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Sheriffs, Shills, or Just Paying the Bills?: Rethinking the Merits of Compelling Merchant Cooperation with Third-Party Policing in the Aftermath of George Floyd's Death

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Sheriffs, Shills, or Just Paying the Bills?: Rethinking the Merits of Compelling Merchant Cooperation with Third-Party Policing in the Aftermath of George Floyd's Death

Stephen Wilks*

Abstract

This Article frames the killing of George Floyd as the result of flawed business regulation. More specifically, it captures the expansion of third-party policing paradigms throughout local nuisance abatement regulations over a period of time that coincided with the militarization of policing culture across the United States. Premised on the notion that law enforcement alone cannot succeed in reducing crime and disorder, such regulations transform grocery stores, pharmacies, bars, and other retail spaces into surveillance hubs by prescribing situations that obligate businesses to contact the police. This regulatory framework, however, sustains the larger historical project of rationalizing enhanced scrutiny of the public and private spaces that Black people occupy; supplies the imprimatur for wider societal involvement in the scrutiny of Black bodies—particularly by constituencies outside the ranks of traditional policing; and complicates psychological relationships

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INTRODUCTION

On May 25, 2020, a clerk at Cup Foods—a convenience store south of downtown Minneapolis—dialed 911 after George Floyd

allegedly used a counterfeit \$20 bill to pay for cigarettes.¹ This telephone call set in motion a series of events that culminated in Minneapolis Police Department (MPD) Officer Derek Chauvin killing Floyd by pinning Floyd’s neck under Chauvin’s knee for approximately nine minutes.² Since Chauvin’s arrest and conviction in connection with Floyd’s death,³ there has been minimal discussion of the nuisance abatement regulations that ultimately brought Floyd into contact with police on that fateful summer day.⁴ These regulations include so-called “third-party policing” regimes—civil enforcement mechanisms that force the owners or managers of “problem properties” to support police in deterring illegal or unwanted activities.⁵ Premised on the notion that law enforcement alone cannot succeed in reducing crime and disorder, such regulations transform grocery stores, pharmacies, bars, and other retail spaces into surveillance hubs by prescribing situations that obligate businesses to contact the police.⁶ This regulatory framework, however, sustains the larger

1. Complaint at 2, *Minnesota v. Chauvin*, No. 27CR2012646 (D. Minn. May 29, 2020) [hereinafter *Chauvin Criminal Complaint*] (“On May 25, 2020, someone called 911 [and] officers learned from store personnel that the man who passed the counterfeit \$20 was parked in a car around the corner George Floyd was in the driver’s seat”); see also Sarah Mervosh & Nicholas Bogel-Burroughs, *Why Derek Chauvin Was Charged with Third-Degree Murder*, N.Y. TIMES (May 29, 2020), <https://perma.cc/Y7YD-V66U> (last updated June 29, 2020) (explaining that “two officers approached Mr. Floyd” in his car and made several attempts to get Mr. Floyd in the back seat of a squad car, that Mr. Floyd intentionally fell down, and that one officer placed his knee onto Mr. Floyd’s neck from 8:19 PM until 8:27 PM).

2. See Dalton Bennett et al., *The Death of George Floyd: What Video and Other Records Show About His Final Minutes*, WASH. POST (May 30, 2020), <https://perma.cc/3ES7-5FYM>; see also Elliott C. McLaughlin, *Three Videos Piece Together the Final Moments of George Floyd’s Life*, CNN, <https://perma.cc/J3V6-NYKA> (last updated June 23, 2020, 9:14 AM); *George Floyd Case: New Bodycam Video Reveals Conversations Between Floyd, Minneapolis Officers*, ABC7 (Aug. 11, 2020), <https://perma.cc/VN7S-SPRH>.

3. See Tim Arango et al., *Derek Chauvin Is Found Guilty of Murdering George Floyd*, N.Y. TIMES (Apr. 20, 2021), <https://perma.cc/K6V9-SFWX> (last updated June 25, 2021).

4. But see Nicholas Bogel-Burroughs & Jack Healy, *Cup Foods, a Minneapolis Corner Store Forever Tied to the Death of George Floyd*, N.Y. TIMES (June 15, 2020), <https://perma.cc/CB8E-AER6> (last updated June 17, 2020).

5. See *infra* Part I.

6. See *infra* Part IV.

historical project of rationalizing enhanced scrutiny of the public and private spaces that Black people occupy.

This Article critiques third-party policing by recognizing its capacity to conscript businesses' participation in an increasingly militarized law enforcement culture. It contends that such compelled cooperation supplies the imprimatur for wider societal involvement in the scrutiny of Black bodies—particularly by constituencies outside the ranks of traditional policing.⁷ This form of commercial regulation complicates the historical and psychological relationships Black people have with the settings they enter, while fueling the continued disregard for their bodily dominion. Confronting such institutional and regulatory arrangements remains a vital scholarly exercise insofar as much of American racism has been historically manifested in spatial terms.⁸ Originating from public and private law,⁹ these terms have spanned the entire arc of African American life—controlling where Black people could

7. See, e.g., Mary Anne Franks, *Democratic Surveillance*, 30 HARV. J.L. & TECH. 425, 443 (2017)

Today, the black population is subject to extensive, literal, daily policing in many cities across the United States. From disproportionate uses of force in police encounters to frequent stops and frisks, black bodies are under constant suspicion and scrutiny. This extends beyond state actors to private citizens, from “subway vigilantes” like Bernhard Goetz, who shot four unarmed young black men after they demanded five dollars, to “neighborhood watchmen” like George Zimmerman, who stalked and ultimately killed a young, black, unarmed teenager named Trayvon Martin. Young black men and women are taught that their bodies are considered threats in themselves, and that because of this they can expect to be followed, investigated, questioned, and evaluated wherever they go. (citations omitted).

8. For an article confronting the significant role that criminal law and procedure have played in maintaining racialized spaces, see I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.C.L. L. REV. 43 (2009).

9. See Peter J. Hammer, *Detroit 1967 and Today: Spatial Racism and Ongoing Cycles of Oppression*, 18 J.L. SOC'Y 227, 229 (2018) (discussing how “the physics of segregation” integrated “fractured home rule” with “racially subsidized” suburbanization, most notably through discriminatory mortgage lending practices, commercial redlining, and the construction of highway systems that carved through Black neighborhoods).

give birth to their children,¹⁰ buy homes,¹¹ operate their own businesses,¹² access education,¹³ vote,¹⁴ worship,¹⁵ pursue

10. See *Hospital Bias Charged: Facilities for Negro Births Declared to be Limited*, N.Y. TIMES (July 24, 1956), <https://perma.cc/G3NG-LNMP> (discussing a report by Augustine Bowe, Chair of the Chicago Commission on Human Relations, that determined 62% of the city's African American infants were born in poorly equipped public hospitals and that "private hospitals either [did] not admit Negro mothers" or "[did] not allow Negro physicians on the staff").

11. See James A. Allen, *The Color of Algorithms: An Analysis and Proposed Research Agenda for Deterring Algorithmic Redlining*, 46 FORDHAM URB. L.J. 219, 221–22, 235 (2019) (detailing how redlining originated in 1933 when the federal Home Owners' Loan Corporation refused to issue government-backed loans to communities of color—areas commonly denoted on maps with red lines drawn around the places where African Americans lived).

12. See Hammer, *supra* note 9, at 229.

13. See Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 8–10 (1994) (discussing how the U.S. Supreme Court's decision in *Brown v. Board of Education* had little impact on school desegregation across the southeastern United States until passage of the 1964 Civil Rights Act and the establishment of enforcement guidelines by the Department of Health, Education, and Welfare in 1966).

14. See Jess Hardin, *'To Me, It's Voter Suppression': The Republican Fight to Limit Ballot Boxes*, THE GUARDIAN (Oct. 29, 2020), <https://perma.cc/UDD4-JADG>; Astead W. Herndon & Alexander Burns, *Voting in Wisconsin During a Pandemic: Lines, Masks and Plenty of Fear*, N.Y. TIMES (Apr. 7, 2020), <https://perma.cc/6ABE-7863> (last updated May 12, 2020) (discussing how the number of polling stations in Milwaukee was reduced from 180 to five despite risks posed by the COVID-19 pandemic).

15. See MARTIN LUTHER KING JR., A MARTIN LUTHER KING TREASURY 129 (1964) ("It is appalling that the most segregated hour of Christian America is 11 o'clock on Sunday morning.").

leisure activities,¹⁶ purchase goods and services,¹⁷ and bury their dead.¹⁸

Whether complying with laws expressly mandating racial segregation or observing customs that emerged out of time-honored usage,¹⁹ American commerce has willingly accommodated racism's demands.²⁰ This acquiescence conforms with the amorality of pursuing profit to the greatest degree permissible by law, the inclination to capitalize on racism's presence in the American political economy, and the economic imperative of coexisting with racism as an inevitability baked into the cost of doing business. History is replete with enterprises that operated segregated spaces, leveraged the availability of nonwhite labor to reduce operating costs, and exploited the captive markets created by restrictions on African American autonomy.²¹ Today—long after the apparent retreat

16. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 590 (1982) (discussing how the City of Jackson, Mississippi decided to close all of its municipal swimming pools rather than racially integrate them following the U.S. Supreme Court's decision in *Palmer v. Thompson* determining that excluding African Americans from the city's pools violated the Equal Protection Clause (citations omitted)).

17. See Tonya Francisco, *How the Sears Catalog Revolutionized the Way Blacks Shopped*, WGN9 (Feb. 27, 2019), <https://perma.cc/3SZK-U8BT> (explaining how the development of the mail order business provided some relief from the degrading experience of shopping in segregated stores, specifically by directing customers to sidestep merchants by engaging with postmen and railway station agents who could take orders).

18. See Nathan Tauger, *Racial Segregation in West Virginia Housing, 1929–1971*, 123 W. VA. L. REV. 171, 225–27 (2020) (detailing litigation that challenged the use of racially-restrictive covenants to prevent Black people from buying burial plots in Charleston and Beckley, West Virginia).

19. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1128 (1995) (explaining how notions of custom and usage formed the basis for leaving racial segregation to the discretion of private markets and how Jim Crow laws were conceived to supplant this discretion with mandatory segregation).

20. See, e.g., Becky Little, *Before the Green Book, These Resorts Offered Hidden Safe Havens for Black Americans*, HISTORY (Nov. 16, 2018), <https://perma.cc/66DJ-CR4E> (last updated Jan. 7, 2019).

21. George Pullman offers a historical example of how late-nineteenth century entrepreneurship exploited the marginality of Black men. After the Civil War, the Pullman Company hired formerly enslaved African Americans to work on sleeper cars as porters, eventually becoming the single largest employer of Black men in the United States. At its peak, the company employed 20,000 Pullman Porters. George Pullman's preference for hiring African Americans rested largely on his ability to pay low wages in an

of more overt, intentional discrimination—nuisance abatement frameworks complement this commercial praxis by reconfiguring the ways regulation can shape the geography of race at the local level.²²

This Article adds to the growing body of scholarship in response to George Floyd’s death. This scholarship has addressed relationships between policing institutions and African American communities,²³ systemic and structural racism,²⁴ voter registration during the 2020 presidential campaign,²⁵ racism’s mental health effects on Black communities,²⁶ and protests as a proxy for the various forms of

employment landscape where few other good-paying jobs were available. Under the leadership of A. Phillip Randolph, Pullman Porters would eventually become the first Black labor union in the United States. For useful histories, see LARRY TYE, *RISE FROM THE RAILS: PULLMAN PORTERS AND THE MAKING OF THE BLACK MIDDLE CLASS* (2005) and Preston Valien, *The Brotherhood of Sleeping Car Porters*, 1 *PHYLON* 224 (1940).

22. See *infra* Part IV.

23. See generally, e.g., John Felipe Acevedo, *Reclaiming Black Dignity*, 99 *TEX. L. REV. ONLINE* 1 (2020); Mitchell F. Crusto, *Black Lives Matter: Banning Police Lynchings*, 48 *HASTINGS CONST. L.Q.* 3 (2020); Brian Mogek, *A Proposal for Police Reform: Require Effective Accountability Measures in Police Union Contracts as a Condition of Tax-Exempt Status*, *U. CHI. L. REV. ONLINE* (Aug. 7, 2020), <https://perma.cc/BD4V-JZT9>; William S. Parkin et al., *Police, Public and Community Violence: Exploring the Relationships Between Use of Deadly Force, Law Enforcement Killed, and Homicide Rates in the United States*, 21 *CRIMINOLOGY, CRIM. JUST., L & SOC’Y* 1 (2020); Katelyn Ringrose & Divya Ramjee, *Watch Where You Walk: Law Enforcement Surveillance and Protester Privacy*, 11 *CALIF. L. REV. ONLINE* 349 (2020).

