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# RACIAL PROFILING IN THE ERA OF BLACK DE-CONSTITUTIONALISM

Donald F. Tibbs\*

On July 6, 2016, Philando Divall Castile was returning from shopping at a grocery store with his girlfriend Diamond Reynolds as the two of them drove through Falcon Heights, Minnesota, a suburb of St. Paul.<sup>1</sup> Earlier that evening, he performed normal day-to-day functions.<sup>2</sup> He had gotten a haircut and eaten dinner with his sister before picking up Diamond and her four-year old daughter at her apartment.<sup>3</sup> Around 9:04pm, Officer Jeronimo Yanez and his partner, Joseph Kauser, radioed the St. Anthony police dispatcher that they were going to pull over a car and check

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1. See Pat Pheifer & Claude Peck, *Aftermath of Fatal Falcon Heights Officer-Involved Shooting Captured on Video*, STAR TRIBUNE (July 7, 2016, 10:43 AM), <http://www.startribune.com/aftermath-of-officer-involved-shooting-captured-on-phone-video/385789251/#1> (describing the officer-involved shooting of Philando Castile) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

2. See Mitch Smith, *Philando Castile's Last Night: Tacos and Laughs, Then a Drive*, NEW YORK TIMES (July 12, 2016), <http://www.nytimes.com/2016/07/13/us/philando-castile-minnesota-police-shooting.html> (documenting Philando Castile's final day) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

3. See *id.* (mentioning that the two siblings discussed the fatal shooting of Alton Sterling over dinner).

the identification of the driver and passenger.<sup>4</sup> The officer told the dispatcher, “the two occupants just look like people that were involved in a robbery . . . . The driver looks more like one of our suspects, just because of a wide-set nose. I couldn’t get a good look at the passenger.”<sup>5</sup> At 9:05pm, Philando’s vehicle was stopped on Larpenner Avenue at Fry Street.<sup>6</sup> Philando was driving, Diamond was in the front-passenger seat, and the child was in the back seat.<sup>7</sup> Officer Yanez approached the car from the driver’s side, while Kauser approached it from the passenger side.<sup>8</sup> For the moment, this is a criminal investigation masked as a routine traffic stop.<sup>9</sup>

While the stop is occurring, we, as a nation, are entirely unaware that these are Philando’s last moments until a recording of the events begins streaming live on Facebook.<sup>10</sup> The recording,

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4. See Andy Mannix, *Police Audio: Officer Stopped Philando Castile on Robbery Suspicion*, STAR TRIBUNE (July 12, 2016, 10:31 AM), <http://www.startribune.com/police-audio-officer-stopped-philando-castile-on-robbery-suspicion/386344001/#1> (noting that because the officers believed that the car looked suspicious, the officers decided to pull the car over and check identifications) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

5. *Id.*; see also Julia Jacobo & Enjoli Francis, *Cops May Have Thought Philando Castile Was a Robbery Suspect, Noting ‘Wide-Set Nose,’ Dispatch Audio Indicates*, ABC NEWS (July 11, 2016, 10:09 PM), <http://abcnews.go.com/US/cops-thought-philando-castile-robbery-suspect-dispatch-audio/story?id=40439957> (documenting the original call to dispatch, as well as other details about that evening) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

6. See Alex Johnson, *Minnesota Officers in Fatal Shooting of Philando Castile Identified*, NBC NEWS (July 7, 2016, 11:44 PM), <http://www.nbcnews.com/news/us-news/minnesota-officers-fatal-shooting-philando-castile-identified-n605701> (describing when and where the officers stopped Philando’s car) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

7. See Matt Furber & Richard Pérez-Peña, *After Philando Castile’s Killing, Obama Calls Police Shootings ‘an American Issue,’* N.Y. TIMES (July 7, 2016), <http://www.nytimes.com/2016/07/08/us/philando-castile-falcon-heights-shooting.html> (describing why the seating arrangement within the car, particularly regarding a young child as a witness, was especially disturbing) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

8. See Johnson, *supra* note 6 (describing the manner in which the officers approached Philando’s car after stopping him for a traffic-related violation).

9. See *id.* (noting Minnesota Governor Mark Dayton’s response, where he explained that Philando’s race was a factor in the incident).

10. See Furber & Pérez-Peña, *supra* note 7 (noting that Philando’s girlfriend

which begins shortly after 9:00pm, depicts the horrifying image of Philando slumped and dangling to the right side of his seat, held in place by his still attached seatbelt.<sup>11</sup> He is bleeding profusely from his left side, the side closest to Officer Yanez, and moaning.<sup>12</sup> It is not until we hear Diamond speaking with Officer Yanez that we are able to piece together what has happened.<sup>13</sup>

We learn that after stopping the car for what he told Philando and Diamond was a broken taillight, Officer Yanez asked Philando for his license and vehicle registration.<sup>14</sup> Unbeknownst to Philando at that time, however, Yanez actually stopped the car because he believed Philando was a robbery suspect.<sup>15</sup> Nonetheless, Philando responded that his license and registration were in his wallet, but that he “had a pistol on him because he was licensed to carry.”<sup>16</sup> Apparently Officer Yanez said, “don’t move,” and as Philando was putting his hands up in the standard pose of surrender, Officer Yanez shot him four times.<sup>17</sup> Diamond narrates directly to the video, “please don’t tell me he is dead,” while Philando is currently losing his life.<sup>18</sup> Yanez can be seen still pointing his gun at the

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took and narrated the video of Philando’s final moments and aftermath of his shooting).

