to maintain and even deepen social and geographic schisms that separate neighborhoods and racial groups. SQF therefore cannot be understood as merely an individual-level intervention. It sets in motion a range of important *social* processes, largely detrimental to the shared interests of a neighborhood and a racial group, in ways that reiterate and recapitulate extant racial and social hierarchies.

These dynamics, finally, may help explain the surprising lack of empirical evidence of crime reduction from SQF.[192] At an aggregate level, communities subject to SQF are likely to see their political efficacy, their collective efficacy, and their shared commitment to the law wither. One effect of these changes is an expected increase in levels of crime. This may offset whatever gains the direct application of SQF achieves partially or in full. SQF, in short, is a short-term panacea that in the medium-term may well prove self-defeating.

D. The Distinctive Moral Wrong of SQF

This Part has provided a definition and analysis of the positives and negatives of SQF with the aim of refashioning the case against SQF. Rather than cabining the inquiry by imposing artificial constitutional categories at the threshold, I have identified both individual and neighborhood-level costs and benefits. With both positives and negatives in hand, it is possible to recapitulate the argument against SQF in a more nuanced and acute form. To be sure, in the absence of precise quantification of both costs and benefits, that argument necessarily has a provisional aspect. I have no proof that the policy's costs exceed its benefits. Nevertheless, I view the weakness of benefit-related evidence and the accumulation of cost-related evidence as sufficiently clear to suggest that a working account of the distinctive moral wrong of SQF is feasible.

The core of the case against SQF is dynamic and ecological in character. It rests on the policy's effect not just on the specific persons stopped by policy, but on the dynamic role that SQF plays in the social and racial stratifications concatenated with urban residential segregation. It is an argument, moreover, that proceeds without making any assumption of racial animus or individual officer fault.

In the early 1990s, SQF was adopted as a response to rising violent crime associated with minority-dominated neighborhoods characterized by concentrated poverty. In that respect, it was at its origin a response to an unexpected externality from the urban residential segregation that had been promoted by state actors from World War II onward. Local and state officials might

[191] SARA WAKEFIELD & CHRISTOPHER WILDEMAN, CHILDREN OF THE PRISON BOOM: MASS INCARCERATION AND THE FUTURE OF AMERICAN INEQUALITY 41 (2014).
[192] *See supra* Part I.B.2.

have taken another path.[193] From the 1960s onwards, historian Elizabeth Hinton has demonstrated, national and local politics gradually "blended opportunity, development, and training programs of the War on Poverty with the surveillance, patrol, and detention programs of the War on Crime."[194] By the 1980s, however, the War on Crime "would completely supplant" Great Society antipoverty programs as a solution to urban discontent.[195] Noncoercive solutions, in short, had already been tabled by the time the crime wave of the late 1980s and early 1990s was in full flush.[196] Nevertheless, the policy response to that crime-wave has had ironically limited crime-control related payoff, while at the same time ratifying racial stereotypes, emasculating minority communities politically, and exacerbating their social and political weaknesses. Especially given the backdrop of municipal policies that consciously enabled and entrenched the urban ghetto, this policy choice was a morally problematic one: It was, in effect a choice by the state to exacerbate a form of racial stratification for which the state itself bears large moral (if not constitutional) responsibility.

On this account, SQF is one link in a larger "process"[197] of social and racial stratification in ways that extend well beyond the discrete effects of an isolated encounter between one officer and one resident.[198] Given its exiguous benefits (shared by society) and its multifarious costs (largely concentrated within already impoverished minority communities), it is hard to imagine that SQF would have anything but regressive distributive effects as between racial groups.[199] On the assumption that my judgments about the relative magnitude of costs and benefits are sustained, I believe that SQF can fairly be characterized as "a systematic and institutional phenomenon that reproduces racial inequality and the presumption of black and brown criminality."[200]

Given this characterization, I resist claims that the problem of race in policing is a distraction, and that it would be better to focus reforming energies on (say) the problem of mass incarceration[201] or structural inequality.[202] SQF—even absent any racial animus—cannot be

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[193] *Accord* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 161 (1997) (arguing that greater expenditures on police is always an alternative to racial profiling).
[194] Elizabeth Hinton, *'A War Within Our Boundaries': Lyndon Johnson's Great Society and the Rise of the Carceral State*, 102 J. AM. HIST. 100, 101-02 (2015).
[195] *Id.* at 111. Indeed, the larger a city's black population, the more it spent on policing through the 1970s. Pamela Irving Jackson & Leo Carroll, *Race and the War on Crime: The Sociopolitical Determinants of Municipal Police Expenditures in 90 non-Southern U.S. Cities*, 46 AM. SOC. J. 290, 302-03 (1981).
[196] *Cf.* DUNEIER, *supra* note 152, at 223 (noting that African-Americans "ghettos," as he calls them, are still characterized by a policy of "withholding resources and opportunities for poor blacks").
[197] Pager & Shepherd, *supra* note 150, at 188.
[198] Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 118 (2000) ("[S]ocial stratification is constituted through features of (1) social structure (institutions or practices) and (2) social meaning (stories or reasons).").
[199] *See* ZIMRING, CITY THAT BECAME SAFE, *supra* note 112, at 149 ("[A]ggressiveness in policing is a costly strategy because it imposes real disadvantages on exactly the minority poor who can least afford additional handicaps.").
[200] Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 L & SOC. REV. 695, 701 (2010).
[201] R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 594-58 (2003) (arguing that "the social harms of incarceration … are likely to be underappreciated in the racial profiling debate").
[202] In a very rich analysis, Mathias Risse and Richard Zechhauser posit a form of profiling that has large crime-control gains, and then argue that "much of the harm ostensibly done by profiling" should be ascribed to "systematic racism rather than acts of profiling." Mathias Risse & Richard Zechhauser, *Racial Profiling*, 32 PHIL. & PUB. AFF.

separated from larger processes of subordination along social and racial lines, and efforts to distinguish the two phenomena are deeply misguided. Equally beside the point are claims that SQF is based on an accurate generalization about racial minorities' criminality.[203] Such background regularities are themselves functions of state action (given the state's role in perpetuating racialized concentrated poverty, which is in turn correlated with crime). A policy choice that reinforces rather than dissipates the force of that generalization is hardly entitled to deference based on its putative accuracy.[204]

A legal remedy might not be able to capture all of the diverse causal pathways I have identified here. But a legal remedy should nonetheless respond in part to SQF's distinctive moral wrong by identifying those instances of policing choice that have the least positive effect on security with the largest stratification related spillovers. It is this question of the aptitude of constitutional doctrine and its subconstitutional counterpart in disparate-impact law to which I now turn.

II. Street Policing and the Limits of Constitutional Doctrine

This Part turns to the core doctrines of constitutional law invoked and applied in challenges to SQF—the Fourth Amendment law associated with *Terry* and the Equal Protection Clause doctrine that coalesces around *Feeney*. I argue that there is a mismatch between these doctrinal vehicles and the core normative challenge posed by SQF, as articulated in Part I, which renders them ill-suited to accounting for the normative challenges of SQF. Thinking about the costs and benefits of SQF in terms of Fourth Amendment and Equal Protection law reveals a troublingly asymmetrical gap cutting across both doctrinal structures: Fourth Amendment law and Equal Protection law alike employ narrow transactional frames to tally the costs imposed by state action to traditionally subordinate minorities, but are periodically open to dynamic and ecological effects in ways that serve to obscure or exculpate harms to racial minorities.

To see the mismatch between current constitutional doctrine and SQF programs in a nutshell, consider a simple hypothetical. Imagine a police force in which every officer had internalized both *Terry* and *Feeney*. Each officer, in consequence, understood that she could not make a nonconsensual street stop without the relevant reasonable articulable suspicion of criminality, and that she could not make that stop "because of,' not merely 'in spite of'"[205] the perceived racial identity of the individual to be stopped. What would change in the actual practice of SQF? Would the concerns about the volume and racial disparities in stops be assuaged? The short answer is probably not. Consistent with the weak *Terry* rule, it may well be possible for a police force to conduct a very large volume of stops. And consistent with *Feeney*, those stops might be constitutional valid even if they were distributed in a way that deepens

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131, 145 (2004). My argument here is aimed at showing this claim of separation, however, plausible in their hypothesized framework, does not hold in the world, and that the benefits of eliminating SQF would not (as they put it) be "comparatively modest." *Id.* at 149. Similarly it is not the case that "African American communities … incur short-term costs while benefiting in the long run" from SQF. *Id.* at 163.

[203] *See* sources cited *supra* in note 79.

[204] Even our impoverished Equal Protection doctrine, *see infra* Part II, does not overtly treat accuracy as a sufficient justification for the use of racial classifications. David Strauss, *The Myth of Colorblindness*, 1987 SUP. CT. REV. 99, 119.

[205] Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979)).

racial stratification. Indeed, racial disparities are particularly likely to persist if police believe that African-Americans commit a disproportionate share of offenses and thus merit a higher per-capita rate of street stops. The application of conventional constitutional doctrine under the Fourth Amendment and the Equal Protection Clause, therefore, is consistent with preservation of SQF at its present volume and as characterized by current racial disparities.

I consider first the Fourth Amendment and then Equal Protection doctrine, in each case emphasizing the parallel gaps revealed by their application to the problem of street policing.

A. The Limits of Fourth Amendment Doctrine

The Fourth Amendment law of street stops cannot impose a meaningful constraint upon SQF in minority neighborhoods characterized by concentrated poverty. To the contrary, Fourth Amendment doctrine systematically lowers the cost of such stops in comparison to others conducted outside the distinctive urban ecologies of SQF. To the extent that the Fourth Amendment law of street policing takes account of changing social and institutional contexts, though, it is thoroughly asymmetrically.

