Article

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

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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 many urban residents.[6] Between May and August 2014, for example, police in Chicago stopped more than 250,000 people—which translates into 93.6 stops per 1000 inhabitants.[7] In Philadelphia, police have stopped between 215,000 and 253,000 people per year since 2009.[8] In Baltimore, the Department of Justice esti-

1. Tracey L. Meares, *The Law and Social Science of Stop and Frisk*, 10 ANN. REV. L. & SOC. SCI. 335, 337, 339 (2014).

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 91.5 CHIC. (Sept. 13, 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), 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. In Chicago, for example, "being stopped for investigative purposes is the predominant experience residents have with the police." Wesley G. Skogan, *Stop-and-Frisk and Trust in Police in Chicago* (Inst. for Pol'y Res., Working Paper No. WP-16-08 (2016)), http://www.ipr.northwestern.edu/publications/papers/2016/WP-16-08.html (emphasis omitted).

7. ACLU OF ILL., STOP AND FRISK IN CHICAGO 11 (2015), http://www.aclu-il.org/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf. Because many individuals were stopped more than once, the effect of the policy was even more concentrated. *See generally id.* at 3 (describing how the stops were disproportionately concentrated).

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

mates, roughly 412,000 people were stopped in 2014.[9] At its peak in 2011, New York's SQF policy generated more than 685,700 stops per year.[10] Between 2004 and 2013, that city's inhabitants experienced roughly five million street stops.[11]

Given the sheer scale of these intrusions into citizens' daily lives, it is hardly surprising that SQF would provoke some public controversy. Sharp-elbowed debate has ensued as to whether African Americans and Hispanics are being inappropriately stopped and searched.[12] In addition to catalyzing a wider national argument about race and policing,[13] SQF has sparked large-scale public protests,[14] mayoral campaigns,[15] threats to sue,[16] and litigation itself. In the wake of legal 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,[17] Chicago,[18] Philadelphia,[19] Cincin-

9. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 25 (2016), https://www.justice.gov/opa/file/883366/download.

10. CHRISTOPHER DUNN, N.Y. CIVIL LIBERTIES UNION, STOP-AND-FRISK 2012, at 3 (Jennifer Carnig ed., 2013), https://www.nyclu.org/sites/default/files/publications/2012_Report_NYCLU_0.pdf.

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

12. *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: NEW AND ESSENTIAL READINGS 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 7, at 3 (finding the same results in Chicago).

13. For a snapshot of that debate, see Julie Bloom et al., *Attack on Officers Jolts a Nation on Edg*e, N.Y. TIMES, July 18, 2016, at A1.

14. *See, e.g.*, John Leland & Colin Moynihan, *Thousands March Silently To Protest Stop-and-Frisk Policies*, N.Y. TIMES, June 18, 2012, at A15 (describing a protest in response to SQF).

15. *See* Khorri Atkinson, *Mayor de Blasio To Reform Stop-and-Frisk*, N.Y. AMSTERDAM NEWS (Feb. 6, 2014), http://amsterdamnews.com/news/2014/feb/06/mayor-de-blasio-reform-stop-and-frisk (describing a mayoral campaign focused on reforming SQF).

16. 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.

17. Floyd v. City of New York, 959 F. Supp. 2d 668, 676, 678 (S.D.N.Y. 2013) (appointing a monitor and ordering broad systemic equitable relief).

18. Settlement Agreement, City of Chicago, Chi. Police Dep't & Am. Civil Liberties Union of Ill., Investigatory Stop and Protective Pat Down (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].

nati,[20] New Orleans,[21] Seattle,[22] Baltimore,[23] Cleveland,[24] and Newark[25] have all entered into either a judicial decree or a similar form of settlement process. Two cities, Boston and Oakland, did not wait for litigation, but engaged expert consultants; in both cases, the consultant isolated evidence of racial discrimination in street policing.[26]

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 law provides a starting point for this inquiry, but ultimately not a satisfying answer.

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 focused centrally on the motivations and beliefs of specific, individual officers. For

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

20. Collaborative Agreement, *In re* Cincinnati Policing (S.D. Ohio 2002) (No. C-1-99-317) (on file with author); *see also In re* Cincinnati Policing, 209 F.R.D. 395, 400–04 (S.D. Ohio 2002) (affirming settlement).

21. United States v. City of New Orleans, 947 F. Supp. 2d 601, 631 (E.D. La. 2012), *aff'd*, 731 F.3d 434 (5th Cir. 2013) (affirming consent decree); Consent Decree Regarding the New Orleans Police Department, United States v. City of New Orleans, No. 12-1924 (E.D. La. 2012) [hereinafter New Orleans Decree] (on file with author).

22. Settlement Agreement and Stipulated [Proposed] Order of Resolution, United States v. City of Seattle, (W.D. Wash. 2012) (No. 12-CV-1282) [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).

23. UNITED STATES & CITY OF BALT., AGREEMENT IN PRINCIPLE BETWEEN THE UNITED STATES AND THE CITY OF BALTIMORE REGARDING THE BALTIMORE CITY POLICE DEPARTMENT (2016), https://www.justice.gov/opa/file/883376/download [hereinafter BALTIMORE AGREEMENT].

24. 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.

25. *Id.*

26. STANFORD UNIV., SPARQ: SOCIAL PSYCHOLOGICAL ANSWERS TO REAL-WORLD QUESTIONS, STRATEGIES FOR CHANGE: RESEARCH INITIATIVES AND RECOMMENDATIONS TO IMPROVE POLICE-COMMUNITY RELATIONS IN OAKLAND, CALIF. 5–6 (Jennifer L. Eberhardt ed., 2016), https://stanford.app.box.com/v/Strategies-for-Change [hereinafter OAKLAND REPORT]; *Boston Police Commissioner Announces Field Interrogation and Observation (FIO) Study Results*, BPDNEWS.COM (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).

example, in New York, the case of *Floyd v. City of New York*, which has yielded the only extensive judicial decision on SQF, focused first on the Supreme Court's 1968 decision *Terry v. Ohio*,[27] which held that officers need "reasonable, articulable suspicion" of criminality to make a nonconsensual street-stop consistent with the Fourth Amendment.[28] Then, citing the Supreme Court's 1979 decision in *Personnel Administrator v. Feeney*,[29] the *Floyd* court held that plaintiffs had to show that SQF not only had a racially disparate effect, but had been adopted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" certain racial groups.[30]

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."[31] 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 . . . ."[32]

This individualist black-letter doctrine means that even absent litigation to a final judgment, courts and legal reform efforts have to use a relatively narrow lens trained solely upon discrete, interpersonal transactions. Similarly, the dominant economic model of racial bias in policing focuses on the identification of individual officers' taste-based discrimination over and above statistical discrimination.[33]

27. 392 U.S. 1 (1968).

28. Floyd v. City of New York, 959 F. Supp. 2d 540, 567 (S.D.N.Y. 2013) (quoting *Terry*, 392 U.S. at 22). 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 (quoting United States v. Lopez, 321 F. App'x 65, 67 (2d Cir. 2009)).

29. 442 U.S. 256 (1979).

30. *Id.* at 662 (quoting Hayden v. Paterson, 594 F.3d 150, 163 (2d Cir. 2010)).

31. Seattle Settlement, *supra* note 22, ¶¶ 140, 142, 145.

32. Philadelphia Settlement, *supra* note 19, at 1, 4.

33. John Knowles et al., *Racial Bias in Motor Vehicle Searches: Theory and Evidenc*e, 109 J. POL. ECON. 203, 205 (2001).

This Article argues that SQF presents a normative challenge that is not well captured by the individualistic lens of *Terry* and *Feeney*, or by a focus on taste-based discrimination as a more general matter. The distinctive moral harm of SQF does not turn on racial animus per *Feeney*, or weak evidentiary predicates per *Terry* although both might well exist and even be pervasive on the ground. This harm, indeed, does not arise within the narrow, individualist "transactional frame" that currently dominates both law and economics.[34]

SQF today is defined by its large scale and "group-based" application.[35] Its distinctive moral wrong is inextricably related to this programmatic quality, not the happenstance of individual officers' motives.[36] 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 observed in New York, Chicago, and Philadelphia. In contrast, 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 an important link in the reproduction of social and racial stratification. In this regard, it typically has large regressive distributional effects and surprisingly little value-added as a crime control measure.

More specifically, SQF should be understood as a historically situated innovation that responds to late twentieth-century urban pathologies in a manner that predictably perpetuates those criminogenic pathologies. The call for SQF arose in important measure because local and state governments had

34. Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1313–14 (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.").

35. 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 M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 127 (1976).

36. 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.

engaged in policies that over time fostered minority neighborhoods that remain entrenched in concentrated poverty and suffer from high violent-crime rates. Rather than addressing those underlying conditions, local and state policy-makers have chosen to respond with a policy that has stigmatizes minority residents, that has limited crime-control benefits, and that imposes large negative spillovers on disadvantaged neighborhoods.

Viewed in this 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 to fall short or to go astray.

In response to such ecological and dynamic dimensions, constitutional law is now disarmed. Some other tool is needed. Consistent with a growing body of scholarship that resists the narrow transactional frame of current constitutional doctrine[37] and the dominant doctrinal focus on individual officials' fault,[38] I argue that our current doctrinal models for capturing the harms of aggressive policing fall woefully short. Instead, a more structural and capacious legal framework is needed 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[39] and fair housing contexts.[40] A dispar-

37. *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").

38. *See* Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 4 (2015) ("[T]he 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); *see also* Aziz Z. Huq & Genevieve Lakier, *The Triumph of Fault in Public Law*, 131 HARV. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940016 (mapping out the role of fault concepts in both substantive criminal law and the law of constitutional remedies).

39. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012) ("[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, 429–30 (1971) (allowing disparate impact under the 1964 version of Title VII). A disparate-impact the-

ate-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 degree of diffused discretion.[41]

To be clear, this alternative approach 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 assigned to minority communities. It 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.[42]

No theory of liability, however, will be a comprehensive panacea to a complex and entrenched social phenomenon like concentrated, racialized, poverty. Disparate-impact liability for SQF captures the instances in which the moral wrong of SQF is at its acme (even if it does not capture all instances in which that wrong arises). It helps ensure that policing responses make matters no worse. It is emphatically only a piece of the larger mosaic of needful policing reform that ought to be pursued through both judicial and political avenues.

Disparate-impact liability is often overlooked because it has not been part of Equal Protection doctrine since the early 1970s.[43] 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

ory of liability is also available under the Age Discrimination in Employment Act. Smith v. City of Jackson, 544 U.S. 228, 240 (2005).

40. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513, 2515, 2526 (2015) (interpreting 42 U.S.C. §§ 3604(a), 3605(a) (1988) to permit disparate-impact liability).

41. *See generally* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 520–23 (2003) (discussing the evidentiary use of disparate-impact liability).

42. *See id.* at 523–24 (arguing that disparate impact is a "mechanism[] for ending segregation and racial hierarchy").

43. 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) (collecting cases).

regulate local police departments[44] and also (in California[45] and Illinois[46]) state law.[47] The Chicago settlement and the New Orleans settlement invoke some of these disparate-impact rules as guiding authorizations.[48] Nevertheless, neither elaborates upon their bare-bone textual 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 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 increasingly being collected by large police departments as a result of settlements and consent decrees.[49]

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 municipality's *overall* distribution of policing resources can be justified on race-neutral grounds.[50] Second, within a given beat

44. 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 (2012) ("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. § 42.101 (2016) (implementing regulations). The Safe Streets Act also prohibits local police action with a racially disparate impact. 42 U.S.C. § 3789d(c)(1) (2012) ("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. § 42.201 (2016) (implementing regulations).

45. CAL. CODE REGS. tit. 2 § 11135 (2017); CAL. CODE REGS. tit. 22, § 11154 (c), (i) (2017).

46. 740 ILL. COMP. STAT. ANN. 23/5(a)(1) (2003).

47. *See infra* Part III.A.

48. Chicago Settlement, *supra* note 18, at 6; New Orleans Decree, *supra* note 21, at 1–2.

49. *See generally* 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, 871–72 (2013) (describing how some consent decrees and settlements require data collection).