24. See generally, e.g., Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 68 *UCLA L. REV. DISCOURSE* 200 (2020); Michael A. Lawrence, *The Thirteenth Amendment as Basis for Racial Truth & Reconciliation*, 62 *ARIZ. L. REV.* 637 (2020); Suzanne Mettler & Robert C. Lieberman, *The Fragile Republic: American Democracy Has Never Faced So Many Threats All at Once*, *FOREIGN AFFS.* (Sept./Oct. 2020), <https://perma.cc/7FWS-WS55>; Alice Ristroph, *The Curriculum of the Carceral State*, 120 *COLUM. L. REV.* 1631 (2020).

25. See generally, e.g., Daniel P. Tokaji, *Voter Registration in a Pandemic*, *U. CHI. L. REV. ONLINE* (June 26, 2020), <https://perma.cc/KGY7-VRXN>.

26. See generally, e.g., Lindsey Tanner, *Coronavirus, Floyd Killing Merge in Brutal Blow to Black Well-Being*, *WHYY* (July 5, 2020), <https://perma.cc/W97R-73QL>; Jonathan Vanian, *A Mental Health Crisis Is Unfolding in the Workplace. COVID-19 and Racial Injustice Are to Blame*, *FORTUNE* (June 6, 2020), <https://perma.cc/3DCC-3HHS>.

economic distress bearing down on a COVID-weary public.²⁷ This discourse has also begun mapping the consequences of Donald Trump's norm-shattering presidency as a key enabler of white supremacist, nativist sentiment²⁸ and the ramifications for people of color.²⁹

This Article is organized as follows. Part I recognizes third-party policing's potential as a social control mechanism that has outlived more formal, historical racializing of American geography. Following a survey of literature outlining the theoretical premises of third-party policing, this Part describes how policing practices from the 1980s onward focused on place management strategies that (i) purported to rely on a systematic analysis of criminal activity to identify "problem properties"; (ii) increased attention to so-called "quality of life" issues, such as public urination, disorderly groups, public drinking, noise complaints, and low-level drug sales; and (iii) crafted civil enforcement mechanisms to target owners and managers of "nuisance properties." Part I then considers how these elements

27. See generally, e.g., Travis D. Hughes & Oscar R. Rivera, *Navigating Early Termination Clauses in Commercial Leases*, PROB. & PROP. MAG (Nov./Dec. 2020), <https://perma.cc/7D5S-UEAL>; Sandee LaMotte, *How to Make Good Decisions When You're Paralyzed by the Stress of Protests and the Pandemic*, CNN, <https://perma.cc/T59E-AVG7> (last updated June 4, 2020, 3:47 AM); Ray Sanchez, *As a Pandemic and Protests Over George Floyd's Death Collide, Officials Stress: Wear a Mask*, CNN, <https://perma.cc/SQQ4-PFC7> (last updated May 30, 2020, 4:05 PM).

28. See David A. Graham et al., *An Oral History of Trump's Bigotry*, THE ATLANTIC (June 2019), <https://perma.cc/7XVZ-T94S>

Trump emerged as a political force owing to his full-throated embrace of 'birtherism,' the false charge that the nation's first black president, Barack Obama, was not born in the United States. His presidential campaign was fueled by nativist sentiment directed at nonwhite immigrants, and he proposed barring Muslims from entering the country.

see also Katie Rogers & Nicholas Fandos, *Trump Tells Congresswomen to "Go Back" to the Countries They Came From*, N.Y. TIMES (July 14, 2019), <https://perma.cc/PQ64-49GL>.

29. See Jonas R. Kunst et al., *Fusion with Political Leaders Predicts Willingness to Persecute Immigrants and Political Opponents*, 3 NATURE HUM. BEHAV. 1180, 1180 (2019) ("From the 2016 US presidential election and into 2019, we demonstrate that a visceral feeling of oneness (that is, psychological fusion) with a political leader can fuel partisans' willingness to actively participate in political violence."); Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125, 151 (2019).

combine to validate enhanced levels of surveillance of Black bodies under the guise of “cleaning up” communities.

Part II outlines the rise of militarism in policing, which makes third-party policing a gateway into a more dangerous form of commercial regulation given the potential harm it poses to African Americans.

Part III explores the danger of this militarism by outlining how third-party policing complements wider social forces that foment negative perceptions of Black people at the hands of police and civilians purporting to enforce the law. This Part also captures the interplay of race and class conflict specifically weaponized against Black men when they find themselves in the crosshairs of law enforcement.

Part IV considers how the commercial regulations that contributed to George Floyd’s death are a form of spatial oppression which has historically plagued the community where he was killed, and which continue in third-party policing theory, militarism in law enforcement, and the normalized humiliation of Black bodies. This Part also uses critical race scholarship to argue that the circumstances of Floyd’s killing answered the demands of a regulatory paradigm that conscripted merchant support and that Floyd’s death symbolizes mainstream society’s ongoing possessive investment in compelling businesses’ participation in controlling minorities through place management regulations. Part IV further contends that evidence of this investment is manifest in the mix of ill-conceived policymaking and local electoral choices that uncritically advance policing priorities while sidestepping more arduous, longer-term commitments to dismantling the inequities that entrench poverty and crime.

Recognizing the need for more feasible and immediate solutions, the Article concludes by stressing the importance of local activism and education in determining who occupies the offices where nuisance actions originate and by encouraging state and local prosecutors to carefully consider when nuisance actions might be counterproductive in light of their potential to misunderstand the conditions they seek to ameliorate.

I. THIRD-PARTY POLICING AND THE LOCALIZED GEOGRAPHY OF RACISM

This Part positions third-party policing as an instrument of social control that complements the legacy of more formal, historical means of racializing geography at institutional and local levels. This legacy includes the lasting effects of zoning restrictions, interstate highway construction, racially-restrictive covenants, and racial violence—all of which placed prohibitions on where African Americans could live, operate businesses, and purchase property.³⁰ With government support, lending institutions often participated in these prohibitions by denying consumer and commercial loan applications to Black applicants seeking to finance property purchases outside of predominantly African American communities.³¹ The impact of these discriminatory processes has survived their formal origins, particularly in present-day Black neighborhoods whose origins are closely tied to the history of racial segregation and where various forms of intrusive state surveillance have been the misplaced response to social problems flowing from persistent inequities in housing, employment, pay, education, and health.³²

By virtue of its origin, structure, and function, third-party policing exists within these responses as a set of relationships that presuppose an ongoing need for enhanced scrutiny as the institutionalized and opportunistic exploitation of white fear—sometimes at great cost to Black lives and to other marginalized populations.³³ The literature examining

30. See MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* 6 (2017).

31. See *id.* (“The government-created credit apparatus did not cross the red lines that policymakers drew around the ghetto, and within the color line a separate and unequal economy took root.”).

32. See *id.* at 249–51.

33. See, e.g., MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 4 (2016) (“There are hundreds of datamining companies that sell landlords tenant-screening reports listing past evictions and court filings.”); Anna Kastner, *The Other War at Home: Chronic Nuisance Laws and the Revictimization of Survivors of Domestic Violence*, 103 CALIF. L. REV. 1047, 1053–56 (2015); Theresa Langley, *Living Without Protection: Nuisance Property Law Unduly Burden Innocent Tenants and Entrench Divisions Between Impoverished Communities and Law Enforcement*, 52 HOUS. L. REV. 1255, 1276–79 (2015); Marc L. Roark, *Under-Propertied Persons*, 27 CORNELL

third-party policing explores its general efficacy,³⁴ canvasses uses within international commerce,³⁵ considers its dependence on the proper use of technology in policing culture,³⁶ explores its capacity for integration with other forms of policing,³⁷ and offers examples of its capacity to control blight and property neglect as “quality of life” concerns.³⁸ A significant portion of this scholarship intersects with debates about the “broken windows”

J.L. & PUB. POL'Y 1, 50 (2017) (“One reason that nuisance becomes a powerful rulemaking authority for those reclaiming land is its moldability to whatever society doesn’t like.”); Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 508 (2006) (“[R]ace-nuisance cases cannot be fully explained by formalist decision-making and . . . related cases concerning racial zoning and the enforceability of racially restrictive covenants show the limits to formalism in racially charged cases.”).

34. See Anthony A. Braga et al., *Can Policing Disorder Reduce Crime? A Systematic Review and Meta-Analysis*, 52 J. RSCH. CRIME & DELINQ. 567, 580 (2015) (“The results of our systematic review and meta-analysis suggest that disorder policing strategies generate noteworthy crime control gains.”).

35. See Adrian Cherney, *Harnessing the Crime Control Capacities of Third Parties*, 31 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 631, 639 (2008)

Harnessing the crime control capacities of third parties is made all the more successful if it incorporates tactics that create incentives and rewards for participants. For example, initiatives adopted by the US Customs Agency focus on facilitating industry partnerships to target vulnerabilities within the commercial transportation industry aimed at preventing drug trafficking, chemical diversion and terrorism.

36. See Cynthia Lum et al., *Understanding the Limits of Technology’s Impact on Police Effectiveness*, 20 POLICE Q. 135, 139.

37. See Matthew C. Scheider et al., *Towards the Unification of Policing Innovations Under Community Policing*, 32 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 694, 694–95 (2009) (discussing how third-party policing can be integrated with other policing paradigms, such as problem-oriented policing, the theory of broken windows, intelligence-led policing, and hot spot targeting).

38. See Steven E. Barlow et al., *Ten Years of Fighting Blighted Property in Memphis: How Innovative Litigation Inspired Systems Change and a Local Culture of Collaboration to Resolve Vacant and Abandoned Properties*, 25 J. AFFORDABLE HOUS. & CMTY. DEV. L. 347, 369–70 (2017) (describing how Memphis became more aggressive in using nuisance abatement powers to target the owners of blighted or abandoned properties and to rebut claims of a “right to blight”); Allison T. Chappell et al., *Broken Windows or Window Breakers: The Influence of Physical and Social Disorder on Quality of Life*, 28 JUST. Q. 522, 526 (2011) (arguing that neighborhood disorder is linked to quality of life by metrics that focus on work, income and education, health and social relationships, and personal characteristics).

theory of policing, which suggests that an apparent lack of community investment is a proxy for criminogenic risk.³⁹ There has also been discussion about possible applications to bullying, sexual misconduct on college campuses, and workplace harassment.⁴⁰ While policing has already developed a dependency on private actors for many aspects of its institutional remit,⁴¹ another line of scholarship explores the specific effects of third-party policing norms that conscript participation of nonoffending parties in crime management by holding them liable for failures to control disorderly behavior on their premises.⁴² Some of these writings consider the inequities

39. See Preeti Chauhan et al., *Race/Ethnic-Specific Homicide Rates in New York City: Evaluating the Impact of Broken Windows Policing and Crack Cocaine Markets*, 15 HOMICIDE STUD. 268, 279 (2011) (arguing that the broken windows theory of policing did not factor in declining drug-related deaths among African Americans during a nine-year period between 1990 and 1999); Hope Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J.L. & ECON. 235, 263 (2005)

To put the broken-windows hypothesis in perspective, note that other cities also experienced significant decreases in crime during the 1990s, without the dramatic increase in misdemeanor arrests. In California, for example, Los Angeles, San Diego, and San Francisco experienced decreases in index crime rates of 50 percent, 56 percent, and 41 percent, respectively, compared with the 58 percent decline in [New York City]. In contrast, misdemeanor arrests declined in the three counties containing these cities. (citations omitted)

see also Wayne A. Logan, *Policing Identity*, 92 B.U. L. REV. 1561, 1584–85 (2012) (“Broken windows’ policing, also popular during the [1990s], targeted petty offenders for arrest on the premise that low-level offenses, such as loitering and graffiti vandalism, contributed to more general neighborhood disorder conducive to criminality.”); James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29, 34. (founding the “broken window” theory of policing, stating that “disorder and crime are usually inextricably linked in a kind of developmental sequence . . . if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken”).

40. See, e.g., Sarah L. Swan, *Bystander Interventions*, 2015 WIS. L. REV. 975, 981 (2015).

41. See, e.g., Seth W. Stoughton, *The Blurred Blue Line: Reform in an Era of Public & Private Policing*, 44 AM. J. CRIM. L. 117, 144 (2017) (“Public officers have come to rely on private actors for everyday police operations. Private police support services—such as private companies that provide call-taking and dispatch services or private forensic laboratories that contract with police agencies—are common . . .” (citations omitted)).