The "reasonable articulable suspicion" predicates for a *Terry* stop and a related frisk are not demanding hurdles. They focus solely on the evidentiary predicate for a stop, and ignore the manner in which a stop is conducted. *Terry*, that is, takes no account of variance in the potential dignitary and demoralization externalities imposed by aggressive or demeaning police behavior. Moreover, the Court has not defined "reasonable articulable suspicion" beyond warning that an officer must be able to articulate something more than a "hunch."[206] The Court has rather underscored that this evaluation be made under the "totality of the circumstances."[207] This gives officers a wide an array of predicate facts to choose from when making their case. With one exception, officers' subjective beliefs and knowledge are hence available as bases for a *Terry* stop,[208] even though such subjective factors are not relevant to the Fourth Amendment analysis in other cases.[209] The exception is also telling: Even where race is the real (i.e., subjective) basis of the stop, the Fourth Amendment provides no remedy where alternative factual grounds for reasonable articulable suspicion exist.[210]

Quite apart from this peculiar gerrymandering of the legally relevant grounds for evaluating the quality of a stop, officers' discretion is rarely in practice subject to rigorous adversarial testing in a subsequent criminal adjudication. Where the sole witnesses to a stop are the suspect and arresting officers, there is little reason to think the resulting testimonial contest

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[206] Terry v. Ohio, 392 U.S. 1, 22 (1968); *see also* United States v. Arvizu, 534 U.S. 266, 274 (2002) (noting that reasonable articulable suspicion "falls considerably short of satisfying a preponderance of the evidence standard").
[207] Alabama v. White, 496 U.S. 325, 330-32 (1990).
[208] United States v. Mendenhall, 446 U.S. 544, 563 (1980) ("Among the circumstances that can give rise to reasonable suspicion are the agent's knowledge of the methods used in recent criminal activity and the characteristics of persons engaged in such illegal practices.").
[209] Kentucky v. King, 563 U.S. 452, 464 (2011) ("Our cases have repeatedly rejected a subjective approach, asking only whether the circumstances, viewed *objectively,* justify the action." (citing *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006)).
[210] Whren v. United States, 517 U.S. 806, 813 (1996) (rejecting "any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers").

will result in accurate outcomes. Police have a strong incentive to color the facts in their favor, or even outright lie.[211] A recent ethnographic account of the Chicago criminal courts, for example, paints a bleak picture of judges acting "overtly racist ways in court, mocked defendant's black-sounding names or used bastardized Ebonics to imitate the voices of defendants, families and victim," judges who routinely "laughed at the fabrication of police reports as if it were a novelty, rather than an abuse of power."[212] Chicago's pathologies might be extreme. But it is hard to imagine such practices are wholly absent from other large metropolitan courts systems. In many urban jurisdictions, therefore, there will be little effectual incentive for officers to comply with *Terry*'s meager epistemic exhortation.

Nevertheless, the general trend in judicial reworkings of the *Terry* has been deflationary. I will just give one example, as it happens one that is particularly relevant to SQF. Whereas the *Terry* Court allowed the stop and frisk only when an office suspected crime was "afoot,"[213] subsequent cases extended that power to instances in which a crime has been completed.[214] While seemingly innocuous and sensible, this subtle shift in practice dramatically expands police discretion. Under *Terry*, the constellation of facts that might be invoked to justify a stop was bounded by what an officer could observe at a specific moment in time. Now, an officer can rely on a far greater universe of historical facts, available through a police forces' index of suspect descriptions, to support reasonable articulable suspicion. In a handful of controversial cases, descriptions identifying African-American suspects have been employed to conduct blanket searches. In the controversial case of *Brown v. City of Oneonta*, for example, a description of a black male suspect provoked Oneonta police to stop more than two hundred "non-white persons," including women, encountered on the streets.[215] Even absent the broad search at issue in *Brown*, a large enough pool of suspect descriptions (as is likely to be the case in large cities) means that police discretion to stop becomes orders of magnitude larger than the authority defined in *Terry*.[216]

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[211] *See* Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037, 1040 (1996).

[212] Nicole Gonzalez Van Cleave, *Chicago's Racist Cops and Racist Courts*, N.Y. TIMES, Apr. 14, 2016, at A27, http://www.nytimes.com/2016/04/15/opinion/chicagos-racist-cops-and-racist-courts.html; *see also* NICOLE GONZALEZ VAN CLEAVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 146-53 (2016) (discussing perjury and abuse by police).

[213] *Terry*, 392 U.S. at 31; *see also* United States v. Cortez, 449 U.S. 411, 417-18 (1981) (stating "[b]ased upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity."). In some instances, the Court has used language that suggests some resistance to settling on a specific quantum of suspicion. Illinois v. Wardlow, 528 U.S. 119, 123 (2000) ("While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop.").

[214] United States v. Hensley, 469 U.S. 221, 229 (1985).

[215] Brown v. City of Oneonta, 235 F.3d 769, 779 (2d Cir. 2000) (Calabresi, J., dissenting from denial of rehearing en banc) (citation and quotation marks omitted); *see also* Bela August Walker, *The Color of Crime: The Case Against Race-Based Suspect Descriptions*, 103 COLUM. L. REV. 662, 673 (2003) (describing other cases of blanket searches for black suspects, and noting the absence of even anecdotal evidence of the same happening for white suspects).

[216] Further discretion arises when police use predictive algorithms, such as PredPol, to forecast crime patterns. *See* Erica Goode, *Sending the Police before There's a Crime*, N.Y. TIMES, Aug. 15, 2011, http://www.nytimes.com/2011/08/16/us/16police.html.

Subsequent refinements to the Terry regime have rendered SQF more attractive relative to other ways of deploying policing resources. As the late William Stuntz noted, criminal procedure rules can act as "subsidies … making some kinds of … law enforcement cheaper" than others.[217] Stuntz applied this logic to make a comparison between "policing street markets," which is "cheap," for the police, and the more expensive regulation of indoor, upscale drug markets.[218] His point, though, can be extended to the neighborhood level.

For a parallel differential arises between neighborhoods of concentrated poverty and areas of comparative wealth because of two Fourth Amendment precedents. First, the Court in *Illinois v. Wardlow* held that mere presence in a "high crime neighborhood," and more particularly "an area of heavy narcotics trafficking" was "relevant" to the legality of a *Terry* stop.[219] Evidence from New York's SQF practice also demonstrates that this term is "vulnerable to subjective and highly contextualized interpretations."[220] This may be of particular concern to the extent that an increasing proportion of minorities tends to create a belief of disorderliness and criminality, as multiple studies show,[221] *Wardlow* creates an incentive to target minority neighborhoods. Indeed, even setting aside the question of how a "high crime area" is to be identified or bounded, *Wardlow* explicitly subsidizes police activity in neighborhoods of concentrated poverty in comparison to wealthy neighborhoods.

Second, the Supreme Court's recent decision in *Utah v. Streiff*[222] creates an incentive for officers to target for stops populations likely to have a higher rate of bench warrants. In *Streiff*, the arresting officer was conducting a stakeout of a house where drug sales were suspected to happen. He saw Strieff leave the house and stopped him, despite lacking reasonable articulable suspicion. Partly as a result of what the state conceded to be an illegal stop, the officer asked Streiff for identification. Upon checking with his dispatcher, the officer learned of an outstanding warrant for Streiff and arrested him. A search incident to arrest found methamphetamine and drug paraphernalia.[223] The issue before the Court was whether this evidence should be excluded as fruit of the initial illegal stop. Writing for five Justices, Justice Thomas said no. Characterizing the initial unlawful stop as "negligent" and a "good-faith" mistake,[224] the Court found that the search-incident-to-arrest that had produced the narcotics to be "sufficiently attenuated by the pre-existing arrest warrant."[225] Hence, the evidence found during the search incident to arrest was not subject to exclusion in Streiff's criminal adjudication.[226]

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[217] William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 782 (2006).
[218] William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1821 (1998).
[219] *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).
[220] Fagan & Geller, *supra* note 10, at 79. *See also* Andrew Guthrie Ferguson & Damien Bernache, *The "High Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1609-18 (2008) ("[W]hat is termed a 'high-crime area' can differ from case to case, and jurisdiction to jurisdiction.").
[221] *See supra* text accompanying notes 179 to 180.
[222] 136 S. Ct. 2056 (2016).
[223] These facts are taken from the majority opinion. *Id.* at 2060.
[224] *Id.* at 2063.
[225] *Id.*
[226] *Id.*

As Justice Sotomayor's dissent pointed out, "[o]utstanding warrants are surprisingly common."[227] A recent ethnography of misdemeanor courts in New York illustrates how courts and prosecutors generate a large volume of outstanding warrants for failures to appear at repeatedly rescheduled hearings, and then seek dispositions with little effect other than to facilitate later arrests.[228] In *Streiff*, Justice Sotomayor did not contextualize the use of outstanding warrants in the SQF context. Rather, she cited evidence gathered by the Justice Department in Ferguson, MO, and explained that the "astounding numbers of warrants can be used by police to stop people without cause," and flagged that "it is no secret that people of color are disproportionate victims of this type of scrutiny."[229] Police, indeed, have long been cognizant of the strategic potential for outstanding warrant-checks during street stops and have strategically exploited it.[230]

The decision in *Streiff* creates a new incentive for police to engage in "negligent" stops,[231] lacking even with the minimal accouterments of reasonable articulable suspicion, in order to check for warrants. This incentive becomes more powerful as the expected number of such outstanding warrants in a neighborhood increases. Here then is yet another incentive pressing police to focus street patrols on neighborhoods of concentrated poverty: Even if they cannot muster the minimal evidentiary predicate of *Terry*, officers have a sure-fire way of showing 'progress,' simply by making illegal stops and arresting based on either outstanding warrants or contraband found during a search incident to arrest. *Streiff* allows officers to employ stops even absent *Terry* suspicion and demonstrate 'success.'

Decisions such as *Wardlow* and *Streiff* mean that current Fourth Amendment jurisprudence systematically tilts in favor of SQF. The doctrinal framework at work in these cases minimizes both proximate and distant harms to individuals stopped. It also ignores the ecological harms and dynamic stratification effects associated with SQF. Indeed, it seems fair to say that the vocabulary of the Fourth Amendment does not at present contain the resources even to account for those harms, let alone hold them in the balance with *Terry* stops' positive, crime-control effects. One indication of this is that Justice Sotomayor's comments about the ecological context of street policing were so striking, and so dissonant from the normative verbiage of the Court's Fourth Amendment cases, that they generated media attention.[232] If the mere fact a Justice is cognizant of the larger policy context in which a legal question arises stimulates the chattering classes into action, it is because the modal Fourth Amendment decision is hermetically detached from the distinctive ecological and dynamic costs flowing from urban policing.