11. *Id.*

12. *Id.*

13. See T. Rees Shapiro, Michael E. Miller, Wesley Lowery & Lindsey Bever, *Police Group: Minn. Governor ‘Exploited What was Already a Horrible and Tragic Situation,’* WASH. POST (July 9, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/07/07/minn-cop-fatally-shoots-man-during-traffic-stop-aftermath-broadcast-on-facebook/> (describing the conversations between the police officers) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

14. See Mannix, *supra* note 4 (noting that the police audio recordings obtained do not shed much light on what happened in between the time the officers stopped Philando and the shooting).

15. See *id.* (describing how what occurred in the 103 seconds missing from the police recording is hotly disputed).

16. Stephen Rex Brown, *Philando Castile Had a Permit for the Gun he Carried When Minnesota Cop Shot Him to Death*, N.Y. DAILY NEWS (July 9, 2016, 4:18 PM), <http://www.nydailynews.com/news/national/philando-castile-minnesota-gun-permit-article-1.2705537> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

17. See *id.* (explaining that, according to his girlfriend, Philando calmly told the police officer that he had a pistol on his person because he had a license to carry).

18. See Mannix, *supra* note 4 (noting that Officer Yanez’s attorney said his

disabled Philando and screaming, “I told him not to reach for it! I told him to get his hands open.”<sup>19</sup> Diamond turns to Officer Yanez and retorts, “You shot four bullets into him, sir. He was just getting his license and registration, sir.”<sup>20</sup>

Afterwards, Officer Kauser called in the shooting.<sup>21</sup> After announcing it was a “Code Three,” which requires an emergency response, meaning blue lights and sirens, additional police officers rush to the scene.<sup>22</sup> They arrive to find Philando bleeding, but still alive.<sup>23</sup> One officer reports, “[o]ne adult female being taken into custody (meaning Diamond). Driver at gunpoint (meaning Philando). Juvenile female, child, is with another officer. We need a couple of other squads to block off intersections.”<sup>24</sup> No mention of the fact that Philando is shot and dying.<sup>25</sup> Another officer calls in, “All officers are good. One suspect that needs medics.”<sup>26</sup>

During the video, Diamond is removed from the car and ordered to get on her knees.<sup>27</sup> The sounds of her being handcuffed are audibly transmitted.<sup>28</sup> Diamond’s phone subsequently falls to the ground but continues recording, and an officer periodically

client believed Philando was a robbery suspect).

19. See Brown, *supra* note 16 (explaining that Officer Yanez’s attorney said that race was not a factor motivating Yanez’s actions).

20. See *Philando Castile Death: Aftermath of Police Shooting Streamed Live*, US & Canada Section, BBC NEWS (July 7, 2016), <http://www.bbc.com/news/world-us-canada-36732908> (discussing how Philando’s death comes in a long line of incidents involving African-Americans dying at the hands of police) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

21. See Mannix, *supra* note 4 (reporting that while the first responders came to the scene, the video was already rapidly circulating on social media).

22. See *id.* (noting that it’s unclear which robbery suspects the officers believed Philando and Diamond resembled).

23. See *id.* (detailing further the fact that Diamond’s daughter watched the situation unfold quietly in the back seat).

24. *Id.*

25. See *id.* (noting that neither officer makes mention of a broken taillight in their radio conversation).

26. *Id.*

27. See Emma Ockerman, *Read the Transcript of the Video Taken During Philando Castile Shooting*, TIME (July 7, 2016), <http://time.com/4397189/minnesota-shooting-philando-castiles-facebook-live-transcript/> (providing the transcript of the video taken during the Philando Castile shooting) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

28. *Id.*

yells, “Fuck!”<sup>29</sup> The paramedics arrive ten minutes later and Philando is delivered to the Hennepin County Medical Center where he dies at 9:37pm in the emergency room, about twenty minutes after being shot.<sup>30</sup> The Hennepin County Medical Examiner’s office ruled Philando’s death a homicide from multiple gunshot wounds.<sup>31</sup> Diamond is interrogated at the police station until being released at 5:00am.<sup>32</sup> “They treated me like a criminal . . . like it was my fault,” she told television reporters.<sup>33</sup> Officer Yanez and Kauser were placed on administrative leave pending an official investigation.<sup>34</sup>

In the immediate aftermath, we learned many disturbing facts surrounding the shooting. First, as he told Officer Yanez, Philando was licensed to carry a weapon.<sup>35</sup> He had a valid permit issued to him in 2015 by the Hennepin County Sheriff, Richard W. Stanek.<sup>36</sup>

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29. *Id.*

30. See Furber & Pérez-Peña, *supra* note 7 (noting that the video was shocking for many reasons, including that Diamond Reynolds narrated the video with a calm and clear voice).

31. See *id.* (noting that Diamond estimated at various times that three, four, or five shots were fired into Philando).

32. See Julie Bosman, *After Poised Live-Streaming, Tears and Fury Find Diamond Reynolds*, N.Y. TIMES (July 7, 2016), <http://www.nytimes.com/2016/07/08/us/after-poised-live-streaming-tears-and-fury-find-diamond-reynolds.html> (describing how just hours after she was released from custody, Diamond protested at the governor’s mansion) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Brandon Patterson, *President Obama Speaks Out About the Police Shooting Deaths of Philando Castile and Alton Sterling*, MOTHER JONES (July 7, 2016, 3:31 PM), <http://www.motherjones.com/politics/2016/07/obama-police-shootings-philando-castile-alton-sterling> (noting that Diamond reported that she was not given food, water, or a phone call while in custody) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

33. Pam Louwagie, *Falcon Heights Police Shooting Reverberates Across the Nation*, STAR TRIBUNE (July 8, 2016, 3:15 PM), <http://www.startribune.com/aftermath-of-fatal-officer-involved-shooting-in-falcon-heights-is-captured-on-video/385861101/> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

34. See Furber & Pérez-Peña, *supra* note 7 (describing the response of the police department to each officer’s conduct in the aftermath of the shooting).