42. See Julie Ayling & Peter Grabosky, *Policing by Command: Enhancing Law Enforcement Capacity Through Coercion*, 28 LAW & POL’Y 420, 424 (2006)

manifest in treating marginality as a nuisance⁴³ and how they perpetuate the racializing of American geography.⁴⁴

Finally, third-party policing complements other forms of state-sanctioned surveillance that not only consider communities of color prone to disorder but deem them untrustworthy participants in social welfare programs.⁴⁵ The regulatory state's fundamental architecture relies on scrutiny to exercise power over benefit recipients already ravaged by the effects of inequitable access to education, employment, and housing.⁴⁶ This operating ethos is manifest in drug testing requirements, preconditions of access to food stamps,

(detailing how nuisance abatement practices can include civil forfeiture and mandatory reporting obligations); Sharyn L. Roach Anleu et al., *Third-Party Policing and Insurance: The Case of Market-Based Crime Prevention*, 22 LAW & POL'Y 67, 75 (2000) (discussing how the insurance industry's actuarial response to neighborhood conditions serves to constrain the behavior of property owners and place managers); Michael E. Buerger & Lorraine Green Mazerolle, *Third-Party Policing: A Theoretical Analysis of an Emerging Trend*, 15 JUST. Q. 301, 308 (1998); Nicole Livanos, *Crime-Free Housing Ordinances: One Call Away from Eviction*, 19 PUB. INT. L. REP. 106, 110 (2014) (discussing how a landlord's failure to comply with abatement proceedings can result in "his or her license being revoked" (citation omitted)).

43. See Capers, *supra* note 8, at 60–72 (arguing that criminal law and procedure continue to support the racializing of space, resulting in continued segregation, adverse effects on social relationships, and reinforced social and economic inequality); Roark, *supra* note 33, at 8–9 (2017) (arguing that "ownership and poverty are insulated from one another" such that owning property broadens one's participation in community membership (citation omitted)).

44. See Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 659 (2020)

Segregation entails uneven geographic distribution of ethnic groups across a coherent geographic area (separation), and the movement of marginalized ethnic groups into identifiable and stigmatized enclaves (concentration), in order to establish and reproduce hegemonic racial hierarchy (subordination), to control and economically exploit disadvantaged groups, and hoard social and political opportunity for advantaged groups (domination).

45. See Julilly Kohler-Hausmann, "The Crime of Survival": *Fraud Prosecutions, Community Surveillance, and the Original "Welfare Queen"*, 41 J. SOC. HIST. 329, 332 (2007) ("Illinois antifraud initiatives were embedded in the long history of welfare bureaucracies' struggles to limit costs while policing sexuality and racial, gender, and class hierarchies.").

46. See *id.*

stipulations for securing subsidized housing, and other forms of institutionalized monitoring.⁴⁷

None of the existing scholarship, however, considers how third-party policing can become dangerous by virtue of regulations that tether nonoffending business owners to an increasingly militarized policing landscape. There is a moral hazard in using order maintenance as the basis for requiring businesses to support continued contact between police and marginalized communities where doing so needlessly puts lives at risk. The circumstances surrounding George Floyd's death offer an example of this risk and merit discussion about how nuisance abatement strategies—as forms of commercial regulation—must account for their potential harm to Black lives.

A. *Third-Party Policing's Theoretical Premise*

In 1998, Michael Buerger and Lorrain Green Mazerolle coined the phrase “third-party policing” and defined it as an effort to persuade or coerce nonoffending parties to participate in activities believed to prevent crime and disorder.⁴⁸ Rooted in the notion that regulating physical environments is necessary for social control, this policing paradigm targeted the owners and place managers in control of spaces thought to host or promote unwanted behavior.⁴⁹ This approach to order maintenance presumes property owners and various types of place managers have behavioral influence over sites of undesirable behavior.⁵⁰ It broadens engagement in the labor of

47. See Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CALIF. L. REV. 569, 579 (2001)

[S]tates can choose to limit the receipt of benefits to less than five years, to deny benefits to mothers who do not identify their children's biological fathers or to children born while their family is receiving benefits, to sanction families that include adults under age fifty-one who neither have nor are seeking a high school diploma, to declare noncitizens ineligible for assistance, to require recipients to take drug tests, or to cut benefits to families with truant children. (citation omitted).

48. Buerger & Mazerolle, *supra* note 42, at 308.

49. See *id.* at 301 (“[T]he proximate target of third-party policing is an intermediate class of nonoffending persons who are thought to have some power over the offenders' primary environment.” (emphasis in original)).

50. *Id.*

policing by using the threat of civil enforcement mechanisms to establish penalties for a range of behaviors, such as neglect or abandonment of property, failing to control noise, allowing excessive building occupancy, and refusing to address general blight.⁵¹

The central component of third-party policing is the process of designating properties as “nuisances” under specified criteria.⁵² While entertainment establishments, apartment complexes, crack-houses, and areas surrounding such properties are commonly subject to third-party policing control, commercial settings—such as grocery stores in low-income or “transitional” neighborhoods—are often singled out as “problem properties.”⁵³ Although regulations vary by jurisdiction, common criteria that give rise to a nuisance designation include: (i) a certain number of service calls (answered by police) within a prescribed time frame; (ii) the occurrence of prescribed behaviors deemed nuisance activities; and (iii) pressure on property owners or place managers—who face jail, shuttering of their businesses, or property forfeiture—for failure to repair or “abate the nuisance.”⁵⁴

Third-party policing’s framework differs from traditional policing, which focuses on individual defendants and their alleged connection to specific crimes, often after the fact.⁵⁵ Investigations, warnings, and arrests purport to single out individual offenders for their alleged conduct, either as a precursor to prosecution or to other criminal-justice responses.⁵⁶ In categorizing wider societal responses to crime outside the law

51. See generally Barlow et al., *supra* note 38 (describing the “the political, policy, and legal lessons learned while developing and implementing a citywide litigation strategy that has deployed specific legal tactics against more than 1,000 owners of vacant and abandoned properties in Memphis”). One author has described this broadened form of order maintenance as a move away from state-centered policing which allows the regulatory state to “steer” rather than to “row.” Ayling & Grabosky, *supra* note 42, at 420 (citation omitted).

52. See Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOCIO. REV. 117, 120 (2012).

53. See Buerger & Mazerolle, *supra* note 42, at 311.

54. Desmond & Valdez, *supra* note 52, at 120 (citation omitted).

55. See Buerger & Mazerolle, *supra* note 42, at 303–04.

56. See *id.*

enforcement sphere, Buerger and Mazerolle distinguish preventative strategies that are either individual or collective in nature.⁵⁷ Individual strategies include self-defense, using pepper spray, carrying firearms, buying home security systems, and avoiding certain parts of town after dark.⁵⁸ This approach to crime prevention necessarily relies on an individual's willingness to proactively manage his or her own protection—even at the cost of lifestyle changes or voluntary constraints on freedom of movement.⁵⁹ While these strategies are a form of resistance to crime, they do not seek to fundamentally alter prospective offenders' motivations.⁶⁰

By contrast, collectivized strategies like neighborhood associations, civilian patrols, and neighborhood watch programs contemplate a community-based role for maintaining order.⁶¹ This model imagines a larger crime reduction role for nonpolice actors who remain interested in promoting neighborhood safety beyond the scope of personal protection and who find common interest in controlling their communities' public spaces while influencing what transpires within them.⁶² Collectivist crime reduction considers neighborhoods fully integrated when residents proclaim their capacity to recognize neighbors and identify strangers, thereby conveying the impression to outsiders that their environment is not amenable to crime, disorder, or "quality of life" problems that range from loud music to parks being littered with used syringes.⁶³

Extending beyond individual and collective models, third-party policing requires nonoffending parties to reduce crime by assuming responsibility for activities occurring within spaces they own or manage.⁶⁴ Operating through nuisance abatement statutes, parties who own commercial and retail establishments are subject to a range of enforcement actions for

57. *See id.* at 304–05.

58. *See id.* at 305.

59. *See id.*

60. *See id.*

61. *See id.* at 305–06.

62. *See id.*

63. *See id.*

64. *See id.* at 308.

failure to control occupant or patron behavior.⁶⁵ This framework marries community policing theories with the concept of “defensible space”⁶⁶ to create a situational approach to preventing crime.⁶⁷ Community policing supplements traditional law enforcement through “a more consistent presence in, and influence over, the lives and behaviors of targeted individuals,”⁶⁸ and defensible space refers to “a residential environment whose physical characteristics . . . function to allow inhabitants themselves to become the key agents in ensuring their own security.”⁶⁹ Each of these elements informs the supposition that the nature of space shapes human behavior, thereby justifying the rationale for treating property owners and managers as guardians responsible for maintaining order inside the spaces they control.⁷⁰ In exerting such coercive power over property owners and managers, this framework seeks to compensate for perceived weaknesses inherent in less formal controls that lack

65. See, e.g., *id.* at 312–14 (providing the Beat Health program of Oakland—which uses the California Drug Nuisance Abatement Act as a weapon to motivate property owners to discourage drug activity around their property by threat of citation for violation of the code—as an example of third-party policing).

66. See OSCAR NEWMAN, DOJ, DESIGN GUIDELINES FOR CREATING DEFENSIBLE SPACE 4 (1976), <https://perma.cc/E2XY-4PKY> (PDF).

67. See Buerger & Mazerolle, *supra* note 42, at 307 (“Situational tactics bring together strategies that alter both voluntary and involuntary activities of both potential victims and offenders by changing factors that are deemed ‘crime-inducing.’”).

68. *Id.* at 302.

69. NEWMAN, *supra* note 66, at 4. For a useful discussion of research studies reaching different conclusions about the relationship between land use and crime, see James M. Anderson et al., *Reducing Crime by Shaping the Built Environment with Zoning: An Empirical Study of Los Angeles*, 161 U. PA. L. REV. 699, 720–22 (2013).

70. See Buerger & Mazerolle, *supra* note 42, at 308

Whether offenders perceive greater risks attached to committing crimes (e.g., the potential for eviction), find it harder to commit certain types of crimes (e.g., because of increased surveillance at gas stations), or perceive fewer rewards from committing crimes (e.g., less money taken during a robbery), situational responses force changes in behavior. Situational crime prevention creates an environment where potential victims are safer and where potential offenders find crime activity less rewarding, more time-consuming, and riskier.

the resources and cohesion required for more authoritative expressions of community will.⁷¹

Construing community will as a set of collective norms that can only be realized through institutional support from law enforcement and public law glosses over its racialized impact in cities with African American populations large enough to instill fear of criminal victimization.⁷² In the 1990s, nuisance abatement models expanded throughout the United States amidst a rapid increase in the per capita growth of police forces—especially in larger cities whose populations were significantly African American.⁷³ In these settings, inclinations to endorse negative perceptions of Black people merged with ethno-majoritarian demands to retain exclusive control over “important rights and privileges.”⁷⁴ Heightened fears of being victimized by crime prompted politicized majorities to demand greater crime control.⁷⁵ Several forces reinforced the momentum of these demands: (i) police were outnumbered by the minority populations that they were under pressure to control;⁷⁶ (ii) the entire ecology of racism—formed through systems, structures, and processes—determined where African Americans could live, often forcing nonoffending parties to share their neighborhoods with street criminals;⁷⁷ (iii) police had no reliable system to

71. *See id.* at 310 (“Third-party policing is an attempt to integrate the formal control of police intervention into the fabric of existing informal social controls that shape individual behavior . . .”).

72. *See* Stephanie L. Kent & David Jacobs, *Minority Threat and Police Strength from 1980 to 2000: A Fixed-Effects Analysis of Nonlinear and Interactive Effects in Large U.S. Cities*, 43 *CRIMINOLOGY* 731, 734–35 (2005) (“[M]ajority whites express greater anxieties about criminal victimization in communities with more black residents. . . . [T]he anxieties and resentments that arise from minority threat lead dominant ethnic groups to pressure political authorities to make greater efforts to control street crime.”).

73. *See id.* at 752 ([T]he overall growth in mean [police] department strength in these large cities since 1980 is at least partly due to the stronger relationships between racial threat and the expensive approach to social control provided by larger police departments.”).

74. *Id.* at 734 (citation omitted).

75. *See id.* at 732 (“[M]ajority whites, apparently threatened by the presence of large minority populations . . . , often make successful political demands for additional police officers in cities with the most minority residents” (citations omitted)).

76. *See id.*

77. *See id.*

identify recent or prospective lawbreakers or to discern what might be occurring inside buildings they could not lawfully enter;⁷⁸ and (iv) “crude decision rules” were erroneously organized around “group rather than individual characteristics,” which shaped police decisions about whom to arrest or question.⁷⁹ These forces contributed to flaws in data-gathering that supported nuisance abatement strategies, and enabled the inference that manifesting community will was an opportunity to place Black communities under enhanced scrutiny.