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[227] *Id.* at 2068 (Sotomayor. J., dissenting).
[228] Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 659 (2014).
[229] *Streiff*, 136 S. Ct. at 2068 (Sotomayor. J., dissenting).
[230] The link between *Terry* stops and outstanding warrants is not a new one. In the late 1990s, New York police realized that quality-of-life stops could be leveraged into frequent arrests that removed many from the streets. Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 341 & n.210 (1998) (describing Mayor Rudy Giuliani's endorsement of this tactic in 1998).
[231] Equally, *Strieff* is an incentive for police departments to fail to train adequately their officers on the factual predicates of a *Terry* stop.
[232] Adam Liptack, *In Dissents, Sonia Sotomayor Takes On the Criminal Justice System*, N.Y. TIMES, July 4, 2016, at A11, http://www.nytimes.com/2016/07/05/us/politics/in-dissents-sonia-sotomayor-takes-on-the-criminal-justice-system.html.

Nevertheless, that jurisprudence is not wholly bounded by a narrow, transactional focus. Rather, the Court selectively and asymmetrically accounts for dynamic effects. Consider the *Streiff* Court's treatment of the exclusionary remedy. The Court's foundational decisions about the scope of that remedy focus on its effects on officers' incentives. The Court has repeatedly stressed that it is willing to allow the costly exclusionary remedy only when its downstream incentive effects in relation to police compliance with the Fourth Amendment are substantial.[233] Notionally acknowledging this point, the *Streiff* Court stated that only "purposeful or flagrant" police misconduct can be deterred.[234] Why this would be so is not clear. Tort liability for negligence, for example, can easily be premised on a deterrence theory. In *Streiff* itself, the Court gave no thought to the possibility that its rule might elicit less care by officers in their use of *Terry* stops—let alone a differential impact in neighborhoods characterized by high rates of outstanding or bench warrants.

Streiff suggests that the Court is willing to think about the dynamic effects of the exclusionary rule on incentives when doing so narrows Fourth Amendment remedies, but is not willing to entertain a dynamic analysis when doing so would expand those remedies.[235] In other cases, the Justices have similarly being willing to account for increases in police professionalism.[236] But judicial decisions on the exclusionary rule systematically ignore potential institutional problems of police perjury and abusive conduct.

There is, in short, little reason to expect that the Court's current Fourth Amendment doctrine will provide a lens for capturing the distinctive wrong of SQF. Indeed to the extent it nudges police conduct of urban street policing in one way or another, the Court has abetted the core wrong of SQF more than it has ameliorated it. For this reason, it seems wiser to analyze SQF in terms of its racial impact—a topic addressed at length below and in Part III.

B. The Limits of Equal Protection Doctrine

The Supreme Court's decisions on race and the Equal Protection Clause provide no better traction on the distinctive wrongs of SQF. To the contrary, thinking about racial equality doctrine through the lens of SQF illuminates a gap between the Court's articulated justifications and its current doctrinal forms. To take seriously the normative concerns I have flagged would mean treating SQF as a paradigmatic Equal Protection violation.

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[233] *See, e.g.,* United States v. Leon, 468 U.S. 897, 917 (1984) ("Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them."); *see also* Messerschmidt v. Millender, 132 S. Ct. 1235, 1246 (2012) (reiterating *Leon*'s deterrence-based logic); *Davis v. United States,* 564 U.S. 229, 236–237 (2011) (same).

[234] Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).

[235] In a similar vein, David Sklansky has pointed out that the Court toggles without any principled basis between rules and standards in Fourth Amendment case-law in ways that inure to the government's benefit. David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 294-98 (1997).

[236] Hudson v. Michigan, 547 U.S. 586, 598 (2006) ("Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline.").

Two core prohibitions are embodied in current Equal Protection Clause jurisprudence. First, explicit racial classifications trigger strict scrutiny, and require government to "demonstrate with clarity" that its "'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of its purpose.'"[237] In the absence of an explicit racial classification,[238] a government action motivated by a "discriminatory purpose" with an adverse effect on a discrete protected class establishes an Equal Protection Clause violation. But the Court's gloss on discriminatory purpose, promulgated in *Personnel Administrator of Massachusetts v. Feeney*, is cast in exacting terms. It compels litigants to show that a state actor "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[239] In contrast, a disparate impact on a racial group alone does nothing to impugn the constitutionality of a state action.[240]

In the criminal justice context, this doctrinal framework leaves the state with a largely free hand. At the Supreme Court, few Equal Protection case have arisen in the criminal justice context. Only one recent case has grappled with a racial classification. In *Johnson v. California*, a state prison used a racial classification to sort inmates temporarily before cell assignments could be determined.[241] The Court rejected the state's call to derogate from strict scrutiny.[242] In contrast, the Court declined to grant certiorari in *Brown v. City of Oneonta*, a case that would have required it to consider whether the Second Circuit had correctly held that a race-based suspect description was not a "racial classification" subject to strict scrutiny.[243]

Under *Feeney*, there are a handful of cases in which prosecutorial use of preemptory challenges is held to be racially motivated, and thus to violate the Equal Protection Clause.[244] But cases involving more systemic challenges to the operation of the criminal justice institutions have been wholly absent from the Court's docket since the 1987 case of *McClesky v. Kemp*.[245] In large measure, this is because *McCleskey* established a near-insurmountable barrier to such

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[237] Fisher v. Univ. of Texas at Austin, 136 S. Ct. 2198, 2208 (2016) (quoting *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2418 (2013)).

[238] This is a bit imprecise. "Often, courts do not approach the question whether a statute uses express racial classifications on formal grounds at all. Instead, the grounds of decision are normative." Primus, *supra* note 38, at 509.

[239] 442 U.S. 256, 279 (1979) (footnote and citation omitted). The same standard applies to both religious and racial discrimination. Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009).

[240] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) (citing *Washington v. Davis*, 426 U.S. 229 (1976), for the proposition "that official action will not be held unconstitutional solely because it results in a racially disproportionate impact").

[241] Johnson v. California, 543 U.S. 499, 502-03 (2005) (describing prison policy).

[242] *Id.* at 505 (holding that "*all* racial classifications [imposed by government] ... must be analyzed by a reviewing court under strict scrutiny" (citation and quotation marked omitted).

[243] Brown v. City of Oneonta, 221 F.3d 329, 334 (2d Cir. 2000), *cert denied* 534 U.S. 816 (2001).

[244] Such cases are rare, but not unknown. In the 2015 Supreme Court Term, for example, the Court found that the Georgia Supreme Court had made a "clearly erroneous" decision when it declined to find that prosecution use of preemptory strikes in a capital case was *not* animated by a discriminatory purpose. Foster v. Chatman, 136 S. Ct. 1737, 1747-55 (2016). This is an extremely rare ruling, and is explained by the graphic evidence of naked racial reasoning (inadvertently) discovered by the defendant. *Id.* at 1744. This is not the only instance, though, in which a finding of discriminatory purpose in the use of preemptory challenges has led to a conviction being vacated. See, e.g., *Snyder v. Louisiana,* 552 U.S. 472, 478 (2008).

[245] 481 U.S. 279 (1987).

challenges.[246] In that capital case, the Court declined to infer discriminatory purpose from unrebutted statistical evidence that Georgia's capital punishment treated defendants differently based on their race and the race of their victim.[247] Among the reasons the Court offered for declining to entertain even powerful statistical evidence,[248] it worried that "if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty," including noncapital sentencing.[249] This concern about what Justice Brennan acerbically characterized as "a fear of too much justice"[250] reoccurs in other instances in which criminal justice disparities have been challenged.[251]

After *McCleskey*, absent the miraculous happenstance of testimonial or documentary evidence of bias—a luck that befell plaintiffs in the challenge to New York's SQF policy[252]—the courthouse door is effectively shut to discriminatory-purpose challenges in the criminal justice context.[253] *McCleskey*, in tandem with the narrow definition of "racial classifications" evinced by the Court's treatment of *Johnson* and *Brown*, drastically narrows litigants' opportunities to challenge the role of race in criminal justice institutions. They evince no concern for either the

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[246] *McCleskey* was quickly pilloried, and has been much criticized since. *See, e.g.,* Randall L. Kennedy, McClesky v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1389 (1988) (compiling earlier criticisms, and noting that "Professor Bedau does not exaggerate when he compares *McCleskey* to *Plessy* and *Korematsu*."). Even Justice Powell, who proved a fifth vote in the case, expressed regret for that vote. David Von Drehle, *Retired Justice Changes Stand on Death Penalty*, WASH. POST, June 10, 1994, at A1. It is not without interest that another case in which Justice Powell cast the deciding vote, and later expressed regret, has since been overruled. Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong*, NAT'L L.J., Nov. 5, 1990, at 3 (noting Powell's regret at having cast a deciding vote in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which was overruled in *Lawrence v. Texas*, 539 U.S. 558 (2003)).

[247] *McCleskey*, 481 U.S. at 286-87. The race-of-the-defendant effect identified in the Baldus study, however, was relatively small.

[248] Although *McCleskey* has been much criticized, it is still worth reiterating here that many of its reasons for rejecting statistical evidence are plainly spurious. For example, the Court asserted that an unlawful purpose might more safely inferred if there were "fewer entities" and "fewer variables." *Id.* at 294-95. But the confidence of estimated generated by regression increases with size—it does not decrease. And the more alternative explanations for variance exist, the more plausible defenses the state has. Further, the Court stated that "discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused." *Id.* at 297. This is hard to understand: In the absence of discretion, there would be no opportunity for a state actor to take a decision motivated by a discriminatory purpose. To insulate discretionary decisions from review for such invalid purposes is to say in effect that there is no discriminatory-purpose liability in the criminal law.

[249] *Id.* at 315 & n.38.

[250] *Id.* at 339 (Brennan, J., dissenting) ("The Court next states that its unwillingness to regard petitioner's evidence as sufficient is based in part on the fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing…. [S]uch a statement seems to suggest a fear of too much justice.").

[251] *See, e.g.,* Lewis v. Casey, 518 U.S. 343, 376 (1996) (noting "the potentially radical implications" of inferences from statistical evidence of racial disparities in the criminal-justice context).

[252] Floyd v. City of New York, 959 F. Supp. 2d 540, 603 (S.D.N.Y. 2013) (quoting the highest ranking uniformed officer of the New York Police Department as mandating stops of "young black and Hispanic youths 14 to 20").