35. See *Philando Castile’s Family Confirms He Had a Permit to Carry a Firearm*, WCCO-TV CBS MINN. (July 12, 2016, 11: 03 PM), <http://minnesota.cbslocal.com/2016/07/12/philando-castile-permit-to-carry/> (providing a photograph of Philando’s actual permit to carry a firearm) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

36. See *id.* (depicting Philando’s accurate name and address on the permit in

Second, Officer Yanez, who stopped Philando under suspicion of armed robbery, actually helped book Philando into jail in 2011 during a previous traffic stop, which interestingly also resulted from a defective brake light.<sup>37</sup> On November 23, 2011, Officer Mark Dokken pulled over Philando for a defective brake light and discovered that Philando had a revoked license and an outstanding misdemeanor warrant for driving after revocation.<sup>38</sup> Officer Yanez was one of the two officers who took Philando to the Hennepin County Jail for booking.<sup>39</sup> Finally, we learned that prior to this “traffic stop,” Philando had been stopped more than fifty-two times by the police in the past fourteen years, many of which resulted in a series of misdemeanors.<sup>40</sup> The stops—averaging one every four months dating back to George Bush’s first year in the White House—resulted in eighty-six violations.<sup>41</sup> All of the citations were for petty misdemeanors of which Philando had paid a total of \$6,588 in fines.<sup>42</sup> One reporter commented that “either Philando is the worst driver in the world or a prime example of racial profiling.”<sup>43</sup>

Over the past fifteen years, racial profiling has been formally recognized as a policing problem.<sup>44</sup> Some argue that it is the result

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the photograph).

37. See Emaunella Gringberg, *Philando Castile Had Met the Officer Who Shot Him*, CNN (July 21, 2016, 11:49 PM), <http://www.cnn.com/2016/07/21/us/philando-castile-officer-jeronimo-yanez/> (noting that there is no way to tell if the officer and Philando recognized each other the day Philando was killed) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. See Lucy Tiven, *The Number of Times Philando Castile Was Pulled Over by Cops*, ATTN (July 10, 2016), <http://www.attn.com/stories/9813/number-of-times-philando-castile-was-pulled-over-by-cops> (noting that various violations Philando was stopped for include misdemeanor and petty misdemeanor charges of speeding, failure to provide proof of insurance, and not wearing a seatbelt) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

43. *Id.*

44. See Ranjana Natarajan, *Racial Profiling has Destroyed Public Trust in Police. Cops are Exploiting our Weak Laws*, WASH. POST (Dec. 15, 2014), [https://www.washingtonpost.com/posteverything/wp/2014/12/15/racial-profiling-has-destroyed-public-trust-in-police-cops-are-exploiting-our-weak-laws-against-it/?utm\\_term=.4dc2a8031a2a](https://www.washingtonpost.com/posteverything/wp/2014/12/15/racial-profiling-has-destroyed-public-trust-in-police-cops-are-exploiting-our-weak-laws-against-it/?utm_term=.4dc2a8031a2a) (explaining that two issues that need to be

of misguided legal interpretations by the Supreme Court of the United States,<sup>45</sup> while others blame it on the social construction of Blackness as stereotypically criminal.<sup>46</sup> A series of empirical studies,<sup>47</sup> some prompted by class-action lawsuits,<sup>48</sup> increasingly prove both theories: that police departments serving large minority communities routinely target individuals based on their race and ethnic identity. Further, the targeting is without boundaries, adding to the routinization of policing. Racial profiling *routinely* occurs in street stops, as much as it does in automobile stops, like in Philando's case.<sup>49</sup> The empirical data, no matter how disparaging, is beneficial. Not only has it increased legal consciousness and outspoken responses from neo-Civil Rights groups, but has also led to new social movements and famous public figures weighing in with their opinion.<sup>50</sup> The increased

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addressed in America are racial profiling and police use of excessive force) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

45. See generally Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010) (explaining that with relatively few exceptions, the Supreme Court has refused to interfere with aggressive police practices and has actually expanded the discretion afforded to police officers).

46. See Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 276, 276–88 (2007) (arguing that, following the civil rights movement, the linkage between blacks and crime was galvanized).

47. See *Racial Profiling and Traffic Stops*, NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, RACE, TRUST, AND POLICE LEGITIMACY, <http://www.nij.gov/topics/law-enforcement/legitimacy/pages/welcome.aspx> (last visited Oct. 10, 2016) (describing data showing a correlation between racial and ethnic identity and perception of the police force).

48. See *Floyd v. N.Y.C.*, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013) (deciding a racial profiling case brought by a class of African-Americans and Hispanics, twelve of whom testified at trial); *ACLU-PA and Civil Rights Firm File Class Action Lawsuit Against Philadelphia Police Department for Racial Profiling*, ACLU (Nov. 4, 2010), <https://www.aclu.org/news/aclu-pa-and-civil-rights-firm-file-class-action-lawsuit-against-philadelphia-police-department> (announcing a filing by the ACLU of Pennsylvania on behalf of a class of "eight African-American and Latino men who were stopped by Philadelphia police officers solely on the basis of their race or ethnicity") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

49. See *Racial Profiling*, *supra* note 47 (illustrating that people of color are stopped more frequently than whites and attempting to explain some of the factors that contribute to this).