When situated in landscapes where proximity to Black neighborhoods shapes community will, third-party policing arrangements answer demands for law and order that are rooted in the perception that African Americans require behavioral regulation.⁸⁰ This framing also fuses negative racial stereotypes with the notion that occupants inside spaces targeted as “nuisance properties” are somehow made better by acquiescence to community will: “A learning process is expected to result from being compelled to follow simple but constant rules. Moreover, it is assumed that these lessons will become generalized, augmenting the potential offender’s capacity and willingness to conform to other levels of the rule system of modern society.”⁸¹ This fusion implies that disorder was more likely in Black communities; that these communities needed greater scrutiny and that nuisance designations were therefore an inevitable and necessary feature of Black existence; and that third-party policing was a vital extension of conventional policing that could not otherwise address majoritarian demands that Black neighborhoods remain under state surveillance.

Data continues to reveal how police departments use nuisance abatement programs to feed narratives about Black people—especially myths about their propensity for disorder—that are subsequently used as the basis for enhanced monitoring.⁸² In 2012, for example, two scholars analyzed every

78. *See id.* (“Officers also face special handicaps in underclass neighborhoods because street criminals and the innocent share many characteristics in such districts.”).

79. *Id.* (citations omitted).

80. *See* Desmond & Valdez, *supra* note 52, at 136.

81. Buerger & Mazerolle, *supra* note 42, at 310.

82. *See, e.g.*, Desmond & Valdez, *supra* note 52, at 136.

nuisance citation issued by the Milwaukee Police Department (“MWPD”) between January 1, 2008, and December 31, 2009.⁸³ During this period, the MWPD issued 503 citations, mostly to owners of residential properties.⁸⁴ In this pool of properties, 319 were in Black neighborhoods and 152 in mixed or integrated neighborhoods.⁸⁵ By contrast, eighteen were in white neighborhoods and fourteen in Hispanic neighborhoods.⁸⁶ The study’s statistical analysis determined that properties in integrated African American neighborhoods were significantly more likely to be cited for nuisance violations.⁸⁷ This same study also found that subjective police observations and citizen complaints were the primary bases of decisions to issue nuisance citations, rather than reports listing properties involved in drug raids or high-volume police calls.⁸⁸ Whereas the uninformed observer might view citation data as indicative of neighborhood climates in Black communities, the study showed that it was just as plausible that data reflected racialized fears that did not appear to be present in white communities.⁸⁹ Indeed, the study highlighted just how misleading citation data can be in determining criminal activity in neighborhoods.⁹⁰

83. *Id.* at 122.

84. *Id.*

85. *Id.* at 125.

86. *Id.*

87. *Id.* at 130.

88. *See id.*

89. *See id.* at 121 (“[R]esidents of integrated black neighborhoods (particularly nonblack residents) might be particularly likely to call owing to a heightened fear of crime based on their living in close proximity to African Americans . . .” (citation omitted)).

90. *See id.* at 136 (“[W]e found that properties from which multiple 911 calls were placed increased their risk of citation only if they were in predominately black neighborhoods.”); *see also* Lum et al., *supra* note 36, at 139

[S]ome police leaders, scholars, and reformers may see technology as a means to facilitate innovations (e.g., problem/community-oriented policing; *hot spots* policing, and third-party policing) that can reduce crime or improve citizen trust, rather than just as a means to react to crime or increase arrests and detections. However, these expectations might be overly optimistic if these innovations are not part of daily police work or are inconsistent with the technological frames of officers, detectives, or supervisors. (emphasis in original).

B. *Weaponizing Abatement Power as a Form of
Aggressive Business Regulation*

In theory, businesses are subject to abatement regulations similar to those targeting owners of residential properties.⁹¹ Police, civilians, and other interested parties are forced to file complaints about practices on the premises—otherwise, undesirable behaviors that occur can be attributed to the business owner.⁹² In addition to “quality of life” concerns that drive nuisance actions in residential contexts, these disputes can also be proxies for contests over gentrification, redevelopment, or a community’s general desire to remove “seedy” business patrons from their environment.⁹³

In addition to license revocations, fines, and jail, business owners who fail to comply with nuisance abatement practices face the risk of being shut down or losing their property through

91. See Buerger & Mazerolle, *supra* note 42, at 310 (“Third-party policing places an extralegal burden on the shoulders of the most capable citizens of an area—usually the holders of land title or their designates, the caretakers of apartment buildings, and managers of businesses.”).

92. See *id.* at 311.

93. For example, beginning in August 1994, local zoning officials instituted nuisance proceedings against owners of a 24-hour adult bookstore in the Canoga Park area of Los Angeles. Operating since 1972, the bookstore became the subject of complaints alleging public sex, prostitution, littered condoms, urination, and harassment of local residents. The bookstore’s owners agreed to a series of conditions—in 1987, 1989, 1990, and 1994—all of which failed to change conditions in or around the premises. See Respondent’s Brief at 3–5, *E.W.A.P., Inc. v. City of Los Angeles*, 65 Cal. Rptr. 2d 325 (Cal. Ct. App. 1997) (No. B102861), 1997 WL 33560464. At the initial hearing before a local Zoning Administrator on August 24, 1994, police supplied much of the evidence in support of a nuisance action, including a record of 943 arrests inside the establishment and in the nearby vicinity between 1977 and 1994. *Id.* at 5. Following a finding that the property was a “nuisance” within the meaning of Los Angeles Municipal Code section 12.21.A.15, the adjudicator imposed additional conditions, largely focused on limiting the bookstore’s operating hours. *Id.* at 6. The bookstore’s owners unsuccessfully challenged the constitutionality of these proceedings. See generally Appellant’s Opening Brief, *E.W.A.P., Inc.*, 65 Cal Rptr. 2d 325, 1996 WL 33454646. As the dispute made its way through the courts, civilians, police, and local politicians told the local press that improving the community required shutting down the bookstore. See Beth Shuster, *City, Merchants at Odds with Sex Store*, LA TIMES (Aug. 26, 1996), <https://perma.cc/8K5Z-KTG6>. In one instance, a local council woman declared, “It’s absolutely an undesirable, bad mark in the community. It certainly doesn’t help create the kind of family neighborhood shopping area we want.” *Id.*

forfeiture proceedings.⁹⁴ Commercial properties subject to nuisance designations can be categorized as follows:

1) Legitimate enterprises conducting unattractive but legitimate business (for example, auto repair shops with an overflow of beat-up or damaged cars); 2) Legitimate enterprises that fulfill their nominal functions inadequately (for example, hotels with bad reputations and low occupancy rates which attract “unsavory” clients); 3) Legitimate enterprises that conduct nominally legitimate functions but simultaneously support illicit functions (for example, dive bars that turn a blind eye to drug dealing); and 4) Strictly illegitimate enterprises, both overt (e.g., crack houses) and camouflaged (for example, houses of prostitution operating behind the facade of a “sauna,” “health spa,” or an “escort service”).⁹⁵

While nuisance abatement functions to regulate businesses across a broad range of place management strategies, its malignant potential can allow police to behave like modern day press gangs—forcing businesses to aid in expanding community surveillance regardless of whether evidence of nuisance exists. One version of this strategy entails a four-step process that broadens the potential for police-civilian contact—all under the pretense of abating nuisances: first, police target immigrant-run businesses located in neighborhoods with predominantly minority populations; second, police coordinate undercover sting operations that initiate the sale of stolen goods or other illegal activities in these businesses; third, police use the fruits of these operations to obtain orders declaring targeted properties a nuisance due to criminal activity; and fourth, police use nuisance orders as leverage to force owners or commercial tenants to waive their constitutional rights, provide police unlimited access to their premises, and pay steep fines.⁹⁶

94. Desmond & Valdez, *supra* note 52, at 119; *see also* Ayling & Grabosky, *supra* note 42, at 428–29.

95. Buerger & Mazerolle, *supra* note 42, at 311. Police also use nuisance designations for other applications. *See, e.g.*, Daniel R. Plane, *Going After the Middleman: Landlord Liability in the Battle Against Counterfeits*, 99 TRADEMARK REP. 810, 821 (2009).

96. *See* Sarah Ryley, *The NYPD Is Running Stings Against Immigrant-Owned Shops, Then Pushing for Warrantless Searches*, PROPUBLICA (Apr. 22, 2016), <https://perma.cc/37HE-BB7N>.

The following example illustrates how aggressive policing works through nuisance abatement power in New York City to execute the four-part strategy outlined above. Sung Cho was the proprietor of Super Laundromat & Dry Cleaners, formally organized as Nagle Washrite LLC, with Mr. Cho as the sole member of the LLC.⁹⁷ The laundromat was located in Inwood, a predominantly Dominican neighborhood in northern Manhattan.⁹⁸ On two separate occasions—January 24, 2013 and May 17, 2013—undercover officers with the New York Police Department (“NYPD”) entered the laundromat and offered to sell stolen electronics to people on the premises—for \$100 and \$200, respectively.⁹⁹ While undercover officers initiated the offer to sell inside the premises, at least one of the transactions took place on the sidewalk outside the Laundromat.¹⁰⁰ Police never informed Cho of either incident, nor did they ask him to voluntarily take steps to prevent such transactions from taking place inside the Laundromat.¹⁰¹ On December 17, 2013—nearly a year after the first undercover sale and roughly seven months from the second—police filed an *ex parte* “no fault” eviction action, arguing that the two sales constituted a “nuisance” within the meaning of the City’s Nuisance Abatement Law.¹⁰²

97. Class Action Complaint for Declaratory and Injunctive Relief at 10, *Cho v. City of New York*, No. 1:16-cv-07961 (S.D.N.Y. Jan. 12, 2018) [hereinafter *Cho Complaint*].

98. Ryley, *supra* note 96.

99. *Cho Complaint*, *supra* note 97, at 11.

100. *Id.*

101. *Id.*

102. *Id.* at 11–12; *see also* N.Y.C., N.Y. ADMIN. CODE § 7703(a) (2018)

Any building, erection or place, including one or two-family dwellings, used for the purpose of prostitution as defined in section 230.00 of the penal law. Two or more criminal convictions of persons for acts of prostitution in the building, erection or place, including one- or two-family dwellings, within the one-year period preceding the commencement of an action under this chapter, shall be presumptive evidence that the building, erection or place, including one or two-family dwellings, is a public nuisance. In any action under this subdivision, evidence of the common fame and general reputation of the building, erection or place, including one or two-family dwellings, of the inmates or occupants thereof, or of those resorting thereto, shall be competent evidence to prove the existence of the public nuisance. If evidence of the general reputation of the building, erection or place, including one or two-family dwellings, or of the inmates or occupants thereof, is

This abatement law authorized the eviction of business owners from property they leased or owned without requiring proof that individual owners did anything wrong or knew of the underlying activities triggering the action.¹⁰³ The offender's identity was also irrelevant, as was the knowledge or consent of the property owner or leaseholder¹⁰⁴—hence the label “no fault eviction.” The City only needed to prove the alleged underlying offense by a civil standard, which did not require proof of conviction.¹⁰⁵ This construction of “nuisance” departs from its classical meaning, which arises from acts or omissions interfering with other parties' use or enjoyment of their property.¹⁰⁶ New York City's law, however, does not require that the triggering “offense” interfere with surrounding neighbors' use or enjoyment of their properties.¹⁰⁷

With no way to defend himself under the ordinance's language, Cho signed a settlement agreement with the City on December 23, 2013¹⁰⁸ to suspend the eviction action and prevent the City from shutting down his business.¹⁰⁹ The agreement required that Cho consent to unannounced and warrantless inspections of the premises, install and maintain surveillance equipment to monitor activities inside and outside the Laundromat, give police access to surveillance recordings, and

sufficient to establish the existence of the public nuisance, it shall be prima facie evidence of knowledge thereof and acquiescence and participation therein and responsibility for the nuisance, on the part of the owners, lessors, lessees and all those in possession of or having charge of, as agent or otherwise, or having any interest in any form in the property, real or personal, used in conducting or maintaining the public nuisance

103. See N.Y.C., N.Y. ADMIN. CODE § 7703(h) (2018) (explaining that “physical absence” of an owner or leaseholder does not “establish that such person would or should not have been aware” that the conduct at issue was occurring).

104. Cf. *City of New York v. P'ship 91, L.P.*, 716 N.Y.S.2d 659, 660 (N.Y. App. Div. 2000); *City of New York v. Castro*, 559 N.Y.S.2d 508, 510 (N.Y. App. Div. 1990).