[253] The Court has also limited discovery respecting evidence of racial bias in the prosecutorial context to instances in which a defendant can already point to clear evidence of bias. United States v. Armstrong, 517 U.S. 456, 459, 470 (1996). *Armstrong*'s somewhat circular standard has been roundly criticized. *See, e.g.*, Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605, 606 (1998) (contending that standard established by the Court in *Armstrong* is nearly impossible for many defendants with meritorious claims to satisfy).

ecological spillovers of enforcement actions onto larger racial cohorts. And much like the Fourth Amendment cases canvassed above, they are heedless of dynamic effects—except perhaps maintaining a concern for maintaining the criminal-justice status quo. Finally, neither the rule against racial classification nor the bar to discriminatory motivations takes into account the possibility that officials are aware that a policy pursued for nonracial ends has a wholly foreseeable spillover effects on other members of a racial or ethnic cohort,[254] or the possibility that race is so pervasively correlated with nonracial traits—such as residence, socioeconomic status, and the like—that official decision-makers simply cannot disentangle racial from nonracial criteria.[255]

But there is something of a puzzle here. In glossing the Equal Protection Clause, the Court has invoked ideas of racial stigma,[256] racial balkanization,[257] and the dignitary interest in being judged on one's own merits.[258] It is not hard to see that SQF, as described in Part I, implicates each of these concerns. It is, most importantly, expressly predicated on an inference from race to criminality.[259] It is indeed explicitly defended on a generalization—a stereotype about racial minorities that is not merely derogatory, but that has historically been a keystone of discriminatory legal architectures. And its advocates make no bones that the price of public safety will be borne disproportionately by only some, and only because of the color of their skin. Further, it thrives upon the festering racial segregation that scars our cities. Worse, it reinforces that segregation to the extent that minorities are subject to increased stops when they leave their neighborhoods. Quite literally, it echoes and embeds the balkanization of our cities into black and white quarters. And thanks to the weak evidentiary threshold of *Terry*, it enables police to engage in aggregate deprivations of individual liberty that are predicated only fractionally on individual behavior and largely on race and place. If one takes the Court's justifications on face value, policing tactics such as SQF, in short, ought to be the sine qua non of what the Equal Protection Clause protects.

Equal Protection doctrine, in conclusion, provides the *moral justifications* but not the *doctrinal tools* for dealing with SQF. It is beholden to the default narrow and atomistic transactional frame of constitutional law, which shears away both ecological and dynamic contexts. And ultimately, it lacks the courage of its putative convictions. For these reasons, it is not an instrument fit for the task of fixing SQF.

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[254] *See Siegel*, *Equality Divided*, *supra* note 40, at 47 (drawing parallel between *Feeney* and the doctrine of double effect).

[255] Strauss, *supra* note 204, at 114-15 (discussing the cognitive consequences of such pervasive correlations).

[256] *See, e.g.,* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.").

[257] *See, e.g.,* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 746 (2007) (expressing concern that the use of racial classifications will exacerbate "race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict" (citation omitted).

[258] *See, e.g.,* Rice v. Cayetano*,* 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.").

[259] *See supra* sources cited in note 79 (quoting, *inter alia*, New York Police Commission Ray Kelly to the effect that it makes sense to stop minorities because minorities tend to commit crime).

III. The Disparate Impact Lens on SQF

This Part turns from critique to a more constructive proposal. Not all instruments to mitigate moral wrongs have to reside in the Constitution. So I look elsewhere. I argue that a disparate impact framework of liability, now found in federal statutes and state law, provides a better—but not a perfect—framework for analyzing urban street-policing policy. The purpose of the disparate impact lens advanced here is diagnostic and distinctly second-best: It is second best in the sense that it does not track the loose cost-benefit analysis that is fleshed out in Part I: That cost-benefit analysis, in my view, impugns all programmatic use of SQF in racially diverse cities at present. More modestly, a disparate impact lens provides a way to identify a class of instances in which a police department's programmatic use of *Terry* stops is especially likely to be unjustified because characterized by its distinctive ecological and dynamic harms. A disparate impact lens, that is, flush out instance in which those harms are at an acme.

Formally, a disparate impact framework identifies a set of cases in which the likely proximate costs of SQF are concentrated on minority communities without an adequately supported justification. The analysis developed in Part II suggested that the proximate costs of SQF—which include the hassle and humiliation of stops—are only a fraction of the total costs of SQF. The latter comprise the larger set of dynamic costs to individuals, families and communities. If the proximate costs of SQF are highly concentrated, it is likely that aggregate costs are also extremely concentrated. Where the state cannot identify a strong public policy justification for that concentration, SQF should be ranked as legally problematic. More specifically, where the state cannot adequately make the case that the concentration of SQF responds to a real crime problem, and *in fact* mitigates that problem, it should be required to reconsider its policing strategy. In this sense, the avoidance of disparate impact is a modest, second-best demand, which directs attention at the right elements of policing strategy.[260] It invites remedial attention to systemic rather than individualistic pathologies. And it avoids the moralizing, and potentially polarizing, language of individual blame and liability.

To flesh out this alternative lens onto SQF, this Part defines and defends disparate impact liability as a legally available approach for analyzing policing decisions. In particular, I develop the reasons for which disparate impact is superior to the currently dominant constitutional approaches described in Part II. Having dealt with potential objections to its translation to the policing context, I conclude by sketching how in practice disparate impact liability can be applied to SQF. In practice, a disparate impact analysis requires econometric studies of the aggregate data about stops, frisks, and other outcomes. I set forth three general lines of inquiry that should be applied to such aggregate data to determine whether a disparate impact exists. Together, these empirical strategies provide a template for making disparate impact an effective and practicable instrument of legal reform.

A. The Availability of Disparate Impact

The theory of disparate impact liability in race discrimination cases is associated with the Supreme Court's construction of Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke*

[260] As such it might be applied more generally to policing tactics, including hot spot policing.

Power Company.[261] In a somewhat narrowed form, it remains available to plaintiffs in employment discrimination cases.[262] Disparate impact is also a cognizable theory of liability under the Age Discrimination in Employment Act[263] and the Fair Housing Act ("FHA").[264] It can be understood as either an instrument for rooting out bad intent, or as a freestanding ground of liability.[265] Disparate impact is in contrast a 'road not taken' in Equal Protection law.[266]

Disparate impact in the policing context is available under two sets of laws. *First*, Title VI of the Civil Rights Act of 1964 prohibits "discrimination under any program or activity" receiving federal funds.[267] Pursuant to an explicit grant of rule-making authority under the statute, federal agencies, including the Department of Justice, have promulgated regulations prohibiting disparate racial impacts as well as disparate racial treatment.[268] The Justice Department's disparate-impact regulation applies to "any program for which Federal financial assistance is authorized under a law administered by the Department."[269] Because local police departments receive federal funding from "dozens" of separate programs, many administered by the Department of Justice,[270] the Title VI bar on disparate impact applies to most police forces. That prohibition, however, may be enforced by public suits but not via private right of action.[271] The New Orleans consent decree and the Baltimore settlement obtained by the Justice Department, for example, both invoke Title VI authority, albeit in nebulous terms.[272]

Second, at least two states prohibit policing measures with disparate racial impacts. The Illinois Civil Rights Act, tracking Title VI's language and effect, prohibits "discrimination under any program or activity on the grounds of that person's race, color, national origin, or gender."[273] In at least one case, it has been applied to policing decisions.[274] California's law, which applies to all state programs, prohibits "criteria or methods of administration that … have the purpose or

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[261] 401 U.S. 424 (1971).
[262] *See* Ricci v. DeStefano, 557 U.S. 557, 584 (2009) (requiring "a strong basis in evidence" to shield employer actions "to avoid violating the disparate-impact provision: from disparate treatment liability under Title VII).
[263] Smith v. City of Jackson, 544 U.S. 228, 240 (2005) (interpreting 29 U.S.C. § 623(a)).
[264] Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2513 (2015) (interpreting 42 U.S.C. §§ 3604(a) & 3605(a) to permit disparate impact liability).
[265] Primus, *supra* note 38, at 520-24 (exploring both accounts).
[266] *See* Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1131-35 (1997) (describing rejection of disparate impact).
[267] 42 U.S.C. § 2000d.
[268] *See, e.g.,* 28 C.F.R. § 42.104(b)(2) (2013) (Department of Justice); 49 C.F.R. § 21.5(b)(2) (2012) (Department of Transportation); Implementation of the Fair Housing Act's Discriminatory Effect Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. §§ 100.5, 100.70, 100.120, 100.130, 100.500).
[269] 28 C.F.R. § 42.103
[270] Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. Rev. 870, 872 (2015)
[271] Alexander v. Sandoval, 532 U.S. 275 (2001). Prior to *Sandoval*, private plaintiffs challenged racially disparate policing using Title VI in Maryland State Conf. of NAACP Branches v. MD Dep't of State, 72 F. Supp. 2d 560 (D. Md. 1999).
[272] New Orleans Decree, *supra* note 19, at 2; Baltimore Agreement, *supra* note 22, at 1.
[273] 740 ILCS 23/5 (West 2012); *See* Jackson v. Cerpa, 696 F. Supp. 2d 962, 694 (N.D. Ill. 2010) ("[ICRA] was expressly intended to provide a state law remedy that was *identical* to the federal disparate impact canon."); accord McFadden v. Bd. of Educ. for Illinois Sch. Dist. U-46, 984 F. Supp. 2d 882, 890 (N.D. Ill. 2013).
[274] For an example of a civil suit based on this provision, see Central Austin Neighborhood Ass'n v. City of Chicago, 2013 Il App. (1st) 123041, ¶ 23 (Nov. 13, 2013) (refusing to dismiss suit on political question grounds).

effect of subjecting a person to discrimination on the basis of ethnic group identification, religion, age, sex, color, or a physical or mental disability."[275]

Disparate impact is commonly framed as a three-step analysis. In the employment-discrimination context, a prima facie case is established by showing that a specific employer practice caused racial disparities in a salient outcome measure.[276] A racial disparity is measured by comparing employment rates in an employer's workforce with the qualified labor pool[277] or the applicant pool,[278] rather than to the general population. Agencies interpreting Title VII have long used a four-fifth rule to single out cognizable disparities.[279] The Court has approving cited this interpretation, adding that a simple "significant statistical disparity, and nothing more" is needed at the threshold.[280] This prima facie case, however, may be rebutted by evidence that "the challenged practice is job related for the position in question and consistent with business necessity."[281] This defense, however, is overcome if there is a legitimate alternative employment practice that will result in less discrimination.[282]

B. The Comparative Advantage of Disparate Impact

Black-letter constitutional law largely ignores the ecological and dynamic aspects of SQF. It therefore fails to provide a useful analytic lens for determining when and how urban street policing goes off the rails. Why would a disparate impact lens do any better? It is not a form of cost-benefit analysis of the kind developed above, after all. Rather, disparate impact isolates the proximate costs of a policy (excluding, that is, its social, familial, and intergenerational effects) and compares to the affirmative policy justifications. In the policing context, disparate impact thus weighs a subcategory of the costs imposed on minority populations against almost all the crime-control related benefits of the policy. Given its failure to capture the full range of costs adumbrated in Part II, and given that it will likely account for most of the benefits of SQF, a disparate impact lens is likely to be radically underinclusive: It will only capture a subset of cases in which SQF imposes a moral wrong.