50. Larger policy has a role in shaping street-level outcomes. *See* 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

or district, disparities in how stops are allocated among different ethnic and racial groups can be evaluated.[51] Finally, at the level of given officers, disparities in the quantum of suspicion deployed for whites and nonwhites can be assessed by using a range of empirical tools.[52]

By aggregating and contrasting disparities at these different levels, the empirical approach that I sketch roughly 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 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 consider the range of legitimate exculpatory justifications that might be offered to diffuse a prima facie finding of racial disparity.[53] I further respond to weaknesses made apparent by disparate impact's extant operation in other contexts. In the employment discrimination context, for example, there has been disagreement about how to identify business justifications that can justify racial disparities,[54] and the magnitude of ultimate disparities required for liability.[55]

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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.").

51. 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. *See* Report of Jeffrey Fagan, Ph.D at 40, Floyd v. City of N.Y., 813 F. Supp. 2d 417 (S.D.N.Y. 2011) (08 Civ. 01034 (SAS)), https://ccrjustice.org/sites/default/files/assets/files/Expert_Report_JeffreyFagan.pdf [hereinafter Fagan Report] (describing modeling technique); Andrew Gelman et al., *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) (same).

52. *See* Sharad Goel et al., *Precinct or Prejudice? Understanding Racial Disparities in New York City's Stop-and-Frisk Policy*, 10 ANNALS APPLIED STAT. 365, 371 (2016) [hereinafter Goel et al., *Precinct or Prejudice?*] (describing tools); *see also* Sharad Goel et al., *Combatting Police Discrimination in the Age of Big Data*, 20 NEW CRIM. L. REV. 181, 186 (2017) [hereinafter Goel et al., *Combatting Police Discrimination*].

53. *See* Abrams, *supra* note 8, at 375 (discussing potential justifications).

54. The availability of employer justifications has been the subject of dispute both on the Supreme Court and in Congress. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012) ("[An employer must] demonstrate that the challenged practice is job related for the position in question and consistent with business

The use of disparate impact in the employment context has also generated worries about the doctrine's constitutionality[56] and its efficacy in promoting structural policy change.[57] 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.[58] But my analysis aligns with penetrating work by Tracey Meares, Jeffrey Fagan, and Amanda Geller, all of whom correctly 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.[59] Furthermore, I echo Richard Banks' worry about the "potential inadequacy as a policy framework" of much constitutional doctrine, although my

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 between legislators and President George H.W. Bush on this topic). *Compare* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989) (describing a relatively lenient standard for business justifications), *with id.* at 671–72 (Stevens, J., dissenting) (advocating for a more demanding standard).

55. *See* Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523, 573–74 (1991) (noting the Equal Employment Opportunity Commission indicates the threshold should be "four-fifths . . . of the rate for the group with the highest rate," but also stating alternative views).

56. 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, and it behooves us now to begin thinking about how—and on what terms—to make peace between them.").

57. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 706 (2006) ("[D]isparate impact theory has produced less change than typically assumed . . . ."); *see also* George Rutherglen, *Abolition in a Different Voice*, 78 VA. L. REV. 1463, 1476 (1992) (reviewing RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) and arguing that Epstein overstates the impact of disparate-impact theory).

58. *See* Goel et al., *Combatting Police Discrimination*, *supra* note 52, at 28–30.

59. 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); *accord* Fagan & Geller, *supra* note 11, 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.").

diagnosis and response to the problem of race in policing differ from his approach.[60]

In addition, my analysis diverges sharply from the large literature on "racial profiling,"[61] which more narrowly focuses on intentional animus or the purposive use of race as a criterion in enforcement decisions.[62] Unlike these analyses, my approach does not focus on individual fault or bad intent. Instead, I argue that legal intervention should be organized around the interaction between a specific kind of common policing strategy and larger social dynamics of racial segmentation and stratification.[63]

The argument proceeds in three steps. In Part I, I provide a comprehensive, 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*

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

61. 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).

62. *See, e.g.*, R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1080 (2001) ("Suspect description reliance, like racial profiling, is both useful and racially discriminatory."); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 654–55 (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) (same). 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.*

63. For an example of this broader lens, see MICHAEL D. WHITE & HENRY FRADELLA, STOP AND FRISK: THE USE AND ABUSE OF A CONTROVERSIAL POLICING TACTIC 81–102 (2016) (discussing "collateral consequences" of SQF). The "disparate impact" analysis defines its central analytic focus in terms of "purposeful" discrimination rather than differential effects. J. Mitchell Pickerill et al., *Search and Seizure, Racial Profiling, and Traffic Stops: A Disparate Impact Framework*, 31 LAW & POL'Y 1, 8 (2009). This is not how the term is used in the legal scholarship, and I do not follow that definition.

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 use by courts and other supervisory and regulatory 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 begins by offering a definition of SQF as a historically situated strategy employed by urban police forces. It then develops a careful tally of its pros and cons.

Some courts have analyzed SQF in terms of costs while bracketing its benefits.[64] I disagree with this approach. Appreciation of the distinctive wrong of SQF demands a comprehensive understanding of related justifications, criticisms, and benefits, all nested in an 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*,[65] an officer is entitled to make a "brief" nonconsensual "investigatory stop" if she has "a reasonable articulable suspi-

64. *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.").

65. 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.

cion" that a crime either has occurred or is about to occur.[66] 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,' he may conduct a 'limited protective search' for concealed weapons."[67]

In either the stop or the frisk context, reasonable articulable suspicion is a less demanding standard than probable cause. But it still requires "a minimal level of objective justification."[68]

In addition to a stop and a frisk, officers may take further actions ranging from a verbal caution or a citation to an arrest. Arrests vary widely in character. They can be discretionary or mandatory.[69] 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 focuses on discrete transactions between specific officers and specific defendants. But this is misleading.[70] SQF (as I have defined it) is a policy that operates today 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.[71] In Philadelphia, a city with one-fifth New York's population, there were more than 200,000 stops each of the last three years

66. Illinois v. Wardlow, 528 U.S. 119, 123 (2000). The earliest use of the phrase "reasonable, articulable suspicion" was twelve years after *Terry* in *Brown v. Texas*, as an unattributed quotation from the state's brief. 443 U.S. 47, 51 (1979). The phrase was used to create common law first in the case *Florida v. Royer*, 460 U.S. 491, 502 (1983).

67. Adams v. Williams, 407 U.S. 143, 146 (1972) (quoting *Terry*, 392 U.S. at 24).

68. *Wardlow*, 528 U.S. at 123; *see also* United States v. Sokolow, 490 U.S. 1, 7 (1989).

69. 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. *See* Geoffrey P. Alpert et al., *Police Suspicion and Discretionary Decision Making During Citizen Stops*, 43 CRIMINOLOGY 407, 408 (2005); *see also* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 817 (2015). Even where law imposes a duty on officers to make an arrest (for example, in domestic violence cases), officers as a practical matter maintain a measure of discretion as to what to do.

70. *See* Meares, *supra* note 59, at 175.

71. Fagan Report, *supra* note 51, at 18, 19 tbl.1; *see also supra* text accompanying notes 7–11 (citing stop rates in New York and Chicago).

despite the existence of a court-supervised consent decree.[72] 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.[73] But the tactics are distinct. Whereas broken windows policing relies on arrests "to remove undesirable persons from a neighborhood,"[74] SQF can involve a relatively low rate of arrests.[75] SQF tends to be a direct response to violent crime. It is not a prophylactic response to the possibility that the sight of "broken windows" will induce escalating forms of disorder.[76] Hence, criticisms of "broken windows" policing cannot be translated to SQF in any mechanical fashion.

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.[77] 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.[78] In Chicago, for example, one study of

72. Plaintiffs' Fifth Report to Court and Monitor on Stop and Frisk Practices at 20, Bailey v. City of Philadelphia, No. 10-5952 (E.D. Pa. Feb. 24, 2015), https://www.aclupa.org/download_file/view_inline/2230/198.

73. Amanda Geller, *The Process Is Still the Punishment: Low-Level Arrests in the Broken Windows Era*, 37 CARDOZO L. REV. 1025, 1029–31 (2016) (distinguishing the two approaches); *see also* Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk,"* 94 B.U. L. REV. 1495, 1504–07 (2014) (same).

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

75. Geller, *supra* note 73, 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 tend to be geographically collocated with SQF.

76. *See* Kelling & Wilson, *supra* note 74. A decisive critique is offered in BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 166–80 (2001).

77. David Weisburd et al., *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, 141, 142 tbl.1 (2014) (finding that five percent of intersections in New York produced about fifty percent of SQFs in 2009 and fifty-six percent in 2010).

78. 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.

stops in 2014 found 266 stops per 1000 residents in the African-American neighborhood of Englewood, but 43 stops per 1000 residents in the white neighborhood of Lincoln/Foster.[79]

In particular, SQF tends to be concentrated upon minority—i.e., African-American and Hispanic—neighborhoods. In New York, 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.[80] And at the height of New York's SQF, an African-American resident of New York City had a ninety-two percent chance of being stopped in a single year period.[81]

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) neighborhoods. So even if it entails a low rate of arrest, therefore, it is likely that SQF at least contributes to the exceedingly high rates of minority arrests in the jurisdictions in which it is deployed.[82]

In summary, 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 of, and indeed embrace, this racial asymmetry.[83] But

ACAD. POL. & SOC. SCI. 123, 124–25 (2000).

79. STOP AND FRISK IN CHICAGO, *supra* note 7, at 9.

80. Floyd v. City of New York, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013); *see also* Fagan Report, *supra* note 51, at 3–4 (explaining neighborhood differences).

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

82. 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).

83. *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; Ray Kelly, *Ray Kelly: The NYPD: Guilty of Saving 7,383 Lives*, WALL ST. J. (July 22, 2013), http://www.wsj.com/articles/SB10001424127887324481045786163358871932 0; 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; *see also* Heather Mac Donald, *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").

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.[84] By 1969, they had become so endemic that the Kerner Commission, established by President Johnson to investigate the 1967 urban riots, singled out the police's excessive use of investigative stops[85] and the "wholesale harassment by certain elements of the police community, of which minority groups, particularly Negros, frequently complain."[86] Today's fires are residues 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."[87] The political sponsors of the policy consistently identified violent crime con-

84. 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 9, 2015), http://www.jacobinmag.com/2015/05/stop-and-frisk-dragnet-ferguson-baltimore. SQF 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, 1950–72, 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 was "primarily reactive," an orientation modified by the rise of community policing. James J. Willis, *A Recent History of the Police*, *in* THE OXFORD HANDBOOK OF POLICE AND POLICING 3, 6–7 (Michael D. Reisig & Robert J. Kane eds., 2014). A 1966 study of Chicago police, for example, found they spent one percent of their time proactively stopping people, fourteen percent of their time reacting to the public's calls, and eighty-five percent of their time on unstructured random patrols. Lawrence W. Sherman, *The Rise of Evidence-Based Policing: Targeting, Testing, and Tracking*, 42 CRIM & JUST. 377, 378 (2013).

85. NAT'L ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 158–61 (1968).

86. Terry v. Ohio, 392 U.S. 1, 14 (1968).

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

trol as its core aim.[88] Because violent crime is disproportionately committed by African Americans and concentrated in black neighborhoods, they argued, it is no surprise that SQF focuses on those predominantly minority neighborhoods.[89] Rather than proof of anti-minority animus, the use of SQF is evidence for this view 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 subpart while the tally of SQF's costs is addressed in the following subpart.

The genesis of an argument for SQF's crime-control benefits is found in 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," a phrase that succinctly encapsulated the distinctive appeal of SQF.[90] 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."[91] His call responded directly to what by any measure was a grave crisis of law and order. At the time, New York City was suffering from a high homicide rate.[92] Of the 1951 murders that occurred in New York in 1993, the year ending as Wilson wrote, more than 1500 were committed by firearm.[93]

Wilson's call for aggressive street policing as a prophylaxis for gun violence 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 twenty-nine weeks in Kansas City of gun-based, intensive street policing and found a forty-nine percent decline in gun crimes without any spillover to neighboring areas.[94]

88. *See* 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.").