105. Cho Complaint, *supra* note 97, at 7.

106. *Id.*

107. *Id.*

108. Declaration of Lesley Berson Mbaye Exhibit H, *Cho v. City of New York*, No. 1:16-cv-07961 (S.D.N.Y. Jan. 12, 2018), ECF No. 47 [hereinafter December 23 Settlement Agreement].

109. Cho Complaint, *supra* note 97, at 12.

notify the City prior to assigning, transferring, or selling his interest in the business.¹¹⁰ Statutory language and the settlement agreement effectively coerced Cho to waive his Fourth Amendment rights and his right to a hearing to contest further allegations of nuisance.

In their investigation of 646 nuisance actions commenced against businesses over an eighteen-month-period starting in January 2013, the Daily News and ProPublica made a series of findings that revealed racialized patterns of enforcement by the NYPD: Eviction actions used template documents demonstrating no meaningful effort to investigate individual cases;¹¹¹ ninety percent of the actions targeted businesses in neighborhoods where most residents were minorities; alcohol violations, which accounted for nearly sixty percent of cases, frequently occurred in a handful of precincts where minorities resided despite other precincts experiencing comparable or higher rates of underage liquor sales; and NYPD applications for orders to close businesses—which were granted seventy percent of the time—were routinely brought on an ex parte basis.¹¹² These “emergency” orders were justified on the basis of immediate and ongoing community harm, even though the average application was heard five months after the offending behaviors.¹¹³ In the investigated period, *three-hundred-and-thirty-three* businesses consented to warrantless searches in their settlements,¹¹⁴ and many settlement agreements included a chilling condition that required businesses to use card readers that would harvest customer data.¹¹⁵

On October 12, 2016, Cho, his LLC, and two other plaintiffs filed a federal lawsuit in the Southern District of New York challenging the constitutionality of the ordinance and the Stipulations of Settlement entered into on December 23, 2013.¹¹⁶

110. December 23 Settlement Agreement, *supra* note 108, at 2–3.

111. Cho Complaint, *supra* note 97, at 8.

112. Ryley, *supra* note 96.

113. *Id.*

114. Cho Complaint, *supra* note 97, at 9.

115. See Ryley, *supra* note 96 (“Another 127 settlements require storeowners to use electronic card readers that store customers’ ID information, also available to NYPD upon request.”).

116. Cho Complaint, *supra* note 97.

The plaintiffs argued that: (i) the City used its abatement law to coerce them into signing settlement agreements that waived constitutional rights, thereby violating the Fourteenth Amendment; and (ii) the settlement agreements themselves were therefore unconstitutional, invalid, and unenforceable.¹¹⁷ The suit was dismissed on the grounds that the plaintiffs' claims lacked subject matter jurisdiction and were thus barred by the *Rooker-Feldman* doctrine.¹¹⁸ The U.S. Court of Appeals for the Second Circuit remanded back to the Southern District of New York,¹¹⁹ at which point the parties settled the lawsuit by vacating the original settlement agreements, including the one Mr. Cho signed on December 23, 2013.¹²⁰

C. Middlemen Minorities as Pawns in the Third-Party Policing Debate

Although Mr. Cho and his fellow plaintiffs opted to settle their lawsuit, his case highlights the complex position of so-called “middleman minorities” within the third-party policing debate.¹²¹ Often first- or second-generation Asian Americans or

117. *Id.* at 1–2.

118. See *Cho v. City of N.Y.*, No. 1:16-cv-07961, 2018 WL 401512, at *1 (S.D.N.Y. Jan. 12, 2018). The *Rooker-Feldman* doctrine originates from two Supreme Court cases, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). These rulings “established the clear principle that federal district courts lack jurisdiction over suits that are, in substance, appeals from state-court judgments.” *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 84 (2d Cir. 2005). The resulting doctrine became a rebuttal to complaints that “invited federal courts of first instance to review and reverse unfavorable state-court judgments.” *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005). Because federal district courts have original jurisdiction, cases that function as de facto appeals of state-court judgments are therefore jurisdictionally barred. In *Cho*, the Second Circuit agreed that the plaintiffs’ alleged injuries were “merely *ratified* by the state-court judgments, and not, as required by *Rooker-Feldman*, *caused* by them.” *Cho v. City of New York*, 910 F.3d 639, 641 (2d Cir. 2018) (emphasis added).

119. See *Cho v. City of New York*, 910 F.3d 639, 642 (2d Cir. 2018).

120. See Stipulation and Order of Settlement, *Cho v. City of New York*, No. 1:16-cv-07961 (S.D.N.Y. Jan. 12, 2018), ECF No. 111 [hereinafter October 2020 Settlement].

121. For an excellent discussion of middleman minorities and their existence across different ethnic groups, see Edna Bonacich, *A Theory of Middleman Minorities*, 38 AM. SOCIO. REV. 583 (1973).

Arab Americans, these merchants exist as commercial intermediaries between customers in low-income communities and suppliers who would rather not sell directly to buyers in these markets.¹²² Despite their focus on narrow-margin businesses such as delicatessens, laundromats, drycleaners, supermarkets, and corner stores, reliance on unpaid family labor offers a more sustainable business model than that of larger retail chains.¹²³ Their location in heavily policed neighborhoods, however, makes these businesses prime targets for nuisance actions and transforms them into surveillance sites that place customers under enhanced scrutiny in a policing climate that has become dangerously militarized.

II. THE MILITARIZATION OF LAW ENFORCEMENT AND THE REPUDIATION OF COMMUNITY POLICING

Nuisance abatement practices are made more dangerous by mandating contact with a more militarized policing culture—an institutional development that accelerated in the late 1990s when rates of violent crime across the United States were nonetheless falling.¹²⁴ This Part captures how aspects of this policing culture supplanted original conceptions of community policing by reimagining neighborhoods as havens for enemies of law enforcement. The shift in law enforcement was reflected in displays of strength used to intimidate and dehumanize targets of state violence as a necessary incident of keeping order in heavily policed communities. This militarized-policing ethos had entered Minneapolis by the time of George Floyd’s death.

122. *See id.* at 584 (“[M]iddle-man minorities plug the status gap between elites and masses, acting as middlemen between the two.”); Moustafa Bayoumi, *Why Did Cup Foods Call the Cops on George Floyd?*, N.Y. TIMES (June 17, 2020), <https://perma.cc/69R4-SVUJ>.

123. Bayoumi, *supra* note 122; *see also* Bonacich, *supra* note 121, at 586 (“The middleman firm is labor-intensive but able to cut labor costs drastically through ethnically-based paternalism and thrift.”).

124. *See* Bayoumi, *supra* note 122 (“Starting in the 1990s, more aggressive policing became the norm in major urban centers on the country, as did the growing use of nuisance abatement laws compelling shopkeepers into doing the police’s work for them.”); MATTHEW FRIEDMAN ET AL., BRENNAN CTR. FOR JUST., CRIME TRENDS: 1990–2016, 1 (2017).

A. *“War Porn” and the Performative Fetishizing of Force as Incidents of State Power*

In the United States, federal, state, and local police remain the primary dispensers of governmental force due to restrictions prescribed by the Posse Comitatus Act of 1878 (“PCA”).¹²⁵ The PCA’s original aim was to separate police and defense functions by prohibiting military involvement in the enforcement of domestic policy except where the Constitution or congressional authorization permits otherwise.¹²⁶ Congressionally-granted exceptions to the PCA are extensive: providing limited law enforcement roles for certain branches of the Armed Forces;¹²⁷ prescribing preconditions for providing military assistance to law enforcement agencies (“LEAs”);¹²⁸ and legislating policy-specific forms of cooperation between military-law enforcement agencies in response to particular commitments—such as the “war on drugs,” counterterrorism efforts, and public health emergencies.¹²⁹

PCA exceptions began to profoundly shape the evolution of policing culture from the 1980s onward.¹³⁰ Their scope accelerated in the late 1990s through authorizations providing for the transfer of surplus military equipment under an

125. 18 U.S.C. § 1385.

126. See Posse Comitatus Act of 1878, Pub. L. No. 45263, § 15, 20 Stat. 145, 152 (1878) (codified as amended at 18 U.S.C. § 1385).

127. See, e.g., 19 U.S.C. § 1401(i) (designating members of the United States Coast Guard as customs officers for the sake of enforcing customs law).

128. See, e.g., 10 U.S.C. § 2576(a) (allowing for the transfer of surplus military equipment to civilian law enforcement agencies).

129. See, e.g., Department of Defense Authorization Act, 1982, Pub. L. No. 9786, § 905, 95 Stat. 1099, 1114–16 (codified as amended at 10 U.S.C. §§ 271–278) (authorizing military cooperation with civilian law enforcement); National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 10665, § 1023, 113 Stat. 512, 747–48 (1999) (permitting the Secretary of Defense to offer counterterrorism assistance to civilian law enforcement during fiscal years 1999 to 2004); 42 U.S.C. § 98 (allowing the Secretary of the Navy to make “vessels or hulks” available at U.S. ports “to be used temporarily for quarantine purposes”).

130. See Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL’Y REV. 383, 384 (2003) (“To fight [the “war on drugs,”] Congress created exceptions to the PCA and encouraged greater interface between the military and law enforcement, passing the Military Cooperation with Law Enforcement Officials Act in 1981.” (citation omitted)).

initiative widely known as the “1033 Program.” Named after the section of the Defense Authorization Act of 1997 creating it, the 1033 Program permitted the transfer of surplus military equipment—such as weapons and armored military vehicles—to civilian LEAs.¹³¹ Data gathered between 1998 and 2014 reveals the scale of these transfers. Over this sixteen-year period, the value of these equipment transfers increased from roughly \$9.8 million to almost \$800 million.¹³² The number of LEAs receiving these transfers also increased sharply over the same timeframe—from 290 in 1998 to 3,029 by 2014.¹³³ The nature and quantity of equipment transferred to LEAs since 2006 lends additional context: “79,288 assault rifles[;] 205 grenade launchers[;] 11,959 bayonets[;] 3,972 combat knives[;] \$124 million worth of night-vision equipment, including night-vision sniper scopes[;] 479 bomb detonator robots[;] 50 airplanes, including 27 cargo transport airplanes[;] 422 helicopters[;] [and] [m]ore than \$3.6 million worth of camouflage gear and other ‘deception equipment.’”¹³⁴

Equipment transfers have continued alongside joint training programs, causing LEAs to adopt a militarized policing posture wholly mismatched for the task of civilian policing. This militarization is apparent in the proliferation of so-called Special Weapons and Tactics (SWAT) units throughout state and local police departments and their involvement in routine policing instead of their supposed role as an emergency response resource.¹³⁵ The concept of a SWAT team was conceived in 1966,

131. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104201, § 1033, 110 Stat. 2422, 2639 (1996)

[T]he Secretary of Defense may transfer to Federal and State agencies personal property of the Department of Defense, including small arms and ammunition, that the Secretary determines is—(A) suitable for use by the agencies in law enforcement activities, including counterdrug and counterterrorism activities; and (B) excess to the needs of the Department of Defense.

132. Ryan Welch & Jack Mewhirter, *Does Military Equipment Lead Officers to be More Violent? We Did the Research*, WASH. POST (June 30, 2017), <https://perma.cc/GZX2-Y4CD>.

133. *Id.*

134. Arezou Rezvani et al., *MRAPS and Bayonets: What We Know About the Pentagon’s 1033 Program*, NPR (Sept. 2, 2014), <https://perma.cc/77P3-TW7V>.

135. See Clyde Haberman, *The Rise of the SWAT Team in American Policing*, N.Y. TIMES (Sept. 7, 2014), <https://perma.cc/535H-VAU9>.

after Charles Whitman climbed the clock tower on the campus of the University of Texas at Austin and began to randomly shoot at people.¹³⁶ Forty-six people were shot and fifteen were killed.¹³⁷ The shooting continued until police arrived, climbed the thirty-two-story tower, and fatally shot Whitman.¹³⁸ In the wake of Whitman's shooting rampage, the Los Angeles Police Department (LAPD) formed the first SWAT team, which came to national prominence following a highly-publicized raid on the Black Panther's headquarters in 1969.¹³⁹ Over the next thirty years, police forces across the United States established their own SWAT teams, fueled by the notion that "elite," commando-style units were essential to protect communities in a world beset by otherwise invincible criminals.¹⁴⁰

By 1995, almost ninety percent of state and local police departments with community populations exceeding 50,000 people had SWAT teams.¹⁴¹ No longer reserved for crises such as hijackings, the taking of hostages, and shooting rampages, SWAT teams began participating in routine policing, such as "no-knock" raids like the one leading to Breonna Taylor's

136. See DIANE CECILIA WEBER, CATO INST., WARRIOR COPS: THE OMINOUS GROWTH OF PARAMILITARISM IN AMERICAN POLICE DEPARTMENTS 6 (1999).