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[275] Cal. Code Regs. tit. 22, § 98101(i)(1). Subsection c of the same provision also makes it unlawful to "provide a person with an aid, benefit or service that is not as effective in affording an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others. In some situations, identical treatment may be discriminatory."

[276] 42 U.S.C. § 2000e-2(k)(1) (requiring the identification of "a particular employment practice . . . causes a disparate impact"). The causation element reflects the Court's ruling in *Wards Cove Packing Co. v. Atonio*, which has been abandoned in other respects. 490 U.S. 642, 657 (1989) ("As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack.").

[277] *See, e.g.,* Carter v. Ball, 33 F.3d 450, 456 (4th Cir. 1994) ("In a case of discrimination in hiring or promoting, the relevant comparison is between the percentage of minority employees and the percentage of potential minority applicants in the qualified labor pool."); *accord* Lopez v. Laborers Int'l Union Local No. 18, 987 F.2d 1210, 1216 (5th Cir. 1993); Shidaker v. Tisch, 833 F.2d 627, 631 (7th Cir. 1986).

[278] *See, e.g.,* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (U.S. 1975) (requiring that plaintiffs "show[ ] that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants") (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (U.S. 1973)); Connecticut v. Teal, 457 U.S. 440, 458 (U.S. 1982) (comparing racial composition of those entering the selection process with that of people ultimately promoted).

[279] 29 C.F.R. § 1607.4(D) (1978).

[280] Ricci v. DeStefano, 557 U.S. 557, 587 (2009) (internal citations omitted).

[281] 42 U.S.C. § 2000e-2(k)(1).

[282] *Id.*

Nevertheless, there are three reasons for thinking that disparate impact is a better fit for identifying the distinctive moral wrong of SQF identified in Part I. *First*, disparate impact liability is at least focused on aggregate, rather than individual, outcomes. It is panoramic rather than microscopic. The institutional focus of disparate impact widens the array of relevant institutional decisions that can be considered as causes of harm. Policing is not simply a matter of officers on the street, making ad hoc decisions. Like any other complex organizations, a police force is channeled through policies, practices, and bureaucratic norms developed at competing institutional nodes, from city hall to chief of police's office to the precinct-house. The capacious lens used by disparate impact captures more relevant state actions than an approach focused on bad motives.

Analysis under a wide-angle disparate impact rubric is also not limited to the consequences of a discrete individual's action. It focuses more capaciously on all "the *effects* of [a] … *practice*."[283] SQF, as I have described it in Part I, need not rest on pernicious individual motivations to do a distinctive moral wrong. Rather, that wrong flows from the "effects" of institutional policies and practices. Disparate impact is sensitive to a wide range of effects, and is in particular able to capture the interaction between past distributions and present policing practice. An institutional practice, such as SQF, will produce different effects depending on the context to which is applied. When employed in a fashion that tracks patterns of existing racial segregation, its race-related patterns will be different from an application that cuts across extant forms of racial stratification. This difference is captured in the broad scope of disparate impact analysis, which accounts for history, as well as institutional context, in a way that discriminatory treatment analysis cannot.

Second, disparate impact analysis focuses attention on the morally relevant question of whether the crime-control benefits of the policy *as a whole* justify its costs. Once a racial effect is identified at the threshold step, the second step of the disparate-impact analysis involves a consideration of the affirmative justifications for the disparity. In effect, the analysis weighs positives against negatives. In the discriminatory treatment context, by contrast, there is no opportunity to identify or weigh these costs. As a result, when a race-based criteria is used, as in *Brown v. City of Oneonta*,[284] a Court inclined to permit race-based suspect descriptions as cost-justified will find it easier to avoid strict scrutiny by declining to perceive a racial classification at work in the first instance.[285] On the other side of the ledger, disparate-impact analysis also considers the aggregate outcomes of a policy. In the SQF context, for example, this would mean counts of the numbers of different racial groups who are stopped. Again, it is important to emphasize that this is not a full tally of the ecological and dynamic spillovers from aggressive SQF policing. But it accounts for of the policy's sheer size—and hence reflects (very approximately) the effect of a large number of minority stops on self-worth, residential patterns, and stereotypical assumptions about the links between race and crime far better than a legal framework pinched to fit cleanly around individual motives.

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[283] Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1345 (2015) (second emphasis supplied).
[284] 221 F.3d 329, 334 (2d Cir. 2000), *cert denied* 534 U.S. 816 (2001).
[285] Indeed, the *Brown* Court's argument that no racial classification was at work because the suspect description also mentioned gender, as Richard Primus explains, simply "cannot be right," because it implies that "what would be a racial classification standing alone is not a racial classification if the racial criterion is combined with nonracial criteria." Primus, *supra* note 38, at 512.

Finally, disparate impact liability obviates the need to make controversial judgments about individuals' intentions, beliefs, and attitudes. By focusing attention on these elusive psychological facts, both *Terry* and *Feeney* invite self-deception and perjury. The *Feeney* framework in particular also ratchets up emotional stakes by predicating a remedy on the finding that a specific person is motivated by discriminatory intent, a standard that has the potential to induce backlash.[286] By training upon consequentialist criteria instead, the disparate impact standard obviates loaded, and easily deflected, allegations of bad intent, even as it draws salutary attention to the deeper and more enduring costs of SQF.

To be clear, no judicially enforceable theory of liability will provide a panacea to the problem of concentrated racialized poverty, or the complex network of state action and inaction that created and perpetuated it. The case for disparate impact liability in the policing context rests on the more modest claim that it captures a wider array of morally relevant costs and benefits than the available alternatives. It does not imply perfection.

C. The Objections to Disparate Impact in the Policing Context

Three objections to the application of disparate impact liability to the policing context are worth resolving before turning to the nitty-gritty of application. They concern its constitutionality, its efficacy, and the availability of popular support.

To begin with, there has recently been a question about the constitutionality of disparate impact liability, even though in its infancy in the 1970s it was understood as an important strand of Equal Protection law.[287] Paradoxically, at least one member of the Court has intimated that disparate impact might itself violate the Equal Protection Clause because it forces race consciousness.[288] Nevertheless, more recent precedent suggests that there is "no constitutional problem in the *existence* of disparate impact prohibitions," but that "those prohibitions might raise such problems in their *application*."[289] In particular, the Court has suggested that the second step of the analysis—the proffer of legitimate justifications for a disparity—is key.

In glossing the FHA's disparate impact prong, the Court in its 2015 *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* opinion cautioned that constitutional problems would arise if "liability were imposed based solely on a showing of a statistical disparity."[290] Rather, it is only "artificial, arbitrary, and unnecessary barriers" that

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[286] External control efforts, such as individual blame and liability, tend to increase certain forms of racial bias. See Lisa Legault, Jennifer N. Gutsell, & Michael Inzlicht, *Ironic effects of antiprejudice messages how motivational interventions can reduce (but also increase) prejudice*, 22 PSYCH. SCI. 1472, 1472-75 (2011).

[287] Siegel, *Equality Divided*, *supra* note 40, at 11-13 (noting that in the 1970s, "equal protection law did not sharply distinguish proof of purpose and proof of impact").

[288] Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) ("Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.").

[289] Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After Inclusive Communities*, 101 CORNELL L. REV. 1115, 1129 (2016).

[290] 135 S. Ct. 2507, 2522 (2015).

legitimately and constitutionally trigger such liability.[291] This places great stress on the opportunity for a defendant in a disparate impact proceeding to point to "[non-]arbitrary" and "[]necessary" grounds for a justification.[292] More specifically, a regression analysis used to identify a race effect must include controls for *legitimate* justifications for a disparity.[293]

A second concern raised by a number of recent commentators is that "the disparate impact theory has produced no substantial social change and there is no reason to think that extending the theory to other contexts would have produced meaningful reform."[294] A common thread uniting these concerns is the premise that courts are unwilling to "broadly restructure social institutions"[295] or interfere with the private intra-firm ordering.[296]

To be sure, the frailty of the judicial will to enforce constitutional norms on behalf of disfavored groups can almost never be overstated. Nevertheless, blanket pessimism is excessive for two reasons. To begin with, several cities are already operating under consent decrees or settlements that either include a monitor or envisage much judicially supervised reorganization of street policing.[297] Further, there is no reason to think that municipal officials involved in the negotiation and operationalizing of these deals lack any interest in mitigating the fierce public pressure to diminish the racial tensions of urban policing. The application of disparate impact liability provides a more cogent way for them to understand how to do so than available alternatives. In addition, precise agency regulations, such as those issued in 2015 under the FHA, have the potential "to stabilize disparate impact law and to provide clarity to regulated entities subject to different judicial standards."[298] There is no reason such stabilization cannot be achieved in the policing context through more specific Justice Department regulations. Indeed, the more granular account of how to think about disparate impact in the context of policing data that follows in Part III.C itself can be read as providing a framework for such regulations.

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[291] *Id.* (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

[292] An alternative formulation of this concern is that disparate impact not "operate to encourage regulated entities to classify individuals based on race." Bagenstos, *supra* note 289, at 1116. Whereas in the employment context, the shadow of disparate impact liability might push employers toward the use of quotas, it is hard to see how disparate impact would have this effect in the policing context. To the contrary, in the absence of disparate impact, SQF is arguably best understood as motivated by implicit quotas.