50. See John Eligon, *One Slogan, Many Methods: Black Lives Matter Enters Politics*, N.Y. TIMES (Nov. 18, 2015), <http://www.nytimes.com/2015/11/19/us/one->



public scrutiny has prompted policing agencies and their supporters to fashion a narrative that black Americans are fundamentally anti-police, anti-American, unappreciative, unpatriotic, and even terrorists.<sup>51</sup> According to New York City Police Commissioner William Bratton, cops across this country, when performing their duties, “feel under attack” and are worried about their lives.<sup>52</sup> Regardless of the differing opinions, alas, we at least are talking.

However, not all talk is good talk. For black and brown people, the argument that the police “feel under attack” fails legitimate rationales for the police-citizen paradigm. Simply, the manner in which the police conduct their routine activities not only does, but should, welcome critique. To be respected as legitimate, the police must treat the communities they serve as legitimate. Tyler and Fegan defined “legitimacy” in the context of police-citizen interactions as a feeling of obligation to obey the law and to defer to the decisions made by legal authorities.<sup>53</sup> Black people care as much about how the police interact with them as they do about specific policing outcomes. Simply, black citizens are more likely to obey the law when they believe those who are enforcing it are acting with some constitutional legitimacy.<sup>54</sup>

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slogan-many-methods-black-lives-matter-enters-politics.html (outlining the history of the Black Lives Matter Movement and its spread into popular culture and the political sphere) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

51. See *NC police chief who retired after calling ‘Black Lives Matter’ a ‘terrorist group’ speaks out*, FOX 8 (Oct. 25, 2015, 11:28 AM), <http://myfox8.com/2015/10/25/nc-police-chief-who-retired-after-calling-black-lives-matter-a-terrorist-group-speaks-out/> (illustrating the negative opinions some in the law enforcement community have toward the Black Lives Matter Movement) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

52. See Dale Armbruster, *Bratton: Police Feel ‘Under Attack’ From Federal Government*, NBC NEWS (Dec. 14, 2014, 11:10 AM), <http://www.nbcnews.com/meet-the-press/bratton-police-feel-under-attack-federal-government-n275756> (identifying and explaining the growing tension based on investigations of police brutality between police departments and federal authorities) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

53. See Tom R. Tyler & Jeffrey Fegan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?* 6 OHIO ST. J. CRIM. L. 231, 235–36 (2008) (defining and outlining the importance of perceived legitimacy to the American justice system).

54. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 4 (1990) (positing that individuals are more likely to comply with laws if they perceive the enforcement

When it comes to minority groups, there is a bona fide expression of lower levels of trust and confidence in law enforcement. Admittedly, “bad actors” and “outliers” do exist. However, the single bad actor or outlier explanation fails to account for the systemic problems that the Department of Justice Civil Rights Division has uncovered in their investigations of cities like Ferguson, Missouri, and more recently, Baltimore, Maryland.<sup>55</sup> If the policing apparatus of the state is serious about increasing and sustaining public trust and confidence in law enforcement, or not feeling like they are “under attack,” particularly in the black community, powerful political elites should not only take a critical examination of existing disparities in the routinized selection process for traffic stops, but also address the causes for those disparities.<sup>56</sup> Perhaps one way might be to openly recognize, and admit, that racial profiling is nothing new. Instead, it is connected to the dirty base of anti-blackness in the law or one part of the process of Black De-Constitutionalism which

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mechanism to be legitimate).

55. See UNITED STATES DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) (reporting the disparity in police action in Ferguson) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (Aug. 10, 2016), <https://www.justice.gov/opa/file/883366/download> (reporting the disparity in police action in Baltimore) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

56. See Trymaine Lee, *Democratic Debate: Candidates Focus on Race, Criminal Justice*, MSNBC (Jan. 17, 2016, 9:15 PM), <http://www.msnbc.com/msnbc/democratic-debate-candidates-focus-race-criminal-justice> (explaining that some political candidates have begun to discuss the problem of police violence) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Alice Miranda Ollstein, *Clinton and Sanders Call Out America’s Racist Criminal Justice System*, THINK PROGRESS (Jan. 17, 2016), <https://thinkprogress.org/clinton-and-sanders-call-out-americas-racist-criminal-justice-system-a2a83cb7ecc4#.sdoar044o> (indicating that the two Democrat presidential frontrunners have broached the subject of racism in the justice system) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also *2016 GOP Debate: Donald Trump—Police are Absolutely Mistreated*, WMUR NEWS (Feb. 6, 2016, 11:44 PM), <http://www.wmur.com/politics/granite-state-debates/2016-gop-debate-donald-trump-police-are-absolutely-mistreated/37863200> (illustrating a conservative perspective on racism and police violence in the justice department) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

systemically and legally divests African Americans, and all minorities, of their constitutional rights.