89. *See* sources cited *supra* note 80.

90. James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES (Mar. 20, 1994), http://www.nytimes.com/1994/03/20/magazine/just-take-away-their-guns.html?pagewanted=all.

91. *Id.*

92. Benjamin Bowling, *The Rise and Fall of New York Murder*, 39 BRIT. J. CRIMINOLOGY 531, 534 (1999).

93. *Id.* at 534 fig.1, 535 fig.2.

94. Lawrence W. Sherman & Dennis P. Rogan, *Effects of Gun Seizures on*

Results of this kind prompted "[s]cores of cities [to] rush[] to follow the Kansas City model"[95] 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.[96]

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.[97] The 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 per capita stop rates).[98]

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.[99] 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 phenome-

Gun Violence: "Hot Spots" Patrol in Kansas City, 12 JUST. Q. 673, 684 (1995).

95. Meares, *supra* note 1, at 340; *accord* Bellin, *supra* note 73, at 1505 ("[T]he NYPD uses stop-and-frisk to find guns and deter gun-carrying.").

96. Complaint ¶¶ 83–84, Bailey v. City of Philadelphia, No. 10-5952 (E.D. Pa. 2010), https://www.aclupa.org/download_file/view_inline/669/198.

97. 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 prosecute such charges in court." Thompson v. City of Chicago, 104 F.R.D. 404, 404 (N.D. Ill. 1984). Approximately 100,000 people were arrested in these operations. STOP AND FRISK IN CHICAGO, *supra* note 7, at 5.

98. STOP AND FRISK IN CHICAGO, *supra* note 7, at 6, 11.

99. There is an enormous empirical literature to this effect. A useful summary is Janet J. Lauritsen & 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; Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCI. 918, 919, 923 (1997).

non.[100] Not only impoverished African Americans but also black middle-class cohorts are disproportionately represented in extremely poor urban neighborhoods.[101] One side effect of this is that urban violent crime impacts minority groups more grievously than non-minority groups.[102] In 1993, the year before James Wilson wrote his *Times* op-ed, the African-American homicide victimization rate per 100,000 population was 47; the white rate was 6.4.[103] 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.[104]

If American cities were making progress toward meaningful racial integration, this nexus between policing and race might be expected to have waned by today. But despite increasing ethnic and racial diversity within cities, racial segregation endures in many cities.[105] Indeed, as many American cities are

100. *See* Glenn Firebaugh & Chad R. Farrell, *Still Large, but Narrowing: The Sizable Decline in Racial Neighborhood Inequality in Metropolitan America, 1980–2010*, 53 DEMOGRAPHY 139, 144 (2016) (analyzing data from 1980 to 2010 and finding a "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 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) ("[S]egregation is a major predictor of the rates of homicide and robbery among blacks.").

101. 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).

102. Jeffrey Fagan & 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.").

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

104. *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").

105. *See* John R. Logan et al., *Segregation of Minorities in the Metropolis:*

as "hypersegregated" today as they were in 1970.[106] The experience of residential segregation, moreover, has remained especially stable for African Americans regardless of class. Nationally, the proportion of African-American areas lacking racial diversity has "remained stubbornly set at around 8.6 percent" throughout the 1990s.[107] Even "relatively advantaged" black neighborhoods "continue to be unique in the degree to which they are spatially linked with communities of severe concentrated disadvantage."[108]

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.[109]

2. The Difficulties of SQF as Violent Crime Control

The benefits of SQF, however, are more qualified than its advocates suggest. I analyze here how those benefits are properly characterized before turning to the policy's costs. Fo-

Two Decades of Change, 41 DEMOGRAPHY 1, 7 (2004) (finding that despite modest declines in racial segregation, blacks remain more segregated from whites than Hispanics or Asians).

106. Douglas S. Massey & Jonathan Tannen, *A Research Note on Trends in Black Hypersegregation*, 52 DEMOGRAPHY 1025, 1027–28 (2015).

107. Steven R. Holloway et al., *The Racially Fragmented City? Neighborhood Racial Segregation and Diversity Jointly Considered*, 64 PROF. GEOGRAPHER 63, 69–70 (2012).

108. Patrick Sharkey, *Spatial Segmentation and the Black Middle Class*, 119 AM. J. SOC. 903, 905–06 (2014).

109. Paybarah, *supra* note 83; *accord* sources cited *supra* note 83. For scholarly defenses of SQF and its effect on violent crime, see David Rudovsky & Lawrence Rosenthal, Debate, *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 73, 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 insofar as he concludes that SQF is not narrowly tailored as required by the application of strict scrutiny under Equal Protection doctrine. *Id.* at 1546.

cusing solely upon SQF's suppression of violent crime, there are both reasons for skepticism of the magnitude of the ensuing welfare gain and grounds for treating such 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 in cities such as Chicago today.

If there is no convincing evidence that SQF in fact meaningfully improves policing outcome—and if there is also evidence that it has substantial deleterious effects—then it should be considered a moral wrong in the same class as employment discrimination or housing segregation. Moreover, evidence that SQF imposes concentrated costs on minority populations without remotely commensurate benefits points toward the need for a distinct, programmatic remedy such as disparate impact liability.

I highlight four interrelated 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 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."[110] Two subsequent efforts at replicating the former study, in Indianapolis and Pittsburgh, have produced ambivalent results.[111] The Indianapolis study, for example, found that homicide rates decreased in one of two treatment areas, but remained unchanged in the other.[112] Its authors concluded that the "present state of

110. Meares, *supra* note 1, at 344.

111. CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 32–33 (2014) (describing and discussing both studies).

112. Edmund F. McGarrell, Steven Chermak, Alexander Weiss & Jeremy Wilson, *Reducing Firearms Violence Through Directed Police Patrol*, 1 CRIMINOLOGY & PUB. POL'Y 119, 136–37 (2001).

knowledge does not allow us to answer the theoretical questions of what produced the effects observed in Kansas City."[113]

A meta-analysis of six policing experiments involving increased police patrols in North and South America reexamined the Pittsburgh data. This data found that while the earlier studies had found a statistically significant reduction in gun violence, alternative specifications "strongly suggest[] the estimated drop in shots-fired incidents was due at least in part to a preintervention trend, a seasonal pattern, or chance."[114] Nevertheless, the authors of the meta-study found themselves ultimately "generally favorable" to the method pioneered in Kansas City, even as they raised substantial concern as to whether Sherman's experiment could be scaled up beyond the level of small neighborhoods.[115]

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."[116] 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."[117]

113. *Id.* at 145.

114. Christopher S. Koper & Evan Mayo-Wilson, *Police Crackdowns on Illegal Gun Carrying: A Systematic Review of Their Impact on Gun Crime*, 2 J. EXPERIMENTAL CRIMINOLOGY 227, 238, 245–46 (2006).

115. *Id.* at 248–49.

116. Richard Rosenfeld & Robert Fornango, *The Impact of Police Stops on Precinct Robbery and Burglary Rates in New York City, 2003–2010*, 31 JUST. Q. 96, 97 (2012). Rosenberg and Fornango persuasively argue 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.

117. David F. Greenberg, *Studying New York City's Crime Decline: Methodological Issues*, 31 JUST. Q. 154, 181–82 (2014); *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) (reporting study findings that increased rates of police stops and decreased efficiency of those stops disproportionately affects particular neighborhoods).

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."[118]

A leading criminologist and the paramount expect on New York policing, Zimring has seemed of two minds about street policing in general. On the one hand, he has identified "aggressive" measures such as hot-spot policing, the elimination of open-air drug markets, and firearm reduction as "probably" successful.[119] On the other hand, he has been much 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.[120] At the very best, Zimring's evidence leaves open the possibility that SQF had some role to play in crime reduction. It casts little light on the magnitude of that role, and it has little to say about 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."[121]

In Chicago, a different and more complicated story prevails. A sharp rise in murder and decline in arrests followed the November 2015 release of long-suppressed video footage of a fatal police shooting that provoked sharp public outcry against the Chicago Police Department.[122] Immediately thereafter, in

118. FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL 148–49 (2012).

119. *Id.* at 145.

120. *Id.* at 147–48. I am grateful to John Rappaport for discussion on this point.

121. 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.

122. Rob Arthur & Jeff Asher, *Gun Violence Spiked—and Arrests Declined—in Chicago Right After the Laquan McDonald Video Release*, FIVETHIRTYEIGHT (Apr. 11, 2016), http://fivethirtyeight.com/features/gun-violence-spiked-and-arrests-declined-in-chicago-right-after-the-laquan

January 2016, changes to how stops and frisks are recorded—but no change to *operational* policy—went into effect.[123] Given that the highly critical public reaction to the video likely had a significant effect on multiple aspects of police morale and hence police behavior, it is hard to disentangle any discrete effect from changes in SQF policy from changes due to the critical public reaction to the demoralizing release of evidence of unlawful police violence. Those who rush to judgment or seek to cast blame based on the Chicago (or New York) data trends may well be ensnared unwittingly in a species of motivated reasoning.

The empirical case for a crime-control benefit from SQF, in short, does not stand on strong foundations.[124] While there is some empirical support for an effect from SQF in small-scale experiments, there is no existing evidence that this effect can be replicated at a citywide level.[125] The weakness of its evidentiary predicate contrasts with firmer evidentiary basis for other kinds of reform, including the deployment of more officers and the use of more data-driven approaches. More than forty years after Wilson's initial intervention, therefore, SQF remains largely predicated on a mere prediction about the effect of intensive street stops on violent crime levels.

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 strive to hold all else constant and then search for an ef-

-mcdonald-video-release.

123. *See id.*

124. 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 et al., *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 plainly incorrect to rely on this sort of multi-pronged effort, in which the effects of one policy might be contingent on the manner in which another is operationalized as a basis for drawing inferences about the narrower tactic of SQF.

125. For a challenge to the small-scale effects, see EPP ET AL., *supra* note 111, at 153–54 ("Nor is it clear that investigatory stops help reduce the crime rate . . . .").

fect 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 that it occupies for other tactical uses.

There are, moreover, other modalities of policing that are positively associated with crime control in rigorous empirical studies. Consider, for example, the empirical literature on "hot-spot policing," a technique that has some parallels with SQF, but that can also be distinguished from it. Hot-spot policing involves "the application of police interventions at very small geographic units of analysis."[126] A range of studies and meta-studies suggests that the highly localized deployment of officers has a meaningful and statistically significant effect on crime rates.[127]

Hot-spot policing and SQF have some similarities, but their differences are critical. To begin, there is a question of scale. I have already stressed more than once that SQF (as I use the term) involves tens or hundreds of thousands of arrests. Hot-spot policing does not require similarly massive deployments. 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.[128] Even if the distinction in scale

126. 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).

127. Cody W. Telep & 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 base for hot spots 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 A. Braga et al., *Problem-Oriented Policing in Violent Crime Places: A Randomized Control Experiment*, 37 CRIMINOLOGY 541 (1999).

128. Fagan & Geller, *supra* note 11, 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 target-

between SQF and hot-spot policing is hard to quantify, in practice it seems easy enough to draw.[129]

Moreover, hot-spot policing does not require stops, let alone frisks or arrests to be effective. There is instead evidence that "increased police presence alone" dampens crime rates, and the "strongest" impact is associated with "situational prevention" strategies, that "disrupt situational dynamics that allow crime to occur," for example by "razing abandoned buildings."[130] One study of street stops at "microgeographic" hot spots examined in one-week increments in New York generated reductions in crime, but cautioned that "evidence suggests that crime prevention can be achieved without resorting to an unrestricted SQF policy."[131] 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."[132]

Hot spot policing plainly requires a nontrivial number of officers. So it is important to emphasize that my argument here solely concerns the style of policing, not the sheer volume of officers deployed.[133] And increasing stops or arrests, do not appear to be a necessary component of hot-spot policing. To the contrary, in one leading study, the authors noted approvingly that officers in the treatment condition (i.e., engaged in hot-

ing trespassers, but without any explanation of why the suspicion of trespass arose).