137. *Id.*

138. *Id.*

139. *Id.*; see also Haberman, *supra* note 135 ("Los Angeles's SWAT team tested its mettle in 1969 against a local Black Panther militia. . . . Its bona fides thus established, SWAT units spread across the national landscape, romanticized in song and on television."); Samuel Warde, *This 1969 Raid on the Black Panthers' Headquarters Led to Militarized Policing in America*, ALL THAT'S INTERESTING (Mar. 12, 2020), <https://perma.cc/FK7Z-LSVR> (last updated Mar. 16, 2020).

140. See Haberman, *supra* note 135

To these units' defenders, the need could not be more fundamental: The world is dangerous. Some drug lords have weaponry that would be the envy of small armies; the police cannot possibly take them on with mere handguns. Terrorism lurks as an ever-present threat. And sudden menace demanding a well-armed police response can arise even in the most tranquil places.

141. Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOC. PROBS. 1, 6 (1997).

killing¹⁴² and ordinary street patrols.¹⁴³ This militarization of policing culture engendered a law enforcement dynamic where civilians became “the enemy” and where frontline officers behaved like members of an occupying army. One scholar offers a concise statement of the problem:

Whereas soldiers must attack and defeat an enemy, police officers are charged with not only protecting the community from lawbreakers, but also protecting the constitutional rights of the lawbreakers they arrest. Whereas soldiers are trained to inflict maximum damage in many situations, police officers have a duty to use minimum force, and only when reasonably justified, in accomplishing their mission.¹⁴⁴

Equipment transfers and joint training programs dovetailed with elements of militarism that had already begun seeping their way into LEAs.¹⁴⁵ The language police officers used to describe their work and to interact with the public epitomized this militarism. One police department’s description of their policing approach in a 1996 survey of state and local police forces offers a useful example:

We’re into saturation patrols in hot spots. We do a lot of our work with the SWAT unit because we have bigger guns. We send out two, two-to-four-men cars, we look for minor violations and jump-outs, either on people on the street or automobiles. After we jump-out the second car provides periphery cover with an *ostentatious display of weaponry*. We’re sending a clear message: if the shootings don’t stop, we’ll shoot someone.¹⁴⁶

142. See Steven Greenhut, *The Police Tactics That Caused Breonna Taylor’s Death Should Infuriate Second Amendment Advocates*, REASON (Oct. 9, 2020), <https://perma.cc/C8R5-W6TY>.

143. See Haberman, *supra* note 135 (“Originally . . . SWAT deployment was supposed to be reserved for truly perilous situations—hostage-takings, high-powered shootouts and the like. Now, these teams execute routine warrants in “no-knock” drug raids, bursting into homes with a show of force that often far exceeds the threat to them.”).

144. Kealy, *supra* note 130, at 386–87 (citations omitted).

145. Here, militarism is defined as “a set of beliefs and values that stress the use of force and domination as appropriate means to solve problems and gain political power, while glorifying the tools to accomplish this—military power, hardware, and technology.” Kraska & Kappeler, *supra* note 141, at 1 (citation omitted).

146. *Id.* at 10 (emphasis in original).

Another respondent in the same survey—the commander of a paramilitary policing unit—wrote, “We stop anything that moves. We’ll sometimes even surround suspicious homes and bring out the MP5s. We usually don’t have any problems with crackheads cooperating.”¹⁴⁷ A third respondent’s comments frame militarism as a fully normalized aspect of community policing:

We conduct a lot of saturation patrol. We do “terry stops” and “aggressive” field interviews. These tactics are successful as long as the pressure stays on relentlessly. The key to our success is that we’re an elite crime fighting team that’s not bogged down in the regular bureaucracy. We focus on “*quality of life*” issues like illegal parking, loud music, bums, neighbor troubles. We have the freedom to stay in a hot area and clean it up—particularly gangs. Our tactical enforcement team works nicely with our department’s emphasis on community policing.¹⁴⁸

These comments demonstrate attempts to extend theories of warfare into ordinary policing¹⁴⁹ and support the inference that militarized aggression offers its own endorphin-laden pleasure, despite enhanced risks to officers themselves.¹⁵⁰

147. *Id.*; see also *id.* at 3 (explaining that the MP5 is the “weapon most popular among” SWAT units and possesses a “central place in police paramilitary subculture” because of its connection to special operations military units).

148. *Id.* at 13 (emphasis in original).

149. Joint training exercises have also created marketing opportunities for weapons manufacturers whose own strategies exploit aspirations to link military and law enforcement, using slogans like, “From the Gulf War to the Drug War—battle proven.” Timothy Egan, *Soldiers of the Drug War Remain on Duty*, N.Y. TIMES (Mar. 1, 1999), <https://perma.cc/M5EU-YA52>.

150. See Bill Donnelly, *Swating at Flies*, WASH. POST (July 18, 1997), <https://perma.cc/W5FP-PESB>

The real reason for the exponential growth in SWAT teams seemed to have been summed up best by the conclusion drawn by police researcher Peter Kraska: “Cops love this stuff; its fun to fire weapons and train, this stuff is a rush.” Police work always will be dangerous, but its primary function is to protect and serve the community and not to supply endorphins to SWAT team members.

see also Peter B. Kraska, *Enjoying Militarism: Political/Personal Dilemmas in Studying U.S. Police Paramilitary Units*, 13 JUST. Q. 405, 409 (1996) (“Why serve an arrest warrant to some crack dealer with a .38? With full armor, the right [gun], and training, you can kick ass and have fun.”).

SWAT teams and other forms of militarized policing have remained a constant through-line in the relationship between policing institutions and Black communities since the LAPD's raid on Black Panther Headquarters on December 1969. This tension lives on in debates about the 1033 Program's impact on Black people.¹⁵¹ Indeed, in the wake of protests following the August 2014 shooting death of Michael Brown, President Barack Obama attempted to address the shooting by curtailing the 1033 Program via Executive Order.¹⁵² This decision followed distinct public concern over scenes of militarized police responses to protests in Ferguson, Missouri and elsewhere.¹⁵³ President Obama's order resulted in equipment prohibitions for LEAs, which included "tracked armored vehicles and weaponized vehicles of any kind, rifles and ammunition of .50-caliber or higher, and grenade launchers."¹⁵⁴ Other weapons, such as "specialized firearms, manned and unmanned aircraft, explosives and riot gear" were restricted and could only be provided upon a showing of a "demonstrated need."¹⁵⁵

In response to lobbying from the Fraternal Order of Police (FOP), the Trump administration restored the program in August 2017.¹⁵⁶ President Donald Trump's Attorney General, Jeff Sessions, announced the reversal at the FOP's annual convention in Nashville.¹⁵⁷ Sessions framed the transfers as essential to preventing crime,¹⁵⁸ further eroding the underlying

151. See Warde, *supra* note 139 ("The raid's legacy as America's first step toward militarized police is more relevant today than ever."); Casey Delehanty et al., *Militarization and Police Violence: The Case of the 1033 Program*, RSCH. & POL., Apr.–June 2017, at 1, 1 (noting that by the second day of protests following the killing of Michael Brown, police "showed up in armored vehicles wearing camouflage, bulletproof vests, and gas masks brandishing shotguns and M4 rifles" (citation omitted)).

152. See Exec. Order No. 13688, 3 C.F.R. § 13688 (2015).

153. Tom Jackman, *Trump to Restore Program Sending Surplus Military Weapons, Equipment to Police*, WASH. POST (Aug. 27, 2017), <https://perma.cc/QK5M-FT5L>.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. See *id.*

We will not put superficial concerns above public safety. . . . The executive order the president will sign today will ensure that you can get the lifesaving gear that you need to do your job and send a

spirit of the PCA. By declaring that providing LEAs with tools of war was both an efficient and essential response to protests over police brutality, Sessions signaled support for the projection of strength as a social ordering mechanism.

This posture became a cornerstone of the Trump presidency's open encouragement of police aggression, which has been followed by more violent and at times heavily militarized policing, particularly in response to protests following George Floyd's death.¹⁵⁹ Over the summer of 2020, several press reports captured images of police forces around the country entering city streets looking like deployed armies—wearing tactical gear, driving heavily armored vehicles, and carrying high-powered assault weapons.¹⁶⁰ Recent research suggests that this militarization has only increased the risk of lethal violence. Indeed, preliminary results of a 2017 study examining police-involved fatalities concluded that militarizing LEAs was associated with higher civilian deaths,¹⁶¹ even “controlling for a battery of possible confounding variables including county wealth, racial makeup, civilian drug use, and violent crime.”¹⁶²

There is good reason to assume militarism influences officers' behavior when they are without tactical gear, light

strong message that we will not allow criminal activity, violence, and lawlessness to become the new normal. And we will save taxpayer money in the meantime.

159. See Shaila Dewan & Mike Baker, *Facing Protests Over Use of Force, Police Respond with More Force*, N.Y. TIMES (May 31, 2020), <https://perma.cc/4Q4C-U8G9> (last updated June 2, 2020).

160. See Philip V. McHarris, *Why Does the Minneapolis Police Department Look Like a Military Unit?*, WASH. POST (May 28, 2020), <https://perma.cc/D7LQ-KRZW>; Michelle Nichols & Catherine Koppel, *Should U.S. Police Get Free Military Equipment? Protests Revive Debate*, REUTERS (June 5, 2020), <https://perma.cc/W2MT-QRUT>; Tom Nolan, *Militarization Has Fostered a Policing Culture That Sets Up Protesters as 'the Enemy'*, CHI. REP. (June 12, 2020), <https://perma.cc/LV42-JYM7>

Night after night, angry protesters have taken to the street. So too have police officers dressed in full riot gear and backed by an arsenal that any small military force would be proud of: armored vehicles, military-grade aircraft, rubber and wooden bullets, stun grenades, sound cannons and tear gas canisters.

161. See Delehanty et al., *supra* note 151, at 3 (“[T]he receipt of more military equipment increases both the expected number of civilians killed by police . . . and the change in civilian deaths . . .”).

162. *Id.* at 2.

armored-vehicles, and submachine guns. If no aspect of contemporary policing is safe without such equipment, it stands to reason that officers will be especially fearful of real or perceived dangers when they “only” have a handgun. For the lightly-armed officer, minor risks necessarily become major ones, an outlook uniquely dangerous for Black men whose presumed criminality is more likely to render them “enemies,” and whose deaths are routinely explained away by an officer’s fear for his safety or by some inexplicable need to secure a detainee in ways that produce fatal outcomes.¹⁶³

Correlations between militarism and officer behavior, be they heavily-armed or not, appear to exist in Minneapolis—the city where George Floyd died. The city’s police department is equipped with military equipment;¹⁶⁴ its Black community has experienced disproportionate levels of police force since 2015;¹⁶⁵ and the city’s Black people have been subjected to twenty-seven of the forty-four attempts at neck restraints—a technique used to render someone unconscious—over the same five-year period.¹⁶⁶ This was the policing climate in which Floyd’s death occurred.

163. See Benjamin Wallace-Wells, *Police Shootings, Race, and the Fear Defense*, THE NEW YORKER (July 12, 2016), <https://perma.cc/4Q7S-R5W8> (“The [police’s] protestations of fear have in some cases seemed cynical and absurd . . . because the suggestions that their victims were scary and impossible to control have tended to draw on the basest racial fears, and to be expressed in the crudest language.”); Michael Wines & Frances Robles, *Key Factor in Police Shootings: ‘Reasonable Fear’*, N.Y. TIMES (Aug. 22, 2014), <https://perma.cc/K2P7-Z5M7> (“If an officer believes he or someone else is in imminent danger of grievous injury or death, he is allowed to shoot first, and ask questions later.”).

164. See McHarris, *supra* note 160.

165. Richard A. Oppel Jr. & Lazaro Gamio, *Minneapolis Police Use Force Against Black People at 7 Times the Rate of Whites*, N.Y. TIMES (June 3, 2020), <https://perma.cc/2QR2-CBVF> (“About 20 percent of Minneapolis’s population of 430,000 is black. But when the police get physical—with kicks, neck holds, punches, shoves, takedowns, Mace, Tasers or other forms of muscle—nearly 60 percent of the time the person subject to that force is black.”).

166. *Id.*

III. POLICING BLACK BODIES AS A FORM OF PERFORMATIVE HUMILIATION IN THE PUBLIC SQUARE

This Part addresses the wider social forces fomenting negative perceptions of Black people, who routinely experience public humiliation at the hands of police and civilians purporting to enforce the law. These forces are an unsavory complement to third-party policing's racialized dimensions, which convey state power in terms that are both performative and spatial. The confluence of compelled scrutiny and policing continues to complicate life for people of color, tainting public environments with latent hostilities that can come to life at any moment and from any direction. Once inside these monitored spaces, biases already stalking Black people take on new dimensions—both as racial-profiling events and as sources of class-based contests in Black communities about perceived pressures to emulate white, middle class norms.