Recognizing Black De-Constitutionalism as an archaic function of the policing apparatus requires accepting that it began long before I attached it to a socio-legal moniker. In fact, the practice cut its teeth several centuries prior to the passage of the USA PATRIOT Act.<sup>57</sup> Prior, as well, to the American Civil Liberties Union's (ACLU) "Driving while Black" campaign in the late 1990s,<sup>58</sup> to the launch of President Ronald Reagan's infamous war on drugs in the early 1980s, and even prior to President Richard Nixon's earlier consolidation of the first truly nationwide police apparatus in the late 1960s.<sup>59</sup> In fact, the genealogy of this nefarious police practice is properly charted beyond the twentieth century, reaching back, with stunningly little modification, to the culture of the colonial slave patrols of the seventeenth, eighteenth, and nineteenth centuries.<sup>60</sup> Given this line of descent, it is not unreasonable to say that racial profiling and Black De-Constitutionalism is the *sine qua non* of modern policing.

In the recent official and unofficial political debates on national security, black people and black protesters are treated

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57. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter Patriot Act] (codified in scattered titles of U.S.C.).

58. See DAVID A. HARRIS, AMERICAN CIVIL LIBERTIES UNION, *Driving While Black: Racial Profiling on our Nation's Highways* (1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways> (explaining the history of racial profiling while highlighting the "Driving While Black" campaign) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

59. See *A Brief History of the Drug War*, DRUG POLICE ALLIANCE, <http://www.drugpolicy.org/new-solutions-drug-policy/brief-history-drug-war> (last visited Oct. 10, 2016) (detailing the history of the drug war in America and its problems) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

60. See MaCherie Placide & Duchess Harris, *From Slave Patrols to Jim Crow Laws: Examining the Nexus of Racial Profiling in America*, Presentation at 2014 National Conference of Black Political Scientist Annual Meeting (Oct. 31, 2013) (explaining how discrimination throughout history set the backdrop for continuing societal acceptance of discrimination); Keith Rushing, *Dissecting the Long, Deep Roots of Racial Profiling in America*, HUFFINGTON POST (Mar. 1, 2013, 8:54 PM), [http://www.huffingtonpost.com/keith-rushing/dissecting-racial-profiling\\_b\\_2740246.html](http://www.huffingtonpost.com/keith-rushing/dissecting-racial-profiling_b_2740246.html) (outlining the history of racial profiling in America) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

like weapons of mass destruction.<sup>61</sup> One political pundit even touts using a law and paradigm for “making American great again,” as coded language to return blackness and black people to the lowest social underclass devoid of constitutional rights.<sup>62</sup> This call to arms in order to socially control and crisis-manage black and brown people figures historically because it relies on Reconstruction era policing paradigms that routinize white male supremacy in the functional apparatus of dismembering black male bodies.<sup>63</sup> But, unlike other threats to national security across the broad swath of United States history, policing black people has never required a credible threat of invasion, no evidence of insurrectionary design, no proven stockpile of illicit chemical agents or radioactive material, no particular breach of domestic or international law, and no sensational moral or ethical transgression, although all of these items, real or imagined, have factored in the relevant public and private discourses. Simply, it has only required the presence—within social and legal culture—of what W.E.B. DuBois referred to

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61. See Naomi Lim, *Rudy Giuliani: Black Lives Matter is “Inherently Racist,”* CNN (July 11, 2016, 3:48 PM), <http://www.cnn.com/2016/07/11/politics/rudy-giuliani-black-lives-matter-inherently-racist/> (illustrating the opinion some politicians have of the Black Lives Matter Movement) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Eugene Scott, *Sarah Palin: Black Lives Matters is a “Farce,”* CNN (July 9, 2016, 1:39 PM), <http://www.cnn.com/2016/07/08/politics/sarah-palin-black-lives-matter/> (examining the reaction of some politicians to the Black Lives Matter movement after the Dallas sniper attack) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also David Weigel, *Texas Republicans Blame Black Lives Matters for Shooting of Dallas Police*, WASH. POST (July 8, 2016), <http://www.washingtonpost.com/news/post-politics/wp/2016/07/08/texas-republicans-blame-black-lives-matter-for-shooting-of-dallas-police/> (illustrating the responses of several other conservative politicians in the wake of the Dallas sniper attacks and the blame they placed on the Black Lives Matter movement) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

62. See Esther Suh, *The Racist Nostalgia Behind “Making American Great Again,”* HUFFINGTON POST (Sep. 16, 2015, 3:15 PM), [http://www.huffingtonpost.com/esther-suh/the-racist-nostalgia-behind-make-america-trump\\_b\\_8145962.html](http://www.huffingtonpost.com/esther-suh/the-racist-nostalgia-behind-make-america-trump_b_8145962.html) (explaining the racist implications of Donald Trump’s presidential campaign) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

63. See generally ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* (1982) (accounting of lynching that occurred in the south); RALPH GINZBURG, *100 YEARS OF LYNCHING* (1996) (compiling vivid newspaper accounts spanning 80 years of black men being lynched in the deep South).

as a “problem people,” existing in the absence of human presence and equal constitutional rights.<sup>64</sup>

Racial enslavement—the inaugural institution for the age of Europe, the precondition for the American Constitution and its coveted sequels: Jim Crow Segregation, Mass Incarceration, a racialized Death Penalty, and, today, the shooting death of Philando Castile—is enabled by and dependent on the most basic of operations: symbolic and legal de-constitutionalization of the black polity.<sup>65</sup> The absolute divestment of black and brown people’s constitutional rights occurs not in the abstract, but instead at the location of black presence. Policing paradigms that divest black people of their freedom of movement,<sup>66</sup> restrict their right to protest,<sup>67</sup> assault their physical and emotional sustenance,<sup>68</sup> and punish their political and cultural representations are attacks on the fundamental guarantees of free speech, free assembly, and the right to petition the government protected by the American Constitution.<sup>69</sup> This affront to black people’s exercise of their

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64. See generally W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* (1903) (illustrating the complicated history of race in this country and the feeling within the African American community that they are considered “problem people” by the rest of society).