129. 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 SQF qua urban policing strategies.

130. Telep & Weisburd, *supra* note 127, at 333–41; *accord* Braga & Bond, *supra* note 127, at 599 (reporting results from a controlled, randomized study in Lowell, Massachusetts, 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).

131. David Weisburd et al., *Do Stop, Question and Frisk Practices Deter Crime? Evidence at Microunits of Space and Time*, 15 CRIMINOLOGY & PUB. POL'Y 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").

132. *Id.* at 49–50. Another study conducted by Weisburd similarly finds "modest" effects that are concentrated in space and time. Alese Wooditch & David Weisburd, *Using Space-Time Analysis To Evaluate Criminal Justice Programs: An Application to Stop-Question-Frisk Practices*, 32 J. QUANT. CRIM. 191, 191 (2015).

133. *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").

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."[134] A recent meta-analysis of nineteen 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.[135] Three of the ten existing studies of the traditional policing model found small positive effects on crime reduction.[136] But the overall mean effect size of problem-oriented hot-spot policing was twice the effect size of the traditional policing model.[137] It would seem that the decision 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 underscores a more general point: policing is not a single, undifferentiated public good. Rather, policing is mutative and takes several forms. It can entail the pursuit of diverse ends of crime-control, order-maintenance, and social provision, with divergent tools.[138] Police forces now engaged in SQF have at other times employed other, quite different approaches, which focus instead on service provision,[139] community relations,[140] or 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.[141] 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 not nec-

134. Braga & Bond, *supra* note 127, at 599.

135. Anthony A. Braga et al., *The Effects of Hot Spot Policing on Crime: An Updated Systematic Review and Meta-Analysis*, 31 JUST. Q. 633, 640, 655–56 (2014).

136. *Id.*

137. *Id.* at 656.

138. For an excellent survey of diverse views on the police function, see THE FUTURE OF POLICING (Jennifer M. Brown ed., 2014).

139. *See, e.g.*, 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).

140. *See, e.g.*, Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593 (2002) (describing an effort by police in Chicago to build relations with African-American churches).

141. WESLEY G. SKOGAN, POLICE AND COMMUNITY IN CHICAGO: A TALE OF THREE CITIES 247 (2006) (discussing community policing in Chicago in the early 1990s).

essarily receive high levels of other policing services.[142] Indeed, racial segregation at the municipal level is systematically correlated to depressed levels of public service provision.[143]

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 non-minority neighborhoods when seeking police aid via 911 calls.[144] Policing is thus both under-supplied and over-provided simultaneously.

Defenders of SQF therefore mislead when they equate SQF with a police force "focus[ing] its resources where people most need protection."[145] Rather, it is both possible—and in fact often seems to be the case—that SQF is accompanied by serious deficiencies in respect to other elements of the bundle of police services. Estimation of the margin costs of ending SQF must as a result account for the possibility of variance across these other elements of the police function.

Third, the assumption of SQF's advocates, particularly 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.[146] Implicitly, these advocates are drawing a comparison between SQF and affirmative action. Both, they suggest, 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.[147] It may be that among the gains of SQF is a reduction in the fear of crime,[148] and that this gain is diffused

142. ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 41–42 (2010) (noting disparate access to public-order resources in cities such as Los Angeles).

143. Jessica Trounstine, *Segregation and Inequality in Public Goods*, 60 AM. J. POL. SCI, 709, 720 (2016).

144. Cent. Austin Neighborhood Ass'n v. City of Chicago, 1 N.E.3d 976 (Ill. App. Ct. 2013) (describing longer wait times for 911 calls in minority neighborhoods).

145. Mac Donald, *supra* note 83.

146. *See* sources cited *supra* note 83.

147. *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 M. Grimes, *Polls, Politics, and Crime: The "Law and Order" Issue of the 1960s*, 5 W. CRIMINOLOGY REV. 50, 50 (2004) (discussing origins of public concerns about crime in the 1960s).

148. *See generally* Jonathan P. Jackson, *A Psychological Perspective on Vulnerability in the Fear of Crime*, 15 PSYCHOL. CRIME & L. 365 (2009) (exam-

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,[149] it is necessarily the case that whereas the (predominantly minority) residents of impoverished neighborhoods experience both costs and benefits, the (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 group benefits from being able to access more of the city, as well as from a more general reduction in their fear of crime.[150]

Depending on the magnitude of these various costs and benefits for different racial groups, it is at least possible that the adoption of SQF might create larger net benefits for the class of white nonresidents as a whole than for the class of minority residents of highly policed neighborhoods in a manner that is racially regressive—*even without accounting for the potential costs of SQF*.[151]

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 contingency. It is hardly clear that—again, even bracketing the costs of SQF—it is true that a disproportionate share of the social benefits of SQF run to minori-

ining factors that impact fear of crime).

149. *But see supra* text accompanying notes 126–30 (suggesting that hot spot policing is better supported empirically as a crime-control measure than SQF).

150. It seems likely to me that some non-minorities gain satisfaction from policies that confirm their prior belief that minorities are responsible for social ills such as crime, a belief that helps obscure the ways in which both national and state social provision have long disproportionately benefited non-minority populations. For the canonical historical analysis on this point, see IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN THE TWENTIETH CENTURY (2005). SQF, that is, is a policy that simultaneously confirms racial resentment and assuages white guilt. As such, it has large psychological payoffs for the correctly disposed non-minority populations. *See also* Michael Tesler, *The Conditions Ripe for Racial Spillover Effects*, 26 ADVANCES POL. PSYCH. 101, 101 (2015) (summarizing evidence of continued high levels of racial resentment).

151. 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).

ty communities. Much depends on the welfare effects from crime reductions and from mitigation of crime-related fears.

Fourth, the 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 its welfare-related consequences. Rather, it is moral in nature, and depends on a distinctive (and 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."[152]

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 individual politicians) also resorted to SQF.[153]

But 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. Policing, that is, should be subject to a Hippocratic constraint.

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 wealthy African Americans have driven the growth of concentrated, racialized poverty.[154] But these forces

152. Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889).

153. In Chicago, the argument might well be personalized given the lengthy tenure of Richard M. Daley in office.

154. 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 sub-

have been magnified by "deliberate policy decisions to concentrate minorities and the poor in public housing."[155]

In Chicago, for example, alderman and the mayor thwarted efforts from the 1940s onward to disperse African Americans outside traditionally black neighborhoods.[156] Across the country, zoning restrictions and permitting requirements have been extensively deployed to perpetuate racially "exclusionary" residential patterns.[157]

The implications of state involvement in the creation of concentrated racialized poverty turn 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.[158] 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

urbs 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 canonical history of post-war Detroit. THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT (1996).

155. Sampson & Wilson, *supra* note 154, 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. J.L. 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).

156. *See* ARNOLD R. 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* note 156, at 215–18.

157. *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).

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

general 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.[159] 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.

Stated in brief then, my fourth point is that 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 a demand for special efforts to ensure that no policy response to crime imposes a disproportionate share of costs on the legatees of historical discrimination, or that denies them a disproportionate share of its benefits.

To summarize then, 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-best policy option such as hot-spot policing is even shakier. Accounting for SQF's more diffuse effect on 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 properly understood or evaluated once they are detached from the historical origins of concentrated poverty.

159. 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).

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 embrace here the dominant emphasis in recent sociological scholarship on "modeling discrimination as a process."[160]

I identify eight pathways by which SQF can impose harms on individuals and communities defined by race. I began the analysis of costs by focusing on the immediate encounter between police and an individual. Having documented costs in that proximate 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.[161] Several critically depend upon "vicious cycles," or positive feedback mechanisms that entangle individual and neighborhood-level effects,[162] 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."[163] In subsequent cases, however, the Court has tended to downplay the immediate psychological and dignitary costs of being stopped.[164]

160. Devah Pager & Hannah Shepherd, *The Sociology of Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 188 (2008).

161. Because not all have been rigorously empirically tested, I will carefully identify what data exists respecting each pathway. Where data is absent, I will offer (with appropriate caveats) reasoned hypotheses.

162. Mitchell Duneier argues that "the black ghetto has been the site of a series of vicious cycles 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.

163. Terry v. Ohio, 392 U.S. 1, 16–17 (1968).

164. *See, e.g.*, Carol S. Steiker, Terry *Unbound*, 82 MISS. L.J. 329, 338–39 (2013).

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 substantial. Perhaps the best evidence derives from a recent survey of 1200 young men in New York conducted by Amanda Geller and colleagues. The latter found that contact with the police (primarily in the form of *Terry* stops) was consistently associated with persisting "stigma," "trauma," "anxiety," and "depressive symptoms."[165]

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 a sharp fear of violence and deadly force.[166] 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.[167] This psychological toll is not immediately visible. It may be shameful even to confess. 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.[168] 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.[169]

165. Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2321–22 (2014).

166. 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.").

167. 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 in New York City).

168. *See, e.g.*, Maryland v. Wilson, 519 U.S. 408, 414–415 (1997) (stressing the risk of harm to officers while characterizing the cost to those under the control of the officers of being physically moved as "minimal").

169. 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 (1988) (employing a reasona-

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.[170] Even assuming perfectly compliant behavior, African Americans were twenty-one percent more likely to experience force than whites.[171] In Chicago, Wesley Skogan has found higher rates of nonlethal force in the context of stops of blacks than in white citizen stops.[172]

Given such large racial 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.[173]

Third, the effects of *Terry* stops on the individuals subjected to police attention do not expire when their participants are released from police control. Rather, negative experiences with the police breed cynicism about the law,[174] 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

bleness standard). 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.*

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

171. Fryer, *supra* note 170, at 31.

172. Skogan, *supra* note 6, at 9.

173. *See infra* text accompanying notes 331–34 (addressing the argument that SQF is justified because of minority community support).

174. On the concept of legal cynicism, see generally David S. Kirk & Andrew V. Papachristos, *Cultural Mechanisms and the Persistance of Neighborhood Violence*, 116 AM. J. SOC. 1190 (2011) (exploring the consequences of legal cyncisim).

contexts where SQF has been implemented.[175] But studies from the specific cities where SFQ is employed demonstrate vividly that intensive street policing has lingering effects on the dispositions and upon the beliefs of any population routinely subject to its rigors.

For instance, a recent qualitative study of young men living in three high-crime neighborhoods in Philadelphia found that less than ten percent were willing to call the police "in any circumstance," in part because many had themselves had negative experiences with the police in the past.[176] Tellingly, the same study also found resentment directed at police because of their failure to respond to 911 calls in a timely fashion.[177] Police, that is, are not seen reflexively in a negative light: it is their intrusive and disrespectful behavior toward minority citizens in particular, coupled with their failure to provide noncoercive public safety, that elicits negative perceptions of the badge.

175. 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 [sic] conduct stops as well."). Sherry Colb has raised doubts that such "targeting harm" is likely to arise because individuals stopped do not know the police's motivations and therefore cannot know if there is racial animus. Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1500 (1996). After Colb made this argument, however, Epp and colleagues demonstrated empirically that minority motorists subject to vehicular stops based on minor regulatory offense are quite aware of the fact that similarly situated white motorists would not have been stopped, and make strong negative judgments of the police as a result. EPP ET AL., *supra* note 111, at 117–18.

176. Patrick J. Carr et al., *We Never Call the Cops and Here Is Why: A Qualitative Examination of Legal Cynicism in Three Philadelphia Neighborhoods*, 45 CRIMINOLOGY 445, 457 (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) (detailing study that examined African-American mens' experiences and lack of trust of police).

177. Carr et al., *supra* note 176, at 459; *accord* Robert J. 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. *See also* ALICE GOFFMAN, ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY (2014).