A. *Humiliation as a Presumed Necessity of Policing*

The press continues to publish examples of Black people being accused of crimes or wrongdoing that lead to humiliating police involvement: In December 2020, after mistakenly identifying Jamar Mackey as a suspect who used a stolen credit card at the Lynnhaven Mall in Virginia Beach, police arrested him in a crowded food court while his family watched;¹⁶⁷ in July 2018, police were called to a CVS store in Chicago after Camilla Hudson tried redeeming a coupon store employees claimed was fake;¹⁶⁸ and when Sauntore Thomas deposited checks issued by his lawyer's firm in connection with a race discrimination case, employees at a Livonia, Michigan branch of TCF Bank contacted police who questioned him about the checks' authenticity—even after Thomas's lawyer spoke with the bank to confirm its validity.¹⁶⁹

167. See Stefan Sykes, *Police Apologize After Handcuffing Black Man They Thought Was Credit Card Thief at Virginia Mall*, NBC NEWS (Dec. 22, 2020), <https://perma.cc/H9DE-3WW6>.

168. See Matt Stevens, *CVS Fires 2 for Calling Police on Black Woman Over Coupon*, N.Y. TIMES (July 16, 2018), <https://perma.cc/2SUC-669L>.

169. See Christine Hauser, *A Bank Wouldn't Take His Bias Settlement Money. So He's Suing.*, N.Y. TIMES (Jan. 23, 2020), <https://perma.cc/74XD-YUWD>.

Facing the prospect that any ordinary act can unexpectedly trigger police involvement is its own source of emotional distress. More than a form of public shaming, such interactions are performative expressions of state aggression, widely broadcasting negative perceptions of Black people. The effects of these perceptions linger long after the “misunderstandings” from which they originate are acknowledged¹⁷⁰ and corrective action is not always as public as the humiliation it purports to remedy.¹⁷¹ The following example offers a useful illustration. Around midnight on July 7, 2018, police stopped a group of Black incoming Washington University freshman walking home from an IHOP restaurant, demanding proof they were not involved in a recent “dine and dash.”¹⁷² Although a number of the students furnished receipts, the entire group was forced to walk back to the restaurant alongside police cruisers, only to have the manager confirm that they were not the suspects.¹⁷³ The image of a police cruiser slowly moving behind a group of young Black men produces its own theater, traumatizing the objects of suspicion while projecting racialized images to passersby that outlast the immediate basis for police involvement.¹⁷⁴ These interactions and the specter of police

170. See Chad Davis, *The Weight of Trauma: Racial Profiling on Black Citizens Has Lasting Effects*, ST. LOUIS PUB. RADIO (July 27, 2018), <https://perma.cc/2YD5-AAH4> (“A study from the Journal of Mental Health Counselling found that 81 percent of the African-Americans who reported racial discrimination were more likely to experience symptoms of PTSD.”).

171. See Keith L. Alexander et al., *The Hidden Billion-Dollar Cost of Repeated Police Misconduct*, WASH. POST (Mar. 9, 2022), <https://perma.cc/V9WJ-Y382> (“More than \$1.5 billion has been spent to settle claims of police misconduct involving thousands of officers repeatedly accused of wrongdoing. Taxpayers are often in the dark.”).

172. Davis, *supra* note 170.

173. *Id.*

174. A more dramatic example of this performative humiliation occurred on August 3, 2019, when police in Galveston, Texas, arrested Donald Neely for criminal trespass. Jon Haworth, *Texas Police Apologize for Photo of Officers on Horseback Leading Suspect Away by Rope*, ABC NEWS (Aug. 6, 2019), <https://perma.cc/J3V7-4FL5>. The arresting officers forced Neely to walk to the police station, leading him with a rope that was tied to the horses both officers were riding. *Id.* The spectacle of a Black man being led through town by police on horseback was shared on the internet and forced the Galveston Police Department to issue an apology. *Id.*

contact producing lethal outcomes cast a dark pall over the ways Black people imagine themselves moving through the world.¹⁷⁵

B. *Misplaced Hope in Respectability Politics*

The enduring presence of respectability politics heightens the anguish of performative humilities by taunting minorities with misplaced hopes that displaying specific standards of dress, deportment, and class membership will somehow protect them from the indignities of racialized policing.¹⁷⁶ This theory was of little help to Claude Coleman, a Black judge who was

175. See Felicia R. Lee, *Young and in Fear of the Police: Parents Teach Children How to Deal with Officers' Bias*, N.Y. TIMES (Oct. 23, 1997), <https://perma.cc/KUC3-QCNL>

So, much as all parents broach sensitive topics like AIDS and sexuality or drug use, black and Hispanic parents say they talk to their children about dealing with the police. It is just a matter of time, they tell them, before they encounter a police officer who sees dark skin as synonymous with crime. They coach them on how to behave: don't hang out in crowds, be polite, don't make any sudden moves, carry identification, ask to make a phone call, refuse to answer incriminating questions.

176. See generally EVELYN BROOKS HIGGINBOTHAM, *RIGHTEOUS DISCONTENT: THE WOMEN'S MOVEMENT IN THE BLACK BAPTIST CHURCH, 1880–1920* (1994) (coining the phrase “respectability politics” in her study of Black women in the National Baptist Convention between 1880 and 1920). “Respectability politics” refers to the social practices adopted by low-status individuals hoping to achieve social mobility. See Erin M. Kerrison et al., “*Your Pants Won't Save You*”: *Why Black Youth Challenge Race-Based Police Surveillance and the Demands of Black Respectability Politics*, 8 RACE & JUST. 7, 9 (2018). This strategy determined that efforts to end racial discrimination were more likely to succeed through behavior in accordance with white, upper middle class standards. See *id.* Expressed through dress, personal conduct, and general deportment, respectability politics pursued the twin goals of encouraging Black people to be “respectable” while working to achieve respectability in the eyes of white people who presumptively enjoyed such respect by birth. See *id.* Critics of the “respectability politics” paradigm insist that it protects the right of white people to control the terms governing when and how respect for Black lives is achieved instead of demanding such respect as a basic human right. See, e.g., Mikeala Pitcan et al., *Performing a Vanilla Self: Respectability Politics, Social Class, and the Digital World*, 23 J. COMPUTER-MEDIATED COMM'N 163, 163 (2018) (recounting how “young people of low socioeconomic status” seek to self-censor to create a neutral image and thereby “reinforce racist and sexist notions of appropriate behavior”); see also Frederick C. Harris, *The Rise of Respectability Politics*, DISSENT MAG. (Winter 2014), <https://perma.cc/V CJ4-D7CF> (criticizing “respectability politics” as an accommodation of neoliberalism).

arrested and wrongly accused of using a stolen credit card at a mall in Short Hills, New Jersey, on December 11, 1993.¹⁷⁷ After failing to convince officers of his innocence, Judge Coleman was handcuffed, escorted through crowds of Christmas shoppers, placed in a police car, and charged with theft and fraud.¹⁷⁸ Even though the department store that was responsible for the accusations recognized its error, the cascade of consequences continued in dramatic form for another week before the charges were eventually dropped:

By the time Bloomingdale's recognized its mistake, however, the case had taken on a life of its own. The Essex County prosecutor's office launched an investigation, and Judge Coleman was suspended. Moreover, the arrest was reported by WCBS News Radio 88, prompting calls—some comforting, others disconcertingly accusatory—from friends and relatives.¹⁷⁹

In the decades since Judge Coleman's ordeal, little has changed the misconception that outward expressions of class affinity operate as a bulwark against policing's stigmatizing effects on Black people—be they doctoral students,¹⁸⁰ undergraduates,¹⁸¹ or physicians.¹⁸² A particularly infamous case involved the arrest of famed academic Henry Louis Gates Jr. after police responded to reports of an attempted break in at

177. See David Margolick, *At the Bar; Falsely Accused: In a Humiliating Arrest, a Black Judge Finds Lessons of Law and Race Relations*, N.Y. TIMES (Jan. 7, 1994), <https://perma.cc/DA8T-FL7D>.

178. *Id.*

179. *Id.*

180. See Cleve R. Wootson Jr., *Video Shows Police Tackling and Beating a Black Man Suspected of Stealing a Car. It Was His.*, WASH. POST (Jan. 14, 2017), <https://perma.cc/2KJE-38ZP>.

181. See Jaclyn Peiser, *'This Could Have Been a Breonna Taylor:' Police Stormed a Black Student's Dorm After a False Report*, WASH. POST (Sept. 29, 2020), <https://perma.cc/WV3S-FPLA>.

182. See Leda Reynolds, *Police Officer Suspended for Holding Black Doctor at Gunpoint on Own Driveway*, NEWSWEEK (Sept. 16, 2020), <https://perma.cc/C4RQ-DA46> (describing the experience of a Black doctor who was at the end of his own driveway when a police officer jumped out of his cruiser and drew his weapon. When asked to leave, the police officer replied by saying, "I'm going to find out whose property this is first").

his home in Cambridge, Massachusetts.¹⁸³ After returning from an overseas trip to find himself locked out of his house, Gates tried to pry the front door open with help from his taxi driver, prompting a police call by a neighbor who apparently did not recognize one of Harvard University's most famous history scholars.¹⁸⁴

Pressures to mirror expressions of white middle class values have extended into obliging Black people to signal disdain for those in their communities whose conduct exists outside the perceived norms of acceptable behavior. Bill Cosby's infamous "pound cake" speech embodied this disdain:

Ladies and gentlemen, the lower economic and lower middle economic people are not holding their end in this deal. In the neighborhood that most of us grew up in, parenting is not going on. In the old days, you couldn't hooky school because every drawn shade was an eye. And before your mother got off the bus and to the house, she knew exactly where you had gone, who had gone into the house, and where you got on whatever you had one and where you got it from. Parents don't know that today. . . . But these people—the ones up here in the balcony fought so hard. Looking at the incarcerated, these are not political criminals. These are people going around stealing Coca Cola. People getting shot in the back of the head over a piece of pound cake! Then we all run out and are outraged: "The cops shouldn't have shot him." What the hell was he doing with the pound cake in his hand? I wanted a piece of pound cake just as bad as anybody else. And I looked at it and I had no money. And something called parenting said, "If you get caught with it you're going to embarrass your mother." Not, "You're going to get your butt kicked." No. "You're going to embarrass your family."¹⁸⁵

Similar comments have coalesced around George Floyd's prior criminal history in the wake of his death, most notably from conservatives in and outside of Black communities. On June 3, 2020, Black conservative commentator and political

183. See Abby Goodnough, *Harvard Professor Jailed: Officer Is Accused of Bias*, N.Y. TIMES (July 20, 2009), <https://perma.cc/BZ5T-WVTG>.

184. *Id.*

185. (2004) Bill Cosby, "The Pound Cake Speech", BLACKPAST (Jan. 28, 2007), <https://perma.cc/JL9V-4XYR>.

activist Candace Owens shared a video on Twitter, critiquing depictions of Floyd as a “martyr for Black America”:

Our culture is unique from other communities because we are the only community that caters to the bottom denominator of our society. Not every Black American is a criminal. Not every Black American is committing crimes. But we are unique in that we are the only people that fight and scream and demand support for the people in our community that are up to no good.¹⁸⁶

After summarizing details of Floyd’s past criminal history, Owens added:

For whatever reason it has become fashionable over the last five or six years for us to turn criminals into heroes overnight. It is something I find despicable. George Floyd was not an amazing person. George Floyd is being upheld as an amazing human being.¹⁸⁷

These shaming narratives exist alongside strategically deployed, unflattering portrayals of Black men—like Michael Brown, Eric Garner, and Ahmaud Arbery—who die during interactions with police and vigilantes and whose imperfections are weaponized to assume greater importance than the underlying criticisms of discrimination.¹⁸⁸ Similar tactics were used in the wake of George Floyd’s death. Days after the incident, Republican stalwart, Senator Ted Cruz, appeared on Fox News and expressed criticism of police over Floyd’s death.¹⁸⁹ News anchor and fellow conservative Tucker Carlson countered

186. Candace Owens (@RealCandace), PERISCOPE (2020), <https://perma.cc/UHG5-T945>.

187. *Id.*

188. See, e.g., *id.*; Stacey Patton & David J. Leonard, *Viewpoint: Why Eric Garner Was Blamed for Dying*, BBC (Dec. 8, 2014), <https://perma.cc/XN7F-VZHT> (quoting Republican Congressman Peter King as saying, “If [Eric Garner] had not had asthma and a heart condition and was so obese, almost definitely he would not have died”); Mitch Smith, *New Ferguson Video Adds Wrinkle to Michael Brown Case*, N.Y. TIMES (Mar. 11, 2011), <https://perma.cc/AH4G-755Z> (describing the Ferguson Police Department’s decision to release footage of Michael Brown shoving a store clerk hours before his fatal encounter with police in a perceived effort to defame and demonize him after his death).