65. See generally Loic Wacquant, *From Slavery to Mass Incarceration: Rethinking the ‘Race Question’ in the United States*, 13 *NEW LEFT REV.* 40 (2003) (explaining the connections between racial institutions, namely Slavery, Jim Crow, Ghettos, and Mass Incarceration).

66. See *Ill. v. Wardlow*, 528 U.S. 119, 121 (2000) (concluding that running away from police after making eye contact with them creates reasonable suspicion that supports a search).

67. See Aliza Chasan, *White House Responds to Petition to Label Black Lives Matters as Terrorist Group*, PIX TELEVISION (July 18, 2016, 3:10 PM), <http://pix11.com/2016/07/18/white-house-responds-to-petition-to-label-black-lives-matter-as-terrorist-group/> (stating that President Obama has denied a claim to list the Black Lives Matter Movement as a terrorist group) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

68. See Lynh Bui & Tom Jackman, *Strip Searches, “Lock Up all Black Hoodies:” Excerpts from Justice Department Report on Baltimore PD*, WASH. POST (Aug. 10, 2016), <https://www.washingtonpost.com/news/true-crime/wp/2016/08/10/excerpts-from-the-justice-departments-report-on-practices-of-the-baltimore-police-department/> (listing excerpts from the Department Of Justice report highlighting inappropriate policing strategies employed by the Baltimore police department) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

69. See Steven P. Aggergaard, *Black Lives Matters and the Evolution of the First Amendment*, STAR TRIBUNE (Dec. 23, 2015, 7:31 PM),

constitutional rights should be an affront to all American citizens because it strikes at the heart of our most fundamental guarantee to freedom and liberty and active participation in our democracy.

Black people, and all Americans, then, suffer a peculiar relation to the United States policing empire in the historic instance. This peculiarity was underscored dramatically during the United States war in Southeast Asia (1965–1975) where black soldiers, albeit overwhelmingly recruited, were disproportionately offered up as combat fodder, yet differentiated by the enemies of the United States military invasion and occupation.<sup>70</sup> Racially targeted propaganda appealed to the cruel ironies of black military service and offered ideological support to the struggle for freedom, justice, and equality that was, at the time, intensifying and mutating stateside as it raised the galvanizing cry of Black Power.<sup>71</sup>

More important were the notable combat tactics of Vietcong and North Vietnamese Army soldiers, which frequently targeted white soldiers for ambush and sniper attacks while leaving unharmed (if at all possible) contingents of black soldiers on hand, a veritable racial partition of attack.<sup>72</sup> In this circumscribed domain, the campaign of Vietnamese guerrilla fighters sought to exploit—in parts strategically, in parts earnestly—the living legacy of anti-blackness among United States fighting forces not

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<http://www.startribune.com/black-lives-matter-and-the-evolution-of-the-first-amendment/363428071/> (explaining that First Amendment rights of members of the Black Lives Matter Movement are being constrained by the judicial system in Minnesota) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

70. See Paul T. Murray, *Blacks and the Draft: A History of Institutional Racism*, 2 J. OF BLACK STUD. 57, 74 (1971) (“Rather than risk the political consequences of drafting middle-class whites for Vietnam duty, the Pentagon planners have devised several methods for drafting a disproportionate number of blacks.”).

71. See James Maycock, *War Within War*, GUARDIAN (Sept. 14, 2001, 9:25 PM), <https://www.theguardian.com/theguardian/2001/sep/15/weekend7.weekend3> (“Huey Newton, the founder of the [Black Panthers], also suggested that black army personnel turn their weapons on white officers”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

72. See Eugene Smith, *A Little Known Aspect of Blacks in the Vietnam War*, OMNIAFRIKAN (2014) (“We had instances over there where pamphlets were given to black Marines by Vietnamese civilians telling us: ‘Black man go home! This is not your war!’”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

only by suggesting a political affinity between blacks and Asians as victims of white supremacy, but also by enacting a displacement of the racially distributed vulnerability to violence that otherwise slated blacks for gratuitous assault without recourse. Muhammad Ali's famous 1966 statement, "And shoot them for what? No Viet-Cong ever called me nigger," takes on added weight in this light.<sup>73</sup> Black troops, for their part, contributed actively to this antagonistic milieu with, among other things, hundreds of fragging of white junior officers, the repeated refusal of high-risk assignments, and, on several occasions, open rebellion and riot against the system of overseas military policing and prisons in which they were, predictably, overrepresented as captives.<sup>74</sup>

In our contemporary theater of policing, a historical discrepancy—which has hardly been mitigated, even if it is newly mediated—promised to reshape the debate briefly with the July 2016 assault on the Dallas police by United States Army veteran Micah Xavier Johnson, a black man.<sup>75</sup> Racial politics confronted United States policing, so prominent at the site of the 102 unarmed black men killed in 2015.<sup>76</sup> The progressive racial movement, BlackLivesMatter, while eloquent on the menace of the latter, missed an opportunity (or was perhaps afraid)<sup>77</sup> to fully critique

73. See Ilias Khidhr, *No Viet Cong Called Me Nigger*, YOUTUBE (Nov. 11, 2014), <https://www.youtube.com/watch?v=vd9aIamXjQI> (presenting a live interview with Muhammad Ali).