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.[178] In contrast, a recent study in New York, examining young subjects specifically in areas affected by SQF, found that increasing experience of stops (whether negative or positive experiences) diminished perceptions of police legitimacy.[179] Another study in Chicago has found not only that African Americans have "strikingly" lower levels of trust in police, but "those caught up in enforcement and investigative stops were less trusting of police" by almost forty-five percent.[180] A larger body of empirical findings from the United States and beyond demonstrates that diminished police legitimacy is associated with a diminished disposition to follow the law and a lesser willingness to cooperate with police.[181]

Relatedly, a high volume of stops concentrated in a specific geographically locale can create a vicious-circle feedback loop that flows from individual legal cynicism to increased collective victimization, and then back again.

When police are perceived as endorsing excessive force against racial minorities, members of that minority population tend to become more reluctant to seek police aid. In a time-series study of how highly publicized incidents of police violence in Milwaukee influenced the use of 911, Matthew Desmond, Andrew Papachristos and David Kirk found that such incidents

178. A recent study in St. Louis, Missouri, 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.

179. Tom R. Tyler et al., *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).

180. Skogan, *supra* note 6, at 13.

181. 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.").

have a "clear and significant [negative] impact on citizen crime reporting."[182] Other studies have found that when SQF is *perceived* as being distributed on racial grounds (perhaps because African Americans and Hispanics are *in fact* at a much greater per capita risk of being stopped than whites[183]), cynicism about the law and police is likely to be sharpened within minority communities. At the margin, violations of the law become more frequent.[184] As the expected risk of being victimized rises, therefore, 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.[185] More crime in turn leads to more aggressive SQF, which starts the cycle anew.

A version of one element of this dynamic has been termed the "Ferguson effect." This rather loaded term 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 a broad Ferguson effect, however, is weak and is confined to certain crimes in certain cities.[186] If further evidence were to emerge of such an effect, it would nevertheless strengthen the vicious circle argument developed in the previous paragraphs.

Fourth is yet another vicious circle related to legal cynicism: if minorities have consistently negative views of the po-

182. Matthew Desmond et al., *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOC. REV. 857, 870 (2016).

183. *See* EPP ET AL., *supra* note 111, 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 LIVES OF BLACK AND LATINO BOYS 54–57 (2011) (detailing the "code" Latinos and blacks in the inner city develop to survive violent communities).

184. *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.").

185. *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.").

186. The best study of which I am aware is David C. Pyrooz et al., *Was There a Ferguson Effect on Crime Rates in Large U.S. Cities?*, 46 J. CRIM. JUST. 1, 7 (2016) which finds an effect only for homicide and robbery, and only in cities with large impoverished minority communities.

lice, 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.[187] Consistent with this possibility, greater perceived minority threat appears to predict higher levels of police use of force, controlling for other relevant predictors.[188] Appearances, in this way, influence realities.[189] The perception of racial disproportionality in stops, on this theory, influences individual residents' behavior, which in the aggregate creates racial differences in violence by police. This of course merely strengthens minorities' negative expectations of police.[190] In this way, 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.[191]

Fifth, just as legal cynicism leads to higher victimization rates, so too can the carceral consequences of SQF have negative effects. "[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.[192] To the extent SQF does not result in arrests or incarceration, of course, this dynamic is forestalled.

Sixth, SQF might solidify stereotypical assumptions about the correlation of race and criminality. When neighborhoods targeted for SQF are predominantly African American and

187. 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).

188. *See* Joscha Legewie & Jeffrey Fagan, Group Threat, Police Officer Diversity, and the Deadly Use of Police Force 2–4 (2016) (unpublished manuscript) (on file with author).

189. 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).

190. 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 51, at 97–98.

191. Lincoln Quillian, *New Approaches to Understanding Racial Prejudice and Discrimination*, 32 ANN. REV. SOC. 299, 309 (2006).

192. Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1554 (2003).

Hispanic, SQF is likely to strengthen the widely shared perception of a connection between race and crime.[193] Careful empirical studies have demonstrated that the racial composition of a neighborhood already provides a cue for people's estimates of its disorderly character[194] and its crime rate.[195] 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 predate any known disparity in crime rates and invidious generalizations that depend not on empirics, but rather on profound (and harmful) assumptions about racial differences.[196]

Consistent with this dynamic, empirical evidence already suggests that suspects with darker skin pigmentation are more likely to identified as criminal[197] and punished more severely[198] 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."[199]

Seventh, another probable effect of SQF is a dampening of civil participation by residents of affected neighborhoods in

193. *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).

194. 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).

195. Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes*, 107 AM. J. SOC. 717, 718 (2001) ("[T]he percentage of a neighborhood's black population, particularly the percentage [of] young black men, is significantly associated with perceptions of the severity of a neighborhood's crime problem.").

196. 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 Zeckhauser*, 33 PHIL. & PUB. AFF. 94, 97 (2005) (emphases omitted).

197. Travis L. Dixon & Keith B. 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).

198. Jennifer L. Hochschild & Vesla Weaver, *The Skin Color Paradox and the American Racial Order*, 86 SOC. FORCES 643, 644 (2007).

199. ANDERSON, *supra* note 142, at 42.

ways that, over time, conduce to diminished collective political power. Important recent work by Amy Lerman and Vesla Weaver has demonstrated empirically that contact with the criminal justice system, including nonconsensual stops, has a substantial and statistically significant effect on trust in government.[200] In one national sample, "[t]he probability of voting declined by 8 percent for those who have been stopped."[201] 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 on the political distribution of valued public goods,[202] even as it purports to empower those communities.

Eighth, and finally, is yet another potential aggregate-level 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."[203] 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.[204] Although there is no study of the effect of

200. LERMAN & WEAVER, *supra* note 81, at 150–51 (presenting a range of tests reflecting Americans' levels of trust in government).

201. *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, 204 (2014) (finding in a study of New York that "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").

202. Todd R. Clear, *The Effect of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 116 (2008).

203. Robert J. Sampson, *Neighborhood Effects, Causal Mechanisms, and the Social Structure of the City*, *in* ANALYTIC SOCIOLOGY AND SOCIAL MECHANISMS 227, 232 (P. Demeulenaere ed., 2011).

204. Jeffrey D. Morenoff et al., *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 et al., *Assessing 'Neighborhood Effects': Social Processes and New Directions in Research*, 28 ANN. REV. SOC. 443, 457 (2002) (same); Sampson et al., *supra* note

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.

In considering these eight pathways, it is important to note that in many respects, their effects are 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.[205] SQF is likely pivotal in the formation of many minority children's understandings of their status and possibilities in America, an effect compounded by the further fact that one in four black children already experiences parental incarceration.[206] To think that SQF's structural harms will be transient, therefore, is to be far too optimistic.

This is a long list. Its items, though, should not be viewed in isolation. Rather, these mechanisms operate in simultaneous and overlapping ways. All of these pathways generate costs concentrated on the minority individuals and communities in which SQF is imposed. In this, their effects are intersecting and cumulative. 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.

It is for this reason that SQF 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.

99, at 918.

205. 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).

206. SARA WAKEFIELD & CHRISTOPHER WILDEMAN, CHILDREN OF THE PRISON BOOM: MASS INCARCERATION AND THE FUTURE OF AMERICAN INEQUALITY 41 (2014) ("For black children . . . the risk of having a father imprisoned before their fourteenth birthday was one in four.").

These dynamics, finally, may help explain the surprising lack of empirical evidence of crime reduction from SQF.[207] 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 so far 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 a clear picture of both positives and negatives in hand, it is possible to recapitulate the argument against SQF in a more nuanced form. To be sure, absent 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 police on the street, but on the dynamic role that SQF plays in the social and racial stratifications that concatenate with each other to create urban residential segregation. It is an analysis, 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.

207. *See supra* Part I.B.2.

Local and state officials might have taken another path.[208] 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."[209] By the 1980s, however, the War on Crime "would eventually completely supplant" Great Society antipoverty programs as a solution to urban discontent.[210] Non-coercive solutions, in short, had already been tabled by the time the crime wave of the late 1980s and early 1990s was in full flush.[211]

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.

SQF is thus but one link in a larger "process"[212] of social and racial stratification in ways that extend well beyond the discrete effects of an isolated encounter between one officer and one resident.[213] Given its exiguous benefits (shared across the

208. *Accord* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 161 (1997) (arguing that greater expenditures on police is always an alternative to racial profiling).

209. 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 (2015).

210. *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) (finding that a city's black population was a "significant predictor of expenditures for police salaries and operations").

211. *Cf.* DUNEIER, *supra* note 162 (noting that African-American "ghettos," as he calls them, are still characterized by a policy of "withholding resources and opportunities for poor blacks").

212. Pager & Shepherd, *supra* note 160, at 182 ("Beyond more conventional forms of individual racism, institutional processes . . . are important to consider.").

213. Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 82 (2000) ("[S]ocial stratification is constituted through features of

whole of 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.[214]

On the assumption that my judgments about the relative magnitude of costs and benefits are sustained, therefore, I believe that SQF can fairly be characterized as "a systemic and institutional phenomenon that reproduces racial inequality and the presumption of black and brown criminality."[215] It is one of the mechanisms by which racial division in American society is produced and reproduced.

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[216] or structural inequality.[217] SQF—even absent any racial animus—cannot be 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.[218] 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

(1) social structure (institutions or practices) and (2) social meaning (stories or reasons).").

214. *See* ZIMRING, *supra* note 118, 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.").

215. 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).

216. *See* R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 594–98 (2003) ("[T]he social harms of incarceration . . . are likely to be underappreciated in the racial profiling debate.").

217. In a much-noted analysis, Mathias Risse and Richard Zeckhauser 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 the acts of profiling." Mathias Risse & Richard Zeckhauser, *Racial Profiling*, 32 PHIL. & PUB. AFF. 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.

218. *See* sources cited *supra* note 83.

that pernicious generalization is hardly entitled to deference based on its putative accuracy.[219]

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 doctrine associated with *Terry* and the Equal Protection Clause rules that have coalesced around *Feeney*. I argue that there is a mismatch between these doctrinal vehicles and the core normative challenge posed by SQF as I have articulated it in Part I. This mismatch renders current constitutional law 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 instead reveals a troublingly asymmetrical gap cutting across both doctrinal structures. To wit, 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,'

219. 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 A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 119.

not merely 'in spite of'"[220] 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. Consistent with *Feeney*, those stops might be constitutionally valid even if they were distributed in a way that deepens racial stratification. Indeed, racial disparities are particularly likely to *persist* if police sincerely believe that African Americans commit a disproportionate share of offenses and thus ought to comprise 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.

This Part first considers the Fourth Amendment law, and shows its inadequacies. It then analyzes Equal Protection doctrine to reveal why it has utterly failed to address 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. It accounts for such contexts only when doing so expands state authority.

The "reasonable articulable suspicion" predicates for a *Terry* stop and a related frisk are not demanding hurdles. They focus solely on the ex-ante evidentiary basis for a stop, and wholly 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

220. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

must be able to articulate something more than a "hunch[]."[221] The Court has instead underscored that this evaluation be made under the "totality of the circumstances."[222] This gives officers a wide array of predicate facts to choose from when making their case. With one exception, officers' subjective beliefs and knowledge are as a result available as bases for a *Terry* stop,[223] even though such subjective factors are not relevant to the Fourth Amendment analysis in other contexts.[224] 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 can be conjured.[225]

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 will result in accurate outcomes. Police have a strong incentive to color the facts in their favor, or even outright lie.[226] A recent ethnographic account of the Chicago criminal courts, for example, paints a bleak picture of judges who routinely "laughed at the fabrication of police reports as if it were a novelty, rather than an abuse of power."[227]

221. Terry v. Ohio, 392 U.S. 1, 21–22 (1968); *see also* United States v. Arvizu, 534 U.S. 266, 274 (2002) (noting that reasonable articulable suspicion is considerably lower than the preponderance of evidence standard).

222. Alabama v. White, 496 U.S. 325, 332 (1990).

223. United States v. Mendenhall, 446 U.S. 544, 563 (1980) (Powell, J., concurring) ("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.").

224. 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." (quoting Brigham City, Utah v. Stuart, 547 U.S. 398 (2006)).

225. Whren v. United States, 517 U.S. 806, 813 (1996) ("We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.").

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

227. Nicole Gonzalez Van Cleave, *Chicago's Racist Courts*, N.Y. TIMES, Apr. 15, 2016, at A27; *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).