189. See Michael M. Grynbaum et al., *What Top Conservatives Are Saying About George Floyd and Police Brutality*, N.Y. TIMES (May 30, 2020), <https://perma.cc/P7KR-GSUH> (last updated Sept. 30, 2020).

with a question: “Why doesn’t anybody stand up for the rest of us, for civilization?”¹⁹⁰ Less than a week later, Bob Kroll—head of the union representing the MPD—said, “What is not being told is the violent criminal history of George Floyd. The media will not air this.”¹⁹¹ Floyd’s criminal history merged with racial stigma to become a proxy for his limited entitlement to dignity in the courtroom of public opinion:

Information wars suggest that character is destiny and that character is knowable, as if a handful of snapshots or tweets constitute an autopsy of the soul. They are waged in all kinds of legal battles, from civil suits to contract negotiations to public divorces. But when there’s a black victim involved, the information takes a different and predictable turn: The victim becomes thuggified. This is an easy leap for many minds, given the widespread expectation of black criminality. If you become nervous when you see a young black male approaching on the street, it is not hard to convince you that a kid who was shot was not one of the “good ones,” that he was scary and maybe did something to deserve it. Information wars thrive on America’s empathy gap—the way some people struggle to see any kinship or shared humanity with strangers who don’t look like them.¹⁹²

Police never established that the \$20 bill Floyd used to buy cigarettes on May 25, 2020, was counterfeit.¹⁹³ This evidentiary vacuum no longer mattered once the momentum of racism, stigma, regulation, and problematic policing was set in motion.

IV. GEORGE FLOYD’S MURDER AS THE LOGICAL EXTENSION OF THIRD-PARTY POLICING AND EVIDENCE OF FLAWED BUSINESS REGULATION

History casts a long shadow, and its ghosts often reappear to preserve or revive practices by reconfiguring their ongoing presence within the body politic. Embedded in statutes and local

190. *Id.*

191. Libor Jany (@liborjany), TWITTER (June 1, 2020, 8:02 AM), <https://perma.cc/G4DH-RDMP>.

192. Touré, Opinion, *Black America and the Burden of the Perfect Victim*, WASH. POST (Aug. 22, 2014), <https://perma.cc/QE57-L5GK>.

193. See Nicholas Bogel-Burroughs & Will Wright, *Little Has Been Said About the \$20 Bill That Brought Officers to the Scene.*, N.Y. TIMES (Apr. 19, 2021), <https://perma.cc/57S4-2JDM>.

ordinances, Minnesota's nuisance laws are more than simply prima facie evidence of third-party-policing theory's influence. They have been deployed to support forms of spatial oppression that supplant overtly racist practices while producing racially problematic outcomes. Their form and function support place management without questioning the police practices they impose across a variety of regulatory venues. After providing an overview of Minnesota's nuisance laws, this Part demonstrates how such laws are administered at the local level where agency decision-making broadens the specter of problematic policing discussed in the preceding Parts. It argues that regulatory demands to accommodate flawed policing not only contributed to George Floyd's killing, but that these demands naturally flowed from spatial oppression's historic demands of support from private businesses. It outlines how such demands continue to present merchants with an untenable choice between protecting their businesses or endangering members of their community and argues that the nuisance abatement framework represents a possessive investment in controlling Black bodies confined in places created by the ecology of racism.

*A. An Overview of State and Local Nuisance
Abatement Laws in Minnesota*

Minnesota state law establishes two classes of behavior that are deemed nuisance activities when they occur on residential or commercial premises.¹⁹⁴ Depending on the class, one or two separate incidents in a twelve-month period will constitute a nuisance activity.¹⁹⁵ One or more instances of the following behaviors constitutes a public nuisance: "prostitution or prostitution-related activity committed within the building;" any illegal activity relating to the sale of controlled substances within a building; serving alcohol to minors or the unlicensed sale of alcohol in a building where the owner or tenant is absent; or "unlawful use or possession of a dangerous weapon."¹⁹⁶ Within the second behavioral class, two or more of the following incidents are also deemed a public nuisance: gambling or gambling-related activity committed within the building;

194. See MINN. STAT. § 617.81 (2022).

195. *Id.*

196. *Id.*

maintaining a public nuisance in violation of [other statutes]; knowingly permitting property under a party's control to be used as public nuisance; unlawful sales or gifts of alcoholic beverages by an unlicensed person committed within the building in violation of section; and "violation by a commercial enterprise of local or state business licensing regulations, ordinances, or statutes prohibiting the maintenance of a public nuisance as defined in [other statutes] or the control of a public nuisance."¹⁹⁷

Only a "prosecuting attorney" may commence a public nuisance action on behalf of a municipality, county, or state attorney general's office.¹⁹⁸ Interested parties, however, must receive notice before the nuisance action commences.¹⁹⁹ State law requires that such notice provide details of the nuisance action being targeted, summarize the evidence supporting the prospective action, and notify the recipient that it must address the nuisance within thirty days, failing which the nuisance action will commence and could result in an injunction that terminates a lease or closes the respondent's building for one year.²⁰⁰

Where the respondent fails to act within thirty days or breaches the terms of an abatement plan, the prosecuting attorney may file a nuisance action.²⁰¹ The process cascades through the following series of steps: (i) the prosecuting attorney files a petition to obtain a temporary injunction to abate the nuisance; (ii) there is a "show cause" hearing, where the respondents can answer the petition's allegations; (iii) the court must issue the temporary injunction upon determining there is reason to believe the allegations and describe the conduct to be enjoined; and (iv) if there is "clear and convincing evidence" that a nuisance exists, the court must issue both a permanent injunction and an abatement order.²⁰²

Respondents may avoid issuance or enforcement of an order for abatement in one of three ways: (i) they can abate conditions

197. *Id.*

198. *Id.* § 617.80.

199. *Id.* § 617.81.

200. *Id.*

201. *Id.* § 617.82.

202. *Id.* §§ 617.82–617.83.

giving rise to the action—either on their own or through a formal agreement with the prosecuting attorney—within thirty days of receiving the original notice of action; (ii) they can file a motion in court to evict a tenant—either directly or by assigning such a function to the prosecuting attorney; or (iii) they can post a bond—not exceeding \$50,000—for one year, during which time the respondent must pay the costs of the nuisance action, ensure nuisance conditions remain abated, and otherwise act in good faith.²⁰³ Failure to comply with a nuisance abatement order is considered a contempt of court²⁰⁴ and may also subject the respondent to criminal prosecution.²⁰⁵

State law permits municipal governments to craft comparable nuisance abatement mechanisms through local ordinances,²⁰⁶ and the Minneapolis Code of Ordinances imposes a general prohibition on nuisances that impact health and sanitation.²⁰⁷ It also targets specific activities, such as illegal drug sales,²⁰⁸ prostitution,²⁰⁹ and building abandonment.²¹⁰ Similar to state law, the Minneapolis Code of Ordinances imposes specific notice requirements to respondents; requires that any notice outline a summary of the alleged nuisance; indicates the place and time where respondents must appear to arrange any abatement action; and warns respondents that failing to appear could result in the issuance of an injunction mandating closure of the targeted premises for a year.²¹¹ The city attorney may file a formal nuisance complaint when the respondent fails to appear, either refuses to cooperate with or breaches the city attorney’s recommendations for abating the nuisance, or does not act in good faith.²¹² Unlike state law, however, Minneapolis’s remedies are more granular and provide

203. *Id.* §§ 617.82, 617.85, 617.87. During the bond period, an injunction against further nuisance activities remains in effect. *Id.* § 617.87.

204. *Id.* § 617.86.

205. *See id.* § 609.74 (classifying “maintaining a public nuisance” as a misdemeanor offense).

206. *See id.* § 412.221.

207. *See* MINNEAPOLIS, MINN., CODE OF ORDINANCES § 227.10.

208. *See id.* §§ 223.300–223.360.

209. *See id.* §§ 386.10–386.60.

210. *See id.* §§ 249.10–249.90.

211. *Id.* § 223.310.

212. *Id.* § 223.330.

for a range of relief that transcends temporary and permanent injunctions, including capital improvements, installing surveillance cameras, improving internal and external lights, employing security guards, posting additional detailing prohibited illegal activities, and participating in local merchant or neighborhood groups.²¹³

The foregoing provisions reflect a framework that dovetails with third-party policing's fundamental precepts and, in particular, its situational emphasis on crime control. They specify which behaviors are considered nuisance activity, target owners and place managers through mechanisms that formally designate premises as nuisance properties, outline options for ameliorating nuisances, and provide a range of remedies for failure to abate. As discussed below, these statutes and ordinances obscure the policing powers lurking behind them—powers that are uncritically pushed across local agency-level rulemaking.

*B. Spatial Precursors to the Nuisance Actions
Against Cup Foods*

The origin and operating context of Cup Foods demonstrate how nuisance laws operate as the ghosts of prior eras where law and politics served as chaplains to a more overtly racist system of place management. Located at the corner of Chicago Avenue and Thirty-Eighth Street, Cup Foods is situated in a community shaped by the historical geography of racism. The store is less than a mile from Interstate 35W, which was built during the 1960s at considerable cost to Black residents in Minneapolis and St. Paul (the Twin Cities).²¹⁴ Passage of the Federal-Aid Highway Act of 1956²¹⁵ led to massive expansion of the U.S. interstate highway system.²¹⁶ As construction of these highways

213. *Id.* § 223.340.

214. See Darby Ottoson, “Human Toll” and the True Cost of 35W, *MPLS ST PAUL MAG.* (Oct. 31, 2021), <https://perma.cc/RM4G-4SRE>.

215. Pub. L. 84627, 70 Stat. 374 (codified as amended in scattered sections of 16 & 23 U.S.C.).

216. See *The Costs and Consequences of Progress*, UNIV. OF MINN. (Sept. 15, 2021), <https://perma.cc/B9SW-AAKA>

Beginning after the passage of the Federal Aid Highway Act of 1956, interstates 94 and 35W were part of the massive nationwide effort to build an interstate highway system throughout the United

entered urban areas, planners often routed them through poor, predominantly Black communities.²¹⁷ The calculus was straightforward—acquiring Black-owned properties was cheaper thanks to a combination of redlining and other forms of housing discrimination that trapped Black people in less desirable neighborhoods where residents also lacked the political capital to mount much opposition.²¹⁸

In keeping with this practice, 60s-era highways built in the Twin Cities resulted in the forced transfer of land occupied by eighty percent of the area's Black population, dividing some communities while razing others.²¹⁹ Constraints on where Black people could live or own property remained in place throughout this upheaval, further narrowing their housing options.²²⁰ These racist planning strategies had lasting effects on the Black communities living in south Minneapolis—a legacy more recently exacerbated by the demolition of Central High School in 1982 and the financial crisis beginning in 2007.²²¹ Racism

States, creating convenience for many, but serious and persistent harmful consequences for people who were often poor, and often Black.

For useful and recent discussion of how racism was manifest in the building of U.S. highways, see Deborah N. Archer, "White Men's Roads Through Black Men's Homes": *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259 (2020).

217. See *The Costs and Consequences of Progress*, *supra* note 216.

218. See *id.*

[B]ecause redlining and other discriminatory housing practices had already pushed Black people into "blighted" or less desirable neighborhoods, it was both cheaper to build the interstate through these neighborhoods and likely to be met with less resistance from these communities, who had less social and political influence. The pattern was repeated in cities and neighborhoods throughout the nation. In total, nearly 30,000 people—many of whom were people of color—were displaced in the Twin Cities.

219. See *id.*

220. See Archer, *supra* note 216, at 1287 ("For most displaced people, the only housing options were in other racially segregated, economically struggling communities . . .").

221. See Deena Winter, *Cup Foods Has a Past, but Does it Have a Future?*, MINN. REFORMER (Aug. 21, 2020), <https://perma.cc/6YY4-PQWN> ("Black people still grieve the tightknit community torn apart when Interstate 35W divided the 'Black Southside,' and Central High School was bulldozed in 1982. Gang activity picked up in the 1990s . . . before the Great Recession displaced Black families.").

continued to influence Minneapolis, and gaps in education, employment and income continue to disadvantage the city's Black communities.²²² This was the historical backdrop against which