74. See generally David Cortwright, *Black GI Resistance During the Vietnam War*, 2 VIETNAM GENERATION 51 (1990), <http://digitalcommons.lasalle.edu/cgi/viewcontent.cgi?article=1052&context=vietnam-generation> (last visited Oct. 10, 2016) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

75. Aviva Shen & Carimah Townes, *Pundits Didn't Waste Any Time Attacking Black Lives Matter as Dallas Tragedy Unfolded*, THINKPROGRESS (July 8, 2016), <https://thinkprogress.org/pundits-didnt-waste-any-time-attacking-black-lives-matter-as-dallas-tragedy-unfolded-97d37a68b961#.vstgblf7x> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

76. See generally, *Police killed more than 100 unarmed black people in 2015*, MAPPING POLICE VIOLENCE, <http://mappingpoliceviolence.org/unarmed/> (last visited Oct. 10, 2016) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

77. By afraid, I am referring to them experiencing the official condemnation of social acceptance similar to the Malcolm X excise from the Nation of Islam in 1963, when he was excommunicated after commenting on the assassination of President John F. Kennedy, during his famous speech, God's Judgment of White America (The Chickens Come Home to Roost). See generally Malcolm X, God's

the former almost entirely. Political opposition to the illegal and unconstitutional terror of anti-black police brutality across the nation routed in the black freedom struggle of the Black Power Movement of the 1960's, and the work of grassroots activists (or Negroes with Guns) of Huey P. Newton's Black Panther Party in Oakland, California,<sup>78</sup> and Robert F. Williams' Monroe, North Carolina branch of the NAACP.<sup>79</sup> Yet, in and beyond the United States, the outspoken proponents of the American policing apparatus displays a striking disinterest in either the political energies or the lived experience of actually existing black communities.

But, whatever your racial politics, the empirical facts remain as alarming as they are undisputed. In the last year, we have witnessed a series of shooting deaths of unarmed Black men by local police departments.<sup>80</sup> Those deaths, which total more than 102 in the last year, occurred at the rate of nearly two a week. According to data collected on police shooting deaths, we learn that unarmed blacks were killed by the police at five times the rate of unarmed whites in 2015.<sup>81</sup>

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Judgment of White America (The Chickens Come Home to Roost) (Dec. 4, 1963), [http://www.malcolm-x.org/speeches/spc\\_120463.htm](http://www.malcolm-x.org/speeches/spc_120463.htm) (last visited Oct. 10, 2016) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

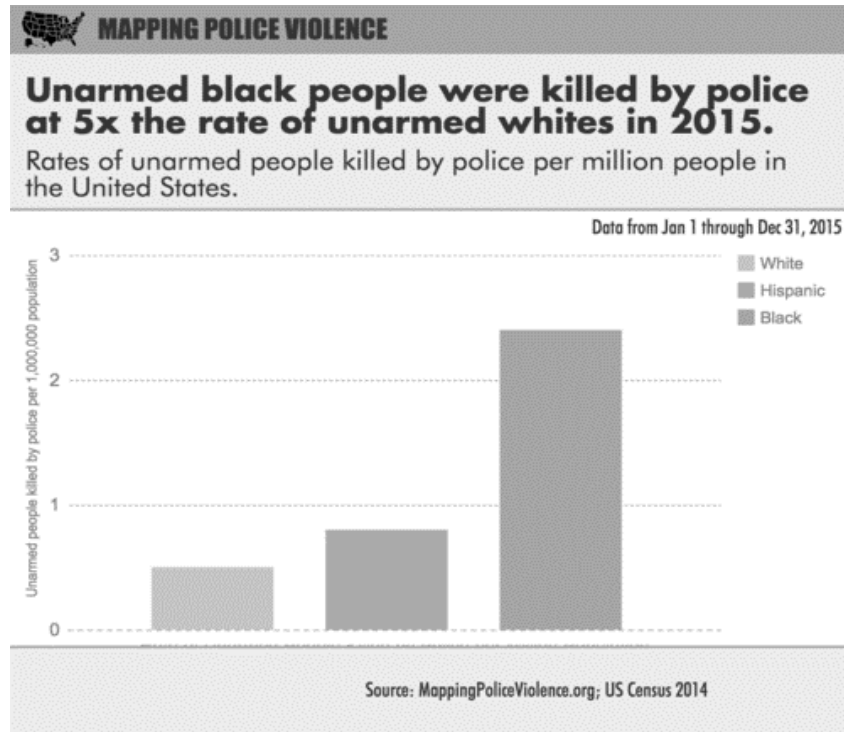
78. See generally HUEY P. NEWTON, *TO DIE FOR THE PEOPLE: THE WRITINGS OF HUEY P. NEWTON* 8 (1995).

79. See ROBERT F. WILLIAMS, *NEGROES WITH GUNS* 5–6 (2013) (describing the NAACP struggle with the state officials, Williams notes that “The lawful authorities of Monroe and North Carolina acted to enforce order only after and as a direct result of our being armed.”).