Chicago's pathologies might be extreme, but it is hard to imagine such practices are wholly absent from other large metropolitan court systems.[228] 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 *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 officer suspected crime was "afoot,"[229] subsequent cases extended that power to instances in which a crime has been completed.[230]

While at first blush it might seem 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.[231] 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.[232] 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-

228. *See, e.g.*, William Glaberson, *In Tiny Courts of New York, Abuses of Law and Power*, N.Y. TIMES, Sept. 25, 2006, at A1 (documenting racial and sexual bigotry in New York State courts).

229. Terry v. Ohio, 392 U.S. 1, 30 (1968); *see also* United States v. Cortez, 449 U.S. 411, 417–18 (1981) ("Based 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 a resistance to settling on a specific quantum of suspicion. *See, e.g.*, 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.").

230. *See* United States v. Hensley, 469 U.S. 221, 229 (1985).

231. *Terry*, 392 U.S. at 33.

232. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 562–63 (1976) (determining that secondary of inspection of motorists do not violate the Constitution even if referrals are made largely on the basis of Mexican ancestry); Brown v. City of Oneonta, 221 F.3d 329, 339 (2d Cir. 2000) ("Yet our role is not to evaluate whether the police action in question was the appropriate response under the circumstances, but to determine whether what was done violated the Equal Protection Clause.").

white persons," including women, encountered on the streets.[233] 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*.[234]

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.[235] 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.[236] 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 a suspect's mere presence in a "high crime area," and more particularly "an area of heavy narcotics trafficking" was "relevant" to the legality of a *Terry* stop.[237] Evidence from New York's SQF practice also demonstrates that this term is "vulnerable to subjective and highly contextualized interpretation."[238]

This may be of particular concern to the extent that an increasing proportion of minorities tends to create a belief of dis-

233. 235 F.3d 769, 779 (2d Cir. 2000) (Calabresi, J., dissenting from denial of rehearing en banc); *see also* Bela August Walker, *The Color of Crime: The Case Against Race-Based Suspect Descriptions*, 103 COLUM. L. REV. 662, 673–74 (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).

234. 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.

235. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 782 (2006).

236. William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1821 (1998).

237. 528 U.S. 119, 124 (2000).

238. Fagan & Geller, *supra* note 11, 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 (2008) ("[W]hat is termed a 'high-crime area' can differ from case to case, and jurisdiction to jurisdiction.").

orderliness and criminality, as multiple studies show,[239] *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.[240]

Second, the Supreme Court's recent decision in *Utah v. Streiff*[241] creates an incentive for officers to target for stops populations that are likely to have a higher per capita rate of bench warrants. In *Streiff*, the arresting officer was conducting a stakeout of a house where drug sales were suspected to happen.[242] He saw Strieff leave the house and stopped him, despite lacking the *Terry* predicate of reasonable articulable suspicion.[243] As a result of what the state conceded to be an illegal stop, the officer asked Streiff for identification.[244] Upon checking the produced documentation with his dispatcher, the officer learned of an outstanding warrant for Streiff and arrested him.[245] A search incident to arrest found methamphetamine and drug paraphernalia.[246]

The issue before the Court was whether this evidence should be excluded as fruit of the initial illegal stop.[247] Writing for five Justices, Justice Thomas said no.[248] Characterizing the initial unlawful stop as "negligent" and a "good-faith" mistake,[249] the Court found the search-incident-to-arrest that had produced the narcotics to be "sufficiently attenuated by the preexisting arrest warrant."[250] Hence, the evidence found during the search incident to arrest was not subject to exclusion in Streiff's criminal adjudication.[251]

As Justice Sotomayor's dissent pointed out, "Outstanding warrants are surprisingly common."[252] A recent ethnography of

239. *See supra* text accompanying notes 194–95.
240. *Wardlow*, 528 U.S. at 124.
241. 136 S. Ct. 2056, 2063 (2016).
242. *Id.* at 2059.
243. *Id.* at 2060.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.* at 2064.
249. *Id.* at 2063.
250. *Id.*
251. *Id.*
252. *Id.* at 2068 (Sotomayor, J., dissenting).

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.[253]

In *Streiff*, Justice Sotomayor did not contextualize the use of outstanding warrants in the SQF context. But she cited evidence gathered by the Justice Department in Ferguson, Missouri, 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."[254] Justice Sotomayor's analysis is hard to dispute. Police, indeed, have long been cognizant of the strategic potential for outstanding-warrant checks during street stops and have strategically exploited it.[255]

The decision in *Streiff* creates a new incentive for police to engage in "negligent" stops,[256] 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.[257] 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 em-

253. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 659 (2014).

254. *Streiff*, 136 S. Ct. at 2068 (Sotomayor, J., dissenting).

255. 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. *See* Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 341 n.210 (1998) (describing Mayor Rudy Giuliani's endorsement of this tactic in 1998).

256. Equally, *Strieff* is an incentive for police departments to fail to train adequately their officers on the factual predicates of a *Terry* stop. *See generally Strieff*, 136 S. Ct. at 2063 ("Officer Fackrell was at most negligent.").

257. *See, e.g.*, Adam Liptak, *Supreme Court Says Police May Use Evidence Found After Illegal Stops*, N.Y. TIMES (June 20, 2016), https://www.nytimes.com/2016/06/21/us/supreme-court-says-police-may-use-evidence-found-after-illegal-stops.html (noting reports cited in the dissent of Justice Sotomayor that claimed that there are outstanding warrants out on 16,000 of 21,000 residents in Ferguson, Missouri).

ploy 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.[258] 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 strikingly at odds with the normative verbiage of the Court's Fourth Amendment cases that they generated national media attention.[259] If the mere fact a Justice is cognizant of the larger policy context in which a legal question arises stimulates the press into action, it is because the modal Fourth Amendment decision is hermetically detached from the distinctive ecological and dynamic costs flowing from urban policing.

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.[260] The Court's foundational decisions about the scope of that remedy focus on its effects on officers' incentives.[261] 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.[262] Notionally acknowledging this point, the *Streiff*

258. *See* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 779 (2012) ("[A]nyone who has experienced a Terry stop, however, knows that the harm to dignity can be substantial. And anyone who has been frisked knows that the invasion affects bodily integrity far more than privacy.").

259. *See* Adam Liptak, *In Dissents, Sonia Sotomayor Takes on the Criminal Justice System*, N.Y. TIMES (July 4, 2016), https://www.nytimes.com/2016/07/05/us/politics/in-dissents-sonia-sotomayor-takes-on-the-criminal-justice-system.html.

260. *Strieff*, 136 S. Ct. at 2061.

261. *Id.* at 2073–74 (Sotomayor, J., dissenting).

262. *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.

Court stated that only "purposeful or flagrant" police misconduct needed to be deterred by exclusion.[263]

But why this would be so is not clear. Tort liability for negligence, for example, can easily be premised on a deterrence theory.[264] 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 it is not willing to entertain a dynamic analysis when doing so would expand those remedies.[265] In other cases, the Justices have similarly been willing to account for increases in police professionalism.[266] Yet judicial decisions on the exclusionary rule systematically ignore potential institutional problems of police perjury and abusive conduct.[267]

There is, in short, little reason to expect that the Court's current Fourth Amendment doctrine will provide a vehicle 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 wise to also analyze SQF in terms of its racial impact—a topic addressed at length below and in Part III.

The threat of exclusion thus cannot be expected significantly to deter them."); *see also* Messerschmidt v. Millender, 565 U.S. 535, 548–49 (2012) (reiterating *Leon*'s deterrence-based logic); Davis v. United States, 564 U.S. 229, 236–37 (2011) (same).

263. 136 S. Ct. at 2063.

264. *Id.* at 2072–73 (Sotomayor, J., dissenting).

265. 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. *See* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 294–98.

266. *See* 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.").

267. For a discussion of how these problems arise, and why common state and local rules exacerbate them, see Aziz Z. Huq & Richard McAdams, *Litigating the Blue Wall of Silence: How To Challenge the Police Privilege To Delay Investigation*, 2016 U. CHI. LEGAL F. 213, 213–26.

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 wrong 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 specifications. To take seriously the normative concerns I have flagged would mean treating SQF as a paradigmatic Equal Protection violation. Today, however, the doctrine relegates policing disparities to the margin.

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."[268]

In the absence of an explicit racial classification,[269] 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.[270] 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."[271] In contrast, a disparate impact on a racial group alone does nothing to impugn the constitutionality of a state action.[272]

268. Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2208 (2016) (quoting Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2418 (2013)).

269. 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." *See* Primus, *supra* note 41, at 509.

270. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

271. 442 U.S. 256, 279 (1979) (citation omitted). The same standard applies to both religious and racial discrimination. *See* Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009).

272. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact." (citing Washington v. Davis, 426 U.S. 229, 242 (1976))).

In the criminal justice context, this doctrinal framework leaves the state with a largely free hand. At the Supreme Court, few Equal Protection cases have arisen in the criminal justice context concerning systemic or structural inequalities, as opposed to discrete instances of bias on the part of individual actors such as jurors or (more rarely) prosecutors.

Only one recent case has grappled with an explicit racial classification. In *Johnson v. California*, a state prison used a racial classification to sort inmates temporarily before cell assignments could be determined.[273] The Court rejected the state's call to derogate from strict scrutiny.[274] 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.[275]

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.[276] But 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*.[277] In large measure, this is because *McCleskey* established a near-insurmountable barrier to such challenges.[278] In that capital

273. 543 U.S. 499, 502–03 (2005) (describing prison policy).

274. *Id.* at 505 ("[A]ll racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny." (citation omitted)).

275. 221 F.3d 329, 337 (2d Cir. 2000), *cert. denied,* 235 F.3d 769 (2000).

276. 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).

277. 481 U.S. 279 (1987).

278. *McCleskey* was quickly pilloried, and has been much criticized since. *See, e.g.*, Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1389 (1988) ("Professor Bedau does not exaggerate when he compares *McCleskey* to *Plessy* and *Korematsu*."). Even Justice Powell, who provided 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 ex-

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.[279] Among the reasons the Court offered for declining to entertain even powerful statistical evidence,[280] 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.[281] This concern about what Justice Brennan acerbically characterized as "a fear of too much justice"[282] reoccurs in other instances in which criminal justice disparities have been challenged.[283]

Absent the miraculous happenstance of testimonial or documentary evidence of bias—a stroke of luck that befell plaintiffs in the challenge to New York's SQF policy[284]—*McCleskey*

pressed 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)).

279. *McCleskey*, 481 U.S. at 286–87. The race-of-the-defendant effect identified in the Baldus study, however, was relatively small in comparison to race-of-the-victim effects. *Id.*

280. 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 be inferred if there were "fewer entities" and "fewer variables." *Id.* at 294–95. But the confidence 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.

281. *Id.* at 315, n.38.

282. *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.").

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

284. *See* 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 youth between the ages of fourteen and twenty).

means that the courthouse door is effectively shut to discriminatory-purpose challenges in the criminal justice context.[285] *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.

The substance of current Equal Protection doctrine, in short, evinces no concern for either the ecological spillovers of enforcement actions onto larger racial cohorts. And much like the Fourth Amendment cases canvassed above, it is heedless of dynamic effects—except perhaps for its evident concern with 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 negative effects on other members of a racial or ethnic cohort,[286] 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.[287]

There is something of a puzzle here. In glossing the Equal Protection Clause, the Court has invoked ideas of racial stigma,[288] racial balkanization,[289] and the dignitary interest in being judged on one's own merits.[290] And then it has been largely silent about policing.

285. 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. *See* United States v. Armstrong, 517 U.S. 456, 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).

286. *See* Siegel, *supra* note 43, at 47 (drawing parallel between *Feeney* and the doctrine of double effect).

287. *See* Strauss, *supra* note 219, at 114–15 (discussing the cognitive consequences of such pervasive correlations).

288. *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.").

289. *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 racial hostility and conflict and will effectively divide the nation into segments based on race).