[293] *Bazemore v. Friday*, 478 U.S. 385, 400-01 & n. 10 (U.S. 1986) (requiring controls for "major factors"). Lower courts have stressed the need to avoid controls for anything other than a legitimate justification. See, e.g., *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 280 (4th Cir. 2005) ("[S]tatistical evidence does not have to control for every single variable in order to be sufficient.").

[294] Selmi, *supra* note 53, at 705. For similar diagnoses, see Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 45 (2006) [hereinafter "Bagenstos, *Structural Turn*"] ("Disparate impact doctrine has been in a massive decline over the past few decades"); Tracy E. Higgins & Laura A. Rosenbury, *Agency, Equality, and Antidiscrimination Law*, 85 CORNELL L. REV. 1194, 1204-07 (2000) (similarly bemoaning "the decline of disparate impact").

[295] Olatunde Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 396 (2007).

[296] Selmi, *supra* note 53, at 708 ("Taking seriously the disparate impact theory would have posed a substantial challenge to existing practices, which is precisely why the theory never has been taken particularly seriously by courts"); *see also* Bagenstos, *Structural Turn*, *supra* note 294, at 45 (making a similar point by noting that courts dislike any departure from a "fault-based" theory of discrimination liability).

[297] *See supra* text accompanying notes 16 to 25.

[298] Olatunde Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125, 127 (2014).

Finally, it might be argued that broad support for aggressive street policing within minority communities provides a sufficient justification for racially disparate allocation of *Terry* stops.[299] If the very communities that suffer the costs of intensive policing also clamor for such policing, the moral case for disparate impact liability seems thin indeed. Yet evidence for community demand in the context of SQF is thin on the ground. Protests in Chicago, New York, and Philadelphia about stop and protest have been led by organizations from minority communities.[300] More generally, to the extent that African-American political leaders have sought increased policing, there have been "accompanying demands to redirect power and economic resources to low-income minority communities."[301] But "[w]hen blacks ask for *better* policing, legislators tend to hear *more* instead."[302] Disparate impact liability is more sensitive to the marginal crime-control costs benefits attached to SQF, as well as its costs. It is therefore a sensible way to reconcile minority communities' demands for both better public security and also freedom for excessive street policing cannot.

D. Disparate Impact In Action

This final section sketches how a disparate impact analysis of SQF data might be put into action. Its twofold aim is to show that such inquiries are feasible, and to start to make progress on some of the knotty theoretical puzzles raised by disparate impact's implementation. I focus on a threshold question. The settlements in Philadelphia and Chicago, which were both reached without information-generating litigation, require collection of extensive data concerning the timing, justifications, suspect demographics, and consequences of stops.[303] How might this data be interrogated for evidence of disparate impact? How concretely, that is, is it possible to inquiry into whether a discrete practice or policy causes a racially disparate impact that is not justified on legitimate and necessary grounds be executed? In answering these questions, I focus on the theoretical questions of what kinds of disparities should count, not more technical questions of econometric identification strategy.

A disparate racial impact can result from one of three elements of policing strategy. Each warrants separate and distinct analysis. At each level, racial disparities salient to the distinctive moral wrong of SQF can emerge. And at each level, the state can also avail itself of different legitimate justifications for the disparity. If anything, the feasible analytic tools favor the state. Disparate impact, in the fashion developed here, is likely underinclusive insofar as it does not capture *all* the ecological and dynamic externalities from SQF. The availability of plural tests to capture a racially disparate effect only partially compensate for this lacuna. Nevertheless, it is the

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[299] *See, e.g.,* Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U. CHI. LEGAL F. 197, 197-98 (celebrating African-American communities' demand for more policing).

[300] Leland & Moynihan, *supra* note 13, at A15 (noting African-American leadership in protests in New York); Leonor Vivanco, *5 young Chicago activists answer 5 questions about the movement*, Redeye (Chicago), Feb 8, 2016, http://www.redeyechicago.com/news/redeye-five-activists-answer-five-questions-20160122-story.html (profiling leaders of anti-SQF movement in Chicago).

[301] Elizabeth Hinton, Julilly Kohler-Haussman, & Vesla Weaver, *Did Blacks really Endorse the 1994 Crime Bill?*, N.Y. TIMES, Apr. 13, 2016, at A25.

[302] *Id.* (emphasis in original); *see also* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 134-38, 322-23 (2016) (tracing the "war on black crime" back to the Nixon and Reagan Administration's policies).

[303] Philadelphia Settlement, *supra* note 18, at ¶ II.B; Chicago Settlement, *supra* note 17, at ¶ I.1.

extant doctrinal framework for the problem, and likely superior to anything that can be created from scratch in current political conditions.

For the purpose of illustration here, I hypothesize a municipal jurisdiction that has just entered a consent decree. We can assume that like New York, Philadelphia, and Chicago, this municipality is racially and economically segregated, with race and socioeconomic status closely covarying. We can also assume that the city is sliced into precincts, which are the foundational elements of the geographic allocation of police. The municipality's SQF, as in real-life cases, is directed at neighborhoods of concentrated poverty and high crime—which are also majority minority. The municipality is required to gather data about stops of the kind elicited by the Chicago and Philadelphia settlements. I will assume police collect that data faithfully.[304] I focus here on the legal question of what questions can be asked of the resulting data.

I discuss each three levels of analysis in turn. Each time, I identify the relevant element of state policy or practice; the outcome across which racial disparities may be observed; and the range of feasible justifications a municipality might offer. Where possible, I also note if the question has been examined in an existing study or litigation.

1. Between Precinct Disparities

The first level of analysis that should be tested is the rate of SQF deployment by precinct. Recall that the core justification for SQF tendered by its defenders is that street police are deployed where crime occurs; racial disparities arise only because crime is concentrated in minority neighborhoods.[305] But this may not be the case. Perceptions of crime can also be a function of the racial composition of a neighborhood.[306] A threshold policy decision to be tested is the volume of *Terry* stop per precinct with a lagged measure of crime as a control as a way of determining whether the geographical distribution of policing resources turns on racial demographics or crime rates.[307]

For example, Jeffrey Fagan tested whether the number of stops per precinct in New York City was disproportionate to the racial composition of the precinct, after controlling for several different types of historical crime rate, revealed that the crime-based justification for SQF's allocation was unfounded.[308] Using an ordinary least squares regression, he found that the percentage of African-American residents was a stronger predictor of *Terry* stop volume than lagged rates of violent crime, narcotics offices, weapons offenses and trespass.[309] Only property

[304] This is a rather ambitious assumption. Jeffrey Fagan, *Law, Social Science, and Racial Profilin*g, 4 JUST. RES. & POL. 103, 112 (2002) [hereinafter "Fagan, *Law, Social Science*"] (expressing concerns on this front).
[305] *See* sources cited in *supra* note 79.
[306] *See* sources cited in *supra* notes 179 and 180.
[307] *Cf.* Sarath Sanga, *Does Officer Race Matter?*, 16 AM. L. & ECON. REV. 403, 405 (2014) [hereinafter "Sanga, *Does Officer Race Matter?*"] (finding in a study of Oakland street policing that "where one is stopped may be more important than by whom one is stopped").
[308] Fagan Report, *supra* note 48, at 33 (table 5). The main regression Fagan presents contains a control for patrol strength, while one of the sensitivity test omits that variable. To the extent that this analysis seeks to ascertain whether deployments at the precinct level are justified, the inclusion of patrol strength creates a potential included variable problem. Stated otherwise, patrol strength is a function of deployment levels, not a justification of the latter.
[309] *Id.* at 41, n.52 & 43. Fagan also presents a series of charts showing stop rates per crime complaints by minority population share. Id. at 25-27. These illustrate the same disparity.

and quality-of-life rates outperformed race as predictors of stop volume.[310] This is an especially striking result given SQF's justification in the Kansas City Experiment as a means of reducing violent crime, and as an alternative to broken windows policing.[311]

It is also striking because the assumption that an increase in crime rates should predict a subsequent increase in street stops is a dubious that stacks the deck in the state's favor in a normative troubling way. More specifically, the use of lagged crime rates as a control assumes that the *only* available, or perhaps the *best available*, policing response to upticks in crime concern is more intensive street policing. But this is false.[312] As I have argued, the evidence that SQF has a large crime-control effect is weak, especially in comparison to alternative policing instruments.[313] The use of crime rates as a baseline further assumes that *Terry* stops are responsive to all kinds of violent crime. At least for the proportion of violent crimes that occur within the home against partners or other intimates, it is hard to see how *Terry* stops respond to those problems.[314] In short, there is no good reason to assume the best, only, or most effective response to rising crime rates in a specific neighborhood is to up the number of people being stopped.[315]

A between-precinct measure of racial disparities can be combined with a range of other measures to develop a more nuanced understanding of how policing resources are allocated across geographic areas. Hence, simple descriptive statistics can provide useful confirmatory evidence, even if they are cannot on their own prove disparate-impact liability under *Inclusive Communities*.[316] The data might be further interrogated by comparing the determinants of precinct-level deployments with the rate of stops per resident, conditional on racial identity.[317] Where such citywide tests find that not only do minority *neighborhoods* bear a disproportionate toll of stops, but minority *individuals* also bear a larger share of those stops, there is reason for concern that SQF is not only regressive in effect, but also triggers the dynamic, vicious-circle processes described in Part I.C. In addition, the between-precinct distribution of street policing is usefully contrast with the distribution of other policing resources. If precincts that receive intensive *Terry* treatments, for example, are associated with lower rates of other policing measures—e.g., they have fewer officers deployed across both reactive and proactive policing, or they have persistently longer wait times for 911 calls—then there is further reason for skepticism that crime control simplicter in fact elucidates racial disparities across geographic subunits within the municipality.

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[310] *Id.*

[311] *See supra* text accompanying notes 88 and 70 (describing, respectively, the Kansas City Experiment and Broken Windows policing).

[312] *See supra* text accompanying notes 119 to 127.

[313] *See supra* Part I.B.2.

[314] Other studies have found that citizen complaints of drug transactions do not predict narcotics-related deployment rates. Katherine Beckett, Kris Nyrop & Lori Pfingst, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 126-27 (2006).