80. MAPPING POLICE VIOLENCE, *supra* note 76.

81. *Id.*





Beyond visualizing these facts, even more significant ones remain. Thirty-seven percent of the unarmed people killed by police in 2015 were Black despite only comprising thirteen percent of the United States population. Only 10 of the 102 cases in 2015 resulted in the officer being charged, and only 2 of those cases resulted in the officer's conviction.<sup>82</sup> Of those two convictions, only one of the officers received jail time: he was sentenced to one year in jail and allowed to serve his time exclusively on weekends.<sup>83</sup>

The fact that the policing function continues to engage in conduct that either appears criminal at least, or is criminal at most, infringes on the ideals that form the bedrock of our criminal justice system.<sup>84</sup> Not only does the lack of accountability produce

82. *Id.*

83. *Id.*

84. See Caren Morrison, *How the Justice System Fails Us After Police Shootings*, CONVERSATION (Dec. 10, 2015, 6:19 AM), <https://theconversation.com/how-the-justice-system-fails-us-after-police-shootings-51978> ("You might think these high-profile cases mark a turning point in the nation's response to fatal

an appearance of impropriety, whether true or not, that undermines black people's faith in the fairness of our criminal justice apparatus,<sup>85</sup> but it affects all Americans' faith in the constitutional promise that we purport to hold to be self-evident: that ALL men (and women) are created equal in the eyes of the law. The appearance that the police are allowed to operate above the law and trample the constitutional rights of black Americans with impunity is a long-standing narrative that has always been challenged by the black radical tradition.<sup>86</sup>

From the era of Slavery, where blackness was demonized and criminalized in the name of white supremacy,<sup>87</sup> to the era of Segregation where blackness was extra-judicially punished in the name of white purity,<sup>88</sup> the policing apparatus of the state has

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police violence. But 1,058 people have been killed by police this year to date alone, and most of the time, no legal charges follow") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

85. See Hon. Alex Kozinski, *Preface* to 44 GEO. L. J. ANN. REV. CRIM. PRO., *Criminal Law 2.0*, i, xiv (2015) ("What we have is faith that our system works very well and the errors, when they are revealed, are rare exceptions. Much hinges on retaining this belief.").

86. The roots of the black radical tradition challenging police brutality and a failed criminal justice system can best be understood through a careful study of Stokely Carmichael and his speech on Black Power. See generally THE MARTIN LUTHER KING, JR. RESEARCH AND EDUCATION INSTITUTE, STANFORD UNIVERSITY, KING ENCYCLOPEDIA, [http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc\\_stokely\\_carmichael\\_1941\\_1998/index.html](http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_stokely_carmichael_1941_1998/index.html) (last visited Oct. 10, 2016) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

When you talk about black power you talk about bringing this country to its knees any time it messes with the black man . . . any white man in this country knows about power. He knows what white power is and he ought to know what black power is.

The best comprehensive work to-date on Stokely Carmichael and his connection to the Black Power era and Black political protest is PENIEL E. JOSEPH, *STOKELY: A LIFE* (2014).

87. See Curtis Bunn, *10 Slave Codes That Were Designed to Oppress and Humiliate Black People*, ATLANTA BLACK STAR (Dec. 22, 2014), <http://atlantablackstar.com/2014/12/22/10-slave-codes-that-were-designed-to-oppress-and-humiliate-black-people/> ("Plantation owners were fearful for their lives from a violent rebellion, so much so that they came together to create what they called 'slave codes,' . . . that restricted enslaved people's behavior to control their actions and reduce the chances of an uprising") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

88. It is a widely-acknowledged fact that gender played a significant role in the lynching of black men during the era of Jim Crow segregation, mostly justified

contributed to the devaluation of black life. From the non-violent marches and sit-ins of the Civil Rights era to the proud display of the Second Amendment right to bear arms during the Black Power era, the policing apparatus of the state has contributed to the devaluation of black life.<sup>89</sup> More recently, from the shooting deaths of Trayvon Martin, Tamir Rice, Akai Gurley, and Samuel Debose to the choking deaths of Jonny Gammage and Eric Garner, the policing apparatus of the state has contributed to the devaluation of black life.<sup>90</sup> And now, we are again vexing in the shooting death of Philando Castile, whose only *crime* was to lawfully carry a legally registered firearm combined with being black: neither, in fact, are crimes.

If there is to be an end to the devaluation of black life we have to eclipse the polarizing rhetoric, where social, legal, and political careers are being managed, and engage in a discourse that seeks answers to the following questions: Why doesn't Philando have a Fourth Amendment right (as one of the people) to be free from unreasonable searches and seizures by the police? Why doesn't Philando have the Second Amendment right to carry a legally registered firearm without fear of punishment by the police? Why don't "the people," of [all races] of the United States, "in order to form a more perfect union," have a right to "ensure justice and domestic tranquility" in an effort to "secure the blessings of liberty to ourselves and our posterity," by being critical of the police that is failing at its promise to uphold this nation's decision to "ordain and establish the Constitution of the United States," without reprisal from that same governmental apparatus? Finally, we should simply ask, why isn't Philando alive to read this Article today?

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by the protection of white female purity. *See generally* DORA APEL, IMAGERY OF LYNCHING 138–41 (2004).

89. For a discussion of how police failed to intervene in the citizen attacks on civil rights freedom rides, *see generally* RAYMOND ARSENAULT, FREEDOM RIDES: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE (2007). For a discussion on how the Black Panther Party marched into the Sacramento Legislature with guns, *see generally* DONALD F. TIBBS, FROM BLACK POWER TO PRISON POWER: THE MAKING OF JONES V. NORTH CAROLINA PRISONERS' LABOR UNION (2012).

90. *See* Jim Clingman, *Requiem for Black People*, BLACKONOMICS (2016) (finding that in each of the above listed cases, except one, the police shot and a killed an unarmed black man).

Perhaps the answer to all of those questions is the same because, like it or not, we are not post-Racial, but are instead living in an era of Black De-Constitutionalism.

Rest in peace, Philando. I am sorry that this happened to you.