290. *See, e.g.*, Rice v. Cayetano, 528 U.S. 495, 517 (2000) ("One of the prin-

But it is not hard to see that SQF, as described in Part I, implicates each of these concerns. It is, most importantly, often expressly predicated on a putative relationship between race to criminality.[291] It is indeed explicitly defended on the basis of 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 not only thrives upon the festering racial segregation that scars our cities, but it reinforces 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.

In addition, 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 prevents.

The 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 doctrine, which shears away both ecological and dynamic contexts. And ultimately, it lacks the courage of its notional convictions. For these reasons, it is not well adapted to the task of fixing SQF.

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 both federal statutes and state law, provides a bet-

cipal 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.").

291. *See supra* sources cited in note 83 (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).

ter—but not a perfect—framework for analyzing urban street-policing policy.

The purpose of the disparate-impact lens advanced here is diagnostic. It is also 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 when a police department's programmatic use of *Terry* stops is especially likely to be unjustified because it is characterized by distinctive ecological and dynamic harms. A disparate-impact lens, in other words, flushes out the subset of municipal policing practices from which the harms identified in Part I are most likely to flow. It does not flag every instance in which SQF is unjustified on welfarist terms.

Formally, a disparate-impact framework identifies a set of policing practices 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.

But if even 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 nudges the state's attention toward the right elements of policing strategy.[292] It invites, that is, 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

292. As such it might be applied more generally to policing tactics, including hot-spot policing.

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, as well as fine-grained judgments about how to specify and interpret such studies. I set forth three general lines of inquiry that might profitably be applied to such aggregate data to determine whether a disparate impact exists; I largely bracket, however, more technical questions of econometric specification. Together, these empirical strategies nevertheless provide a rough 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 Power Co.*[293] In a somewhat chastened form, it remains available to plaintiffs in employment discrimination cases.[294] Disparate impact is also a cognizable theory of liability under the Age Discrimination in Employment Act (ADEA)[295] and the Fair Housing Act (FHA).[296] It can be understood as either an instrument for rooting out bad intent, or as a freestanding ground of liability.[297] Disparate impact is in contrast, a 'road not taken' in Equal Protection law.[298]

Disparate-impact liability 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 activi-

293. 401 U.S. 424 (1971).

294. *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).

295. Smith v. City of Jackson, 544 U.S. 228, 240 (2005) (interpreting 29 U.S.C. § 623(a) (1998)).

296. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513 (2015) (interpreting 42 U.S.C. §§ 3604(a), 3605(a) (1988) to permit disparate-impact liability).

297. Primus, *supra* note 41, at 520–24 (exploring both accounts).

298. *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).

ty" receiving federal funds.[299] 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.[300] 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."[301] Because local police departments receive federal funding from "dozens" of separate programs, many administered by the Department of Justice,[302] the Title VI bar on disparate impact applies to most state and local police forces. That prohibition, however, may be enforced by public suits but not via individuals invoking a private right of action.[303] 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.[304]

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."[305] In at least one case, it has been applied to policing decisions.[306] California's law, which applies to all state programs, prohibits "criteria or methods of administration that . . . have the purpose or effect of subjecting

299. 42 U.S.C. § 2000d (1973).

300. *See, e.g.*, 28 C.F.R. § 42.104(b)(2) (2013) (Dept. of Justice); 49 C.F.R. § 21.5(b)(2) (2012) (Dept. of Transp.); Implementation of the Fair Housing Act's Discriminatory Effect Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (to be codified at 24 C.F.R. §§ 100.5, 100.70, 100.120, 100.130, 100.500).

301. 28 C.F.R. § 42.103 (2012).

302. Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 872 (2015).

303. Alexander v. Sandoval, 532 U.S. 275 (2001). Prior to *Sandoval*, private plaintiffs challenged racially disparate policing using Title VI in *Maryland State Conference of NAACP Branches v. Maryland Department of State Police*, 72 F. Supp. 2d 560 (D. Md. 1999).

304. New Orleans Decree, *supra* note 21, at 2; BALTIMORE AGREEMENT, *supra* note 23, at 1.

305. 740 ILL. COMP. STAT. ANN. 23/5 (West 2012); *see also* 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 Ill. Sch. Dist. U-46, 984 F. Supp. 2d 882, 890 (N.D. Ill. 2013).

306. For an example of a civil suit based on this provision, see *Central Austin Neighborhood Association v. City of Chicago*, 1 N.E. 3d 976, 984 (Ill. Ap. Ct. 2013) (refusing to dismiss suit on political question grounds).

a person to discrimination on the basis of ethnic group identification, religion, age, sex, color, or a physical or mental disability."[307]

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 employment practice caused racial disparities in a salient outcome measure.[308] A racial disparity is gauged by comparing employment rates in an employer's workforce with the qualified labor pool[309] or the applicant pool,[310] rather than to the general population. Agencies interpreting Title VII have long used a four-fifth rule to single out cognizable disparities.[311] The Supreme Court has approvingly cited this interpretation, adding that a simple "significant statistical disparity, and nothing more" is needed at the threshold.[312]

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."[313] This

307. CAL. CODE REGS. tit. 2, § 1154(h)(i) (2017). 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." *Id.* § 1154(c).

308. 42 U.S.C. § 2000e-2(k)(1) (2012) (requiring the identification of "a particular employment practice that 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.").

309. *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).

310. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 458 (1982) (comparing racial composition of those entering the selection process with that of people ultimately promoted); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (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 (1973))).

311. 29 C.F.R. § 1607.4(D) (1978).

312. Ricci v. DeStefano, 557 U.S. 557, 587 (2009) (citations omitted).

313. 42 U.S.C. § 2000e-2(k)(1).

defense, however, is overcome if there is a legitimate alternative employment practice that will result in less discrimination.[314]

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 is a moral wrong.

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, a disparate-impact analysis is appropriate here because it is a way to isolate the proximate costs of a policy (excluding, that is, its social, familial, and intergenerational effects) and to compare those to its 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 under-inclusive: it will only capture a subset of cases in which SQF imposes a moral wrong.

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 even if it does not track precisely a cost-benefit analysis.

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 ac-

314. *Id.*

tion. It focuses more capaciously on all "the *effects* of [a] . . . *practice*."[315] SQF, as I have described it in Part I, need not rest on pernicious individual motivations to generate a distinctive moral wrong. Rather, that wrong can flow 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, the second step of the disparate-impact analysis involves careful consideration of the affirmative justifications for the disparity. In effect, the analysis roughly weighs positives against negatives.

In the discriminatory treatment context, by contrast, there is no opportunity to identify or weigh all relevant costs. As a result, when a race-based criteria is used, as in *Brown v. City of Oneonta*,[316] 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.[317] 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

315. Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1345 (2015) (second emphasis added).

316. 221 F.3d 329, 334 (2d Cir. 2000).

317. 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 41, at 511.

SQF policing. But it accounts for the policy's sheer size—and hence reflects, at least approximately, the effect of a large number of minority stops on self-worth, residential patterns, and the diffusion of stereotypical beliefs about the links between race and crime far better than a legal framework pinched to fit cleanly around individual motives.

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 on the part of police and municipal policymakers. 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 within regulated entities such as police forces.[318] By honing in 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

318. External control efforts, such as individual blame and liability, tend to increase certain forms of racial bias. *See* Lisa Legault et al., *Ironic Effects of Antiprejudice Messages: How Motivational Interventions Can Reduce (but Also Increase) Prejudice*, 22 PSYCH. SCI. 1472, 1472–75 (2011).

strand of Equal Protection law.[319] 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.[320] 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*."[321] 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."[322] Rather, it is only "artificial, arbitrary, and unnecessary barriers" that legitimately and constitutionally trigger such liability.[323] This places great stress on the opportunity a defendant must have in a disparate impact proceeding to point to "[non-]arbitrary" and "[]necessary" grounds for a justification.[324] More specifically, a regression analysis used to identify a race effect must include controls for *legitimate* justifications for a disparity.[325]

319. Siegel, *supra* note 43, at 11–13 (noting that in the 1970s, "equal protection law did not sharply distinguish proof of purpose and proof of impact").

320. 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.").

321. 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).

322. 135 S. Ct. 2507, 2522 (2015).

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

324. An alternative formulation of this concern is that disparate impact does not "operate to encourage regulated entities to classify individuals based on race." Bagenstos, *supra* note 321, at 1130. 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.

325. Bazemore v. Friday, 478 U.S. 385, 400–01 & n.10 (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.").

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."[326] A common thread uniting these concerns is the premise that courts are unwilling to "broadly restructure social institutions"[327] or interfere with the private intra-firm ordering.[328]

To be sure, the frailty of the judicial will to enforce constitutional norms on behalf of disfavored groups cannot be overstated. Nevertheless, blanket pessimism is unwarranted for two reasons.

To begin with, several cities are already operating under consent decrees or settlements that either include an independent monitor or envisage much judicially supervised reorganization of street policing.[329] Further, there is no reason to think that municipal officials involved in the negotiation and operationalizing of these deals lack any interest at all 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."[330] There is no reason such stabilization cannot be achieved in the policing context through more specific Justice Department regulations

326. Selmi, *supra* note 57, 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) ("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").

327. Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 396 (2007).

328. Selmi, *supra* note 57, 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, *supra* note 326 (making a similar point by noting that courts dislike any departure from a "fault-based" theory of discrimination liability).

329. *See supra* text accompanying notes 17–26.

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

(however unlikely these might be in the near term). 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 do double duty by providing a framework for such regulations.

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.[331] 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 frisk have been led by organizations from minority communities.[332] 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."[333] But "[w]hen blacks ask for better policing, legislators tend to hear more instead."[334] Disparate-impact liability is more sensitive to the marginal crime-control 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 pro-

331. *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).

332. Leland & Moynihan, *supra* note 14 (noting African-American leadership in protests in New York); Leonor Vivanco, *5 Young Chicago Activists Answer 5 Questions About the Movement*, REDEYE (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).

333. Elizabeth Hinton et al., *Did Blacks Back the Crime Bill?*, N.Y. TIMES, Apr. 13, 2016, at A25.

334. *Id.*; *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 administrations' policies).

gress on some of the knotty theoretical puzzles raised by disparate impact's implementation.

To set the stage for this inquiry, it is useful to consider its practical context. The settlements in Philadelphia and Chicago, which were both reached without information-generating litigation, require ongoing collection of extensive data concerning the timing, justifications, suspect demographics, and consequences of stops.[335] How might this data be interrogated for evidence of disparate impact? How concretely can one 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 of the latter 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 as a result. Disparate-impact analysis, in the fashion developed here, is decisively under-inclusive 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 best extant doctrinal framework for the problem, and also 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 divided 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 predominantly minority. The municipality is required to gather data about stops of the kind elicited by the Chicago and Phila-

335. Philadelphia Settlement, *supra* note 19, ¶ II.B; Chicago Settlement, *supra* note 18, ¶ I.1.

delphia settlements. I will assume police collect that data faithfully.[336] 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. For each level, 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.[337]

But this may not be the case. Perceptions of crime can also be a function of the racial composition of a neighborhood.[338] A threshold policy decision to be tested is the volume of *Terry* stop per precinct with a lagged measure of crime as a control. This is a way of determining whether the geographical distribution of policing resources turns on racial demographics or crime rates.[339]

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.[340] His analysis suggested that crime-based justification for SQF's allocation was unfounded.[341] Using an ordinary least squares regression, he

336. This is a rather ambitious assumption. Jeffrey Fagan, *Law, Social Science, and Racial Profiling*, 4 JUST. RES. & POL. 103, 112 (2002) (expressing concerns on this front).

337. *See* sources cited *supra* note 83.

338. *See* sources cited *supra* notes 194–95.

339. *Cf.* Sarath Sanga, *Does Officer Race Matter?*, 16 AM. L. & ECON. REV. 403, 405 (2014) (finding in a study of Oakland street policing that "where one is stopped may be more important than by whom one is stopped" (emphasis omitted)).

340. Fagan Report, *supra* note 51.

341. *Id.* at 33 tbl. 5. The main regression Fagan presents contains a control for patrol strength, while one of the sensitivity tests 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.