[315] For a further set of criticisms, see Fagan, *Law, Social Science*, *supra* note 304, at 117-18.

[316] Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2522 (2015) (noting that constitutional problems would arise if "liability were imposed based solely on a showing of a statistical disparity").

[317] Ian Ayres & Jonathan Borowshy, *A Study of Racially Disparate Outcomes in the Los Angles Police Department* 9-10 (October 2008), https://www.aclusocal.org/wp-content/uploads/2015/09/11837125-LAPD-Racial-Profiling-Report-ACLU.pdf.

2. Within-Precinct Disparities

The next level of analysis focuses on the distribution of *Terry* stops by racial or ethnic group within a precinct. Between-precinct tests are incomplete because even if there are no between-precinct disparities, a disparate racial impact might emerge within a given precinct because racial minorities engaged in the same (potentially criminal) conduct as non-minorities are more likely, holding all else constant, to be stopped or otherwise policed than non-minorities.

The intuition that racial minorities may be overpoliced in comparison to similar non-minority citizens is easy to see in the context of racially heterogeneous central business districts, where minority citizens may be perceived as categorically out of place and hence suspicious. But the same disparity can arise even in poorer, majority-minority neighborhoods. A pair of studies of narcotics policing in Seattle by Katherine Beckett and her colleagues nicely illustrate how race might figure in within-precinct dynamics in this way. Their first study demonstrated (among other things) that in the Capitol Hill neighborhood of Seattle, three percent of those purchasing narcotics were African-American, while 20.5 percent of those arrested were African-American.[318] Their second study found that predominantly white outdoor drugs markets received "far less attention" from police than racially diverse ones, such that the "geographic concentration of law enforcement resources [was] a significant cause of racial disparity."[319] Indeed, a qualitative component of the study found that police officers flagged one racially diverse crack market while failing to mention an "overwhelmingly white" market for prescription drugs operating alongside it.[320] Beckett and her collaborators explicitly consider the possibility that differences in the policing of crack cocaine and prescription drug markets may be due to different levels of associated violence. They find, however, that the association between crack and violence "does not appear to have existed in Seattle during the period under study."[321] These Beckett studies' findings echo sociological findings of how racial composition predict perceptions of crime, and historical findings about the deep roots of stereotypes of black criminality. They demonstrate the importance of a nuanced and contextualized analysis of what is happening within heavily policed neighborhoods, rather than a blasé assumption that heavy policing in high-crime neighborhoods is necessarily even-handed or efficacious.

A within-precinct analysis usefully considers whether the rate of minority stops is better predicted by legitimate policing grounds or suspects' race, conditional on certain precinct level characteristics. Within a pool of stop-related data, the number of stops per ethnic group within a given time period would be the outcome variable (i.e., dependent variable) to be explained.[322] For a given precinct, one could ask whether there is a statistically significant correlation between the rate of stops and the fact individual suspects are African-American or Hispanic rather than white, controlling for certain precinct-level characteristics. Some existing studies deploy a method called multilevel modeling to control simultaneously for individual and precinct-level

[318] Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROB. 419, 435 (2005).
[319] Beckett, Nyrop & Pfingst, *supra* note 314, at 129.
[320] *Id.* at 130.
[321] Beckett et al, *supra* note 318, at 433.
[322] *See, e.g.,* Fagan Report, *supra* note 48, at 40-42 & tbl. 6 (reporting the results of a multilevel Poisson regression on stops by suspected crime controlling for precinct characteristics and lagged crime conditions).

factors.[323] I will assume that approach is valid, although nothing rests on that assumption so long as some other econometric technique is available.

The pivotal question for such multilevel models is the choice of control variables to capture "[non-]arbitrary" and "[]necessary" justifications.[324] A disparate impact model should include *only* control variables that provide normatively valid justifications for a within-precinct racial disparity. In this regard, it is fundamentally dissimilar from tests for discriminatory motives. A regression-based test for the latter operates by excluding all possible explanations for a stop except for the race of a suspect. The study employed in the New York litigation, for example, controls for the foreign-born proportion of a precinct; socioeconomic status, and the presence of a business district.[325] But a racial disparate impact, as a matter of law, arises not only when there is *no other possible* explanation for a racial gap in stop rates. It also arises when there is *no legitimate* explanation *related to policing goals* for that gap. In this regard, the economic analysis of disparate impacts is unlike the large array of econometric studies that focus on a "causal if-then question" and treat randomized trials as an "ideal."[326] Variables such as the socioeconomic character of a precinct, its foreign-born populace, and officer race have no place in disparate-impact analysis.[327] Their inclusion leads to "included variable bias" insofar as they "would not plausibly justify a racial disparity in outcomes."[328] Even when included in disparate treatment analyses, they result in "bloated statistical models so chock-full of covariates (i.e., control variables) that any evidence of disparate treatment disappears."[329]

In several existing studies, lagged crime rates are used as the baseline control in this sort of multilevel model.[330] This parameter at least relates directly to the best justification that a municipality has for increased street stops—i.e., crime-related patterns—subject to the concerns raised above.[331] It captures the ways in which deployment levels might fluctuate in respond to shifts in the geographic distribution of crime. It is also superior to a benchmark of lagged arrest rates, which is employed in some models.[332] The latter are potentially influenced by officers' racial beliefs. Hence, a recent metastudy of effect of suspect race on arrest decisions found that

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[323] Multilevel modeling describes a school of approaches for including both micro- and macro-level factors in the same equation to explain a single dependent variable. Thomas A. DiPrete & Jerry D. Forristal, *Multilevel Models: Method and Substance*, 20 ANN. REV. SOC. 331, 332-33 (1994).

[324] *See supra* text accompanying notes 291 to 292.

[325] Fagan Report, *supra* note 48, at 42, tbl. 7; Ayres & Borowsky, *supra* note 317, at 37-38, tbl. 7.

[326] JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST'S COMPANION 11-12 (2009). For this reason, the propensity score matching models used in some policing studies are not suitable for disparate impact analysis. *See* Fagan Report, *supra* note 48, at 97-100 (noting and criticizing the use of such models elsewhere).

[327] The racial composition of a precinct is a relevant control if it proxies for the expected composition of persons on the street—as assumption that will not hold in downtowns or transit hubs.

[328] Ayres & Borowsky, *supra* note 317, at 13; *see also* Ian Ayres, *Testing for Discrimination and the Problem of "Included Variable Bias"* 3-4 (2010) (unpublished manuscript), available at http://islandia.law.yale.edu/ayres/ayresincludedvariablebias.pdf.

[329] Oakland report, *supra* note 25, at 6.

[330] *See* Fagan Report, *supra* note 48, at 42; Ayres & Borowsky, *supra* note 317, at 34. Possible variant on these report's approaches is lagged rates of gun crime, which bear on the violent-crime related justification at times offered for SQF.

[331] *See supra* text accompanying notes 312 to 314.

[332] *See* Gelman, Fagan & Kiss, *supra* note 47, at 817-18.

minorities are at least 30 percent more likely to be arrested as similar nonminority suspects.[333] Historical arrest rates thus provide a distorted baseline, which obscures potential racial disparities in stops by implicitly controlling for officer bias.

It is worth underscoring once more that the racial composition of the pool of those suspected of a crime, or arrested for a crime is by no means an unproblematic benchmark for the racial composition of those subject to a Terry stop even within a particular neighborhood. The best argument from using such data as a benchmark, in my view, focuses solely on racial composition of the local violent offender population. It hypothesizes that police focus either on people or places associated with higher violent crime risk. Given racial segregation and racial divides between social groups, it is then predicted that the racial composition of the stopped population will track that of the at-risk population.

Setting aside questions about the efficacy of SQF generally as a crime-control measure, there are nonetheless three reasons for skepticism of this logic. First, this logic assumes that municipalities can accurately zero in on not just places but persons who present a risk of violence. It is not clear that this is so. A recent study of Chicago's Strategic Subjects List, for example, found that individuals on the city's list were no more or less likely to be victimized by violence than a control group.[334]

Second, if SQF focuses on places rather than persons, the number of individuals involved in violent crime is generally a tiny fraction of the volume of people stopped.[335] In the exceptionally bloody month of August 2016 in Chicago, for example, 90 people were killed by gunfire.[336] The number of stops that month was likely at least two orders of magnitude greater. Even assuming that the Chicago police in that month were focused accurately on corners where violence was likely to occur, more than 100 instances of reasonable articulable suspicion were being targeted for every one act of violence. Even if police then have reason to anticipate a particular corner or street will witness violence, at a minimum some 99 out of every 100 stops will have no relation to that violence. Historical patterns of violence cannot explain why reasonable articulable suspicion existed for those individuals. The racial demographics of violent crimes or violent crime-related arrests on a given street or corner do not in any meaningful sense predict the racial distribution of reasonable articulable suspicion that police can witness at any given moment in time. For most stops, most of the time, therefore, historical crime rates are irrelevant to the incidence of a *Terry* stop.

Finally, imagine a municipality that affirmatively directs its police to engage in a pattern of stops that mimics the racial distribution of violent crime offenders. In many contexts, that

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[333] Tammy Rinehart Kochel, David D. Wilson & Stephen D. Mastrofski, *Effect of Suspect Race on Officers' Arrest Decisions*, 40 CRIMINOLOGY 473, 498 (2011).

[334] Jessica Saunders, Priscillia Hunt, & John S. Hollywood, *Predictions put into practice: a quasi-experimental evaluation of Chicago's predictive policing pilot*, -- J. EXP. CRIM. – (forthcoming 2016) (on file with author).

[335] For evidence of the very small number of those involved in gun violence, see Andrew V. Papachristos, Christopher Wildeman, and Elizabeth Roberto, *Tragic, but not random: The social contagion of nonfatal gunshot injuries*, 30 SOC. SCI & MEDICINE 1, 1 (2014) (finding nonfatal gun injuries confined to "less than 6 percent" of Chicago's population).