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.[342] Only property and quality-of-life rates outperformed race as predictors of stop volume.[343] This is an especially striking result given SQF's justification in the wake of the Kansas City Experiment as a means of reducing violent crime, and as an alternative to broken windows policing.[344]

It is also striking because the assumption that an increase in crime rates should predict a subsequent increase in street stops is dubious insofar as it stacks the deck in the state's favor in a normative troubling way. 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.[345] As I have argued, the evidence that SQF has a large crime-control effect is weak, especially in comparison to alternative policing instruments.[346] The use of crime rates as a baseline further assumes that *Terry* stops are responsive to all species of violent crime. But 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 are responsive.[347] 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 increase the number of people being stopped.[348]

A between-precinct measure of racial disparities can be combined with a range of other measures to develop a more nuanced rendering of how policing resources are allocated across geographic areas. Hence, simple descriptive statistics can provide useful confirmatory evidence, even if they cannot on their

342. *Id.* at 41, 31 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.

343. *Id.* at 45.

344. *See supra* text accompanying notes 94, 74 (describing, respectively, the Kansas City Experiment and Broken Windows policing).

345. *See supra* text accompanying notes 126–34.

346. *See supra* Part I.B.2.

347. Other studies have found that citizen complaints of drug transactions do not predict narcotics-related deployment rates. Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 126–27 (2006).

348. For a further set of criticisms, see Fagan, *supra* note 336, at 117–18.

own prove disparate-impact liability consistent with *Inclusive Communities*.[349] 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.[350] 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 contrasted 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 simpliciter in fact explains or justifies racial disparities in stops across geographic subunits within the municipality.

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 if 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 in the same position.

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

349. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. 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").

350. IAN AYRES & JONATHAN BOROWSKY, A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT 9–10 (2008), https://www.aclusocal.org/en/study-racially-disparate-outcomes-los-angeles-police-department.

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% of those arrested were African American.[351]

Their second study found that predominantly white outdoor drug 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."[352] Indeed, a qualitative component of the study found that police officers flagged one racially diverse crack market while failing to mention a similar but "overwhelmingly white" market for prescription drugs operating alongside it.[353]

Of special note here, Beckett and her collaborators explicitly consider the possibility that differences in the policing of crack cocaine and prescription drug markets may have been due to different levels of associated violence.[354] They find, however, that the association between crack and violence "does not appear to have existed in Seattle during the period under investigation."[355]

These studies' findings echo sociological findings of how racial composition often predicts 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

351. Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419, 435 (2005).

352. Beckett et al., *supra* note 347, at 129.

353. *Id.* at 130.

354. Beckett et al., *supra* note 351, at 433.

355. *Id.*

the outcome (i.e., dependent) variable to be explained.[356] 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, after controlling for relevant precinct-level characteristics. Some existing studies deploy a method called multilevel modeling to control simultaneously for individual and precinct-level factors.[357] I will assume that approach is valid, although nothing rests on that assumption so long as some parallel econometric technique is available.

The pivotal question for such multilevel models is the choice of control variables to capture "[non-]arbitrary" and "[]necessary" justifications.[358] 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.[359] 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 additionally 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."[360] Variables such as the socioeconomic character of a

356. *See, e.g.*, Fagan Report, *supra* note 51, at 40–42, 42 tbl. 7 (reporting the results of a multilevel Poisson regression on stops by suspected crime controlling for precinct characteristics and lagged crime conditions).

357. 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: Methods and Substance*, 20 ANN. REV. SOC. 331, 332–33 (1994).

358. *See supra* text accompanying notes 323–24.

359. Fagan Report, *supra* note 51, at 42, tbl. 7; *see also* AYRES & BOROWSKY, *supra* note 350, at 37–38, tbl. 7.

360. 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 51, at 97–100 (noting and criticizing the use of such models elsewhere).

precinct, its foreign-born populace, and officer race have no place in disparate-impact analysis.[361] Their inclusion leads to "included variable bias" insofar as they "would not plausibly justify a racial disparity in outcomes."[362] 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."[363]

In several existing studies, lagged crime or violent crime rates are used as the baseline control in this sort of multilevel model.[364] This parameter at least relates directly to the notional justification that a municipality has for increased street stops—i.e., crime-related patterns—subject to the concerns raised above.[365] It captures the ways in which deployment levels might fluctuate in response to shifts in the geographic distribution of crime.

It is also likely to be superior to a benchmark of lagged arrest rates, which is employed in some models.[366] The latter are potentially influenced by officers' racial beliefs. To this end, a recent metastudy of the effect of suspect race on arrest decisions found that minorities are at least thirty percent more likely to be arrested as similar non-minority suspects.[367] 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

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

362. AYRES & BOROWSKY, *supra* note 350, at 13; *see also* Ian Ayres, *Testing for Discrimination and the Problem of "Included Variable Bias"* 3–4 (2008) (unpublished manuscript), http://ianayres.yale.edu/sites/default/files/files/Testing%20for%20Discrimination.pdf.

363. OAKLAND REPORT, *supra* note 26, at 6.

364. *See* Fagan Report, *supra* note 51, at 42; AYRES & BOROWSKY, *supra* note 350, at 34. A possible variant on these reports' approaches is lagged rates of gun crime, which bear on the violent crime-related justification at times offered for SQF.

365. *See supra* text accompanying notes 345–47.

366. *See* Gelman et al., *supra* note 51.

367. Tammy Rinehart Kochel et al., *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473, 498 (2011).

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 even this benchmark. 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. For example, a recent study of Chicago's "Strategic Subjects" List, which was used in this fashion, found that individuals on the city's list were no more or less likely to be victimized by violence than a control group.[368]

Second, if SQF focuses on places rather than persons, the number of individuals involved in violent crime is still a small fraction of the volume of people stopped.[369] In the exceptionally bloody month of August 2016 in Chicago, for example, ninety people were killed by gunfire.[370] 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 one hundred instances of reasonable articulable suspicion were being targeted for every one act of violence. And even if police then have reason to anticipate a particular corner or street will witness violence, at a minimum some ninety-nine out of every one hundred 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

368. Jessica Saunders et al., *Predictions Put into Practice: A Quasi-Experimental Evaluation of Chicago's Predictive Policing Pilot*, 12 J. EXPERIMENTAL CRIMINOLOGY 347, 347 (2016).

369. For evidence of the very small number of those involved in gun violence, see Andrew V. Papachristos et al., *Tragic, but Not Random: The Social Contagion of Nonfatal Gunshot Injuries*, 125 SOC. SCI. & MED. 139, 139 (2015) (finding nonfatal gun injuries were confined to "less than 6 percent" of Chicago's population).

370. Jeremy Gorner, *After 90 Killed in August, Chicago May Soon Pass Last Year's Homicide Toll*, CHI. TRIB. (Sept. 1, 2016), http://www.chicagotribune.com/news/local/breaking/ct-chicago-homicides-august-20160901-story.html.

arrests on a given street or corner do not necessarily 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, it seems likely that historical crime rates will be orthogonal 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 distribution will skew heavily towards African Americans (and to a lesser extent Hispanics). This is, in effect a system of racial quotas where some large fraction 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.[371]

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.[372] 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 of citizens during street encounters.[373]

3. Within- and Between-Officer Disparities

Finally, racial disparities can emerge not only at the aggregate levels of between- and within-precincts.[374] They can also

371. *See supra* text accompanying notes 268–72.

372. Beckett et al., *supra* note 351, at 422–23; Beckett et al., *supra* note 347, at 116–18.

373. OAKLAND REPORT, *supra* note 26, at 15–19.

374. *See, e.g.*, *id.* at 11–12 (describing between-officer disparities).

arise either because some (or all) officers within a precinct differentiate between minority and non-minority suspects without a legitimate justification. This level of police action—which comprises the dispersed exercise of individual officers' discretion—demands attention to the specific 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 officer 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 distinct ways. First, the *Terry* standard of reasonable articulable suspicion is a vague term with a range of possible calibrations.[375] 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.

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.[376] A parallel analysis can be run for outcomes, such as the seizure of contraband or firearms.[377] Again, included variable bias would result if controls other than legitimate policing justification (such as the lagged-crime-rate measure) were included.

375. *See supra* text accompanying notes 221–24.

376. This has been done in a number of earlier studies. AYRES & BOROWSKY, *supra* note 350, at 22; Fagan Report, *supra* note 51, at 65–69.

377. *Id.* at 69–71.

Alternatively, a more promising 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.[378] Focusing on weapons-related stops, Sharad Goel and his 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).[379] This enables them to calculate the distribution of ex-ante probabilities of finding weapons for minorities and non-minorities, both in general and holding location constant.[380] 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 for non-minorities.[381] 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.

Rather than following Goel's lead, the economics literature is dominated by a model by John Knowles, Nicola Persico, and Petra Todd known as the KPT model.[382] 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 contraband (i.e., the hit rate) across groups is equal.[383]

The force of the KPT 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.[384] As a correlative, differences in hit rates provide evidence of taste-based discrimination.

378. Goel et al., *Combatting Police Discrimination*, *supra* note 52, at 6.

379. Goel et al., *Precinct or Prejudice?*, *supra* note 52, at 371–73.

380. Goel et al., *Combatting Police Discrimination*, *supra* note 52, at 40–51.

381. *Id.* at 9–10 ("49% of the stops of blacks fell below the 1% probability threshold . . . but only 19% of the stops of whites.").

382. Knowles et al., *supra* note 33, at 205–07; *see also* Nicola Persico & Petra E. Todd, *The Hit Rate Test for Racial Bias in Motor-Vehicle Searches*, 25 JUST. Q. 37, 39–42 (2008).

383. *See* Persico & Todd, *supra* note 382 at 42.

384. *Id.* ("[If] hit rates are equalized [across groups], then disparities in search frequencies across groups, while possible, are not the result of police

For a number of reasons, though, 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."[385] 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., socioeconomic status).[386] Stated otherwise, it ignores all negative externalities from race-based policing.[387] 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.[388] Extensions of their work that vary the models show that equal hit rates might also be consistent with racial animus.[389]

Because the modeling assumptions of KPT are so controversial, and its implications so fragile in the face of subtle changes in relevant actors' information and motivation, in my view it does not provide a useful lens even for the limited question of whether there is animus-based searches in the first instance.

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bias.").

385. *Id.*

386. Engel, *supra* note 62, at 3.

387. Durlauf, *supra* note 151, at F407.

388. For example, the KPT model assumes that "in the absence of preferential discrimination, everyone carries contraband," which is "not true." Sanga, *supra* note 339, 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 & Rob 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 382, at 45. In their original paper, hit rates for Hispanics did not equal rates for whites. Knowles et al., *supra* note 33, at 222; *accord* Rubén 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, 1159 (2009). Applying KPT's own verification criterion, therefore, the theory fails. *See id.*

389. *See, e.g.*, Shamena Anwar & Hanming Fang, *An Alternative 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).

CONCLUSION

Aggressive deployment of *Terry* stops has been a point of friction between urban police and impoverished minority communities for more than fifty years. There has been a moment of late in which a measure of reform appeared politically feasible—or so the recent spate of settlements and consent decrees might suggest.[390] It may well be that this window is closing due to national-level political changes. But the underlying problems of discriminatory policing, popular dissatisfaction with excessive and onerous street hassle, and the frequency of police violence will not go away. Even if the federal government fails to act, there are local, state, and private actors with strong incentives to press for reform. Nevertheless, 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.

To this end, 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 black-letter constitutional law. By demonstrating that a disparate-impact lens is constitutional, potent, and practicable in terms of its implementation, I hope to prompt a deeper conversation about the positive 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.[391] 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. Nor will getting policing right dissolve ghettos overnight. Nev-

390. *See supra* text accompanying notes 17–26.

391. For a useful examination of some possible avenues of institutional reform, see WHITE & FRADELLA, *supra* note 63, at 117–45 (enumerating possible reform measures).

ertheless, doing the hard work of police reform is a necessary step in rectifying the historical blight of entrenched racial stratification.