[336] Jeremy Gorner, *After 90 killed in August, Chicago may soon pass last year's homicide toll*, CHICAGO TRIB., Sept 1, 2016) http://www.chicagotribune.com/news/local/breaking/ct-chicago-homicides-august-20160901-story.html

distribution will skew heavily towards African-Americans (and to a lesser extent Latinos). This is, in effect a system of racial quotas where some 99 out of 100 of those subject to state coercion suffer that fate based solely on their race rather than their own past conduct. Especially given the weak empirical support for SQF's efficacy, such a policy raises stark Equal Protection concerns even under the Supreme Court's current highly restrictive view of the doctrine.[337]

Instead of using crime rates, violent crime rates, or analogous arrest rates as a benchmark of just policing, therefore, a study of disparate impact would ideally track Beckett and colleagues' Seattle study in estimating the racial composition of the baseline population subject to police action through ethnographic observation (of open-air drug markets) and other means.[338] Ideally, that is, data would be sampled, perhaps from police body-cameras, to estimate the racial composition of the population observed on patrol for whom reasonable articulable suspicion obtained. If, like police in Beckett's studies, officers tended to ignore non-minority offenders while stopping minority offenders, a within-precinct disparity would be established with certainty. Such an approach is hardly impossible. Indeed, a recent study of Oakland policing used text analysis of sound recordings from officers' body-cameras to identify differential racial treatment.[339]

3. Within- and Between Officer Disparities

Finally, disparities can emerge not only at the aggregate levels of between- and within-precincts.[340] They can also arise either because some (or all) officers within a precinct differentiate between minority and nonminority suspects without a legitimate justification. This level of police action—which comprises the dispersed exercise of individual officers' discretion—demands attention to the sequence of distinct police actions embedded within a particular interaction, ranging from the decision to stop, the decision to frisk, the use of force, and the imposition of subsequent consequences such as citations or arrests. Given the existence of outstanding warrants as a reason for arrests, however, the latter are a particularly tricky variable to analyze because they may be unrelated to the initial stop. I sketch here the most promising approaches for identifying racial disparities at the individual offer level. I then caution against the use of the most popular economic model of police stops, commonly known as the KPT model, as neither apposite nor realistic as a framework for analyzing SQF.

Individual officers might create racially disparate effects in two ways. First, the *Terry* standard of reasonable articulable suspicion is a vague term with a range of possible calibrations.[341] Some or all officers might apply stronger or weaker evidentiary predicates for stops of different racial groups. Second, as Fryer's powerful analysis of New York policing demonstrates, officers might differentially treat minorities who have been stopped by employing a greater quantum of violence. Other outcomes, such as citations and arrests, might also be disparately allocated. Disparities in both stop rates and post-stop outcomes should be analyzed in a disparate-impact analysis.

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[337] *See supra* text accompanying notes 237 to 240.
[338] Beckett, Nyrop & Pfingst, *supra* note 314, at 116-18; Beckett et al, *supra* note 318, at 422-23.
[339] Oakland report, *supra* note 25, at 15-19.
[340] *See, e.g., id.* at 11-12 (describing between-officer disparities).
[341] *See supra* text accompanying notes 206 to 209.

On the stop-rate question, a simple measure is to rerun the multilevel models used for within-precinct disparities using officers rather than precincts as the relevant unit of analysis and lagged crime rates (measured at the smallest available geographic unit) as a control.[342] A parallel analysis can be run for outcomes, such as the seizure of contraband or firearms.[343] Again, included variable bias would result if controls other than legitimate policing justification (such as the lagged-crime-rate measure) were included.

Alternatively, a more novel approach involves the use of the "stop-level hit rate" ("SHR") or the ex ante probability of discovering contraband or a weapon based on what an officer knows before a stop.[344] Focusing on weapons-related stops, Goel and colleagues first use two years' worth of historical stop forms to calculate the actual probability of finding a weapon for various combinations of factors listed on stop forms as the basis of 'reasonable articulable suspicion' (along with location, timing, and local hit-rate data).[345] This enables them to calculate the distribution of ex ante probabilities of finding weapons for minorities and nonminorities, both in general and holding location constant.[346] In effect, by comparing the distribution of SHRs for blacks and whites, they show that the effective quantum of reasonable articulable suspicion for minorities is lower than that used for nonminorities.[347] The same analysis might be executed by precinct or by officer to determine if racial disparities are either geographically concentrated or the work of a small fraction of officers.

Finally, the economics literature is dominated by a model by John Knowles, Nicola Persico and Petra Todd known as the KPT model.[348] In capsule form, KPT is a game-theoretical model of traffic stops in which police seek to maximize arrests and both black and white motorists maximize contraband. Police observe race. Both they and motorists strategically anticipate the other's actions. KPT predicts a Nash equilibrium in which blacks and whites are stopped at different rates, while the probability of finding contrabands (i.e., the hit rate) across groups is equal. The force of the model is to show how what at first seems a racial disparity—unequal stop rates—is in fact explained by dynamic strategic action by both police and motorists.[349] As a correlative, differences in hit rates provide evidence of taste-based discrimination.

For several reasons, the KPT model is not well-suited to identify the core wrong of racially disparate policing. To begin with, KPT is "informative only about bias in searches, not in stops."[350] It is also a model for detecting taste-based discrimination, or animus, rather than the use of race as an accurate generalization or the disparate racial impact of another factor (e.g.,

[342] Ayres & Borowsky, *supra* note 317, at 22; Fagan Report, *supra* note 48, at 65-69.
[343] Fagan Report, *supra* note 48, at 69-71.
[344] Goel et al., *supra* note 48, at 6.
[345] Goel, Rao & Shiroff, *supra* note 48, at 371-73.
[346] Goel et al., *supra* note 48, at 30-31.
[347] *Id.* at 6 ("49% of the stops for blacks fell below the 1 % probability threshold … but only 1 % for whites.").
[348] Knowles, Persico & Todd, *supra* note 30, at 205-07; *see also* Nicola Persico & Petra Todd, *The Hit Rate Test for Racial Bias in Motor-Vehicle Searches*, 25 JUST. Q. 37, 39-42 (2008).
[349] Persico & Todd, *supra* note 348, at 42 ("If … hit rates are equalized [across groups] then disparities in search frequencies, while possible, are not evidence of police bias.").
[350] *Id.*

socioeconomic status).[351] Stated otherwise, it ignores all negative externalities from race-based policing.[352] Even in this more limited compass, its core equilibrium concept rests on the questionable assumption that police and motorists' know of, and dynamically adapt to, each other's behavior.[353] Extensions of their work that vary the models show that equal hit rates might also be consistent with racial animus.[354] Because the modeling assumptions of KPT are so controversial, and its implications so fragile, it does not provide a useful lens even for the limited question of whether there is animus-based searches.

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This Part has aimed to demonstrate that a disparate-impact lens on SQF is constitutional, legally available, and practicable. To that end, it has both articulated its legal basis and sketched its practical operation. That kernel of analytic methods, I hope, can provide a catalyst for more ambitious and innovation exploration of the ecological and dynamic manifestations of racial disparities from SQF that, to date, remain in the empirical shadows.

Conclusion

Aggressive deployment of *Terry* stops has been a point of friction between urban police and impoverished minority communities for more than fifty years. We are in a moment at which a measure of reform appears politically feasible—or so the recent spate of settlements and consent decrees might suggest.[355] Without a clear account of why and when aggressive deployment of *Terry* stops can be a moral wrong, we will not have a clear sense of when or how we might deploy law to remedy it.

This Article has aimed to specify the distinctive moral wrong of SQF and to demonstrate that the law does have resources to identify it. My central claim has been that a disparate impact lens, applicable to police pursuant to Title VI and state law, provides a better vantage point than

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[351] Engel, *supra* note 58, at 3.

[352] Durlauf, *supra* note 141, at F407.

[353] For example, the KPT model assumes that "in the absence of preferential discrimination, everyone carries contraband," which is "not true." Sanga, *Does Officer Race Matter*, *supra* note 307, at 407. Moreover, "the quest to empirically decompose motives into distinctly moral and economic categories can prove quixotic." Id. at 409. For an extensive critique of this and other assumptions of the KPT model, see Robin S. Engel & Ron Tillyer, *Searching for Equilibrium: The Tenuous Nature of the Outcome Test*, 25 JUST. Q. 54, 65-66 (2008).

Persico and Todd cite the fact that equal hit rates are observed as evidence that their assumptions are correct. Persico & Todd, *supra* note 348, at 45. In their original paper, hit rates for Hispanic did not equal rates for whites. Knowles, Persico & Todd, *supra* note 30, at 222; *accord* Ruben Hernández-Murillo & John Knowles, *Racial Profiling or Racist Policing? Bounds Tests in Aggregate Data*, 45 INT'L ECON. REV. 959, 972 (2004) (same result in a Missouri sample). A subsequent analysis by Sanga of a greater sample of the same data from Maryland used by KPT found lower hit rates for *both* blacks and Hispanics. Sarath Sanda. *Reconsidering Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 117 J. POL. ECON. 1155, 1158 (2009). Applying KPT's own verification criterion, therefore, the theory fails.

[354] *See, e.g.,* Shamena Anwar & Hanming Fang, *An Alternate Test of Racial Prejudice in Motor Vehicle Searches: Theory and Evidence*, 96 AM. ECON. REV. 127, 130-32 (2006) (accounting for officers' race); Dhammika Dharmapala & Stephen L. Ross, *Racial Bias in Motor Vehicle Searches: Additional Theory and Evidence*, 3 CONTRIBUTIONS TO ECON. ANALYSIS & POL'Y 1, 14 (2004) (accounting for offense severity and vehicle ownership).

[355] *See supra* text accompanying notes 16 to 25.

black-letter constitutional law. By demonstrating that a disparate impact lens is constitutional, potent, and practicable in terms of its implementation, I hope to begin a new conversation about the role that law and courts can play in resolving the aching sore that is minority-police relations in America's cities today.

What I have offered here, though, is emphatically only the beginning of that story: The law, I have shown, can be used to identify instances in which street policing plays a role in perpetuating and deepening racial and social stratification. Once identified, dysfunctional policing must be remedied through political pressure and legal injunctions that will vary from jurisdiction to jurisdiction. There is no universal panacea. Police reform, moreover, is only one element of a larger necessary program of social reform necessary to dislodge the persistence of racialized concentrated poverty. Police do not create ghettos, and getting policing right will not dissolve ghettos overnight. Nevertheless, doing so is a necessary component of rectifying an important historical blight on our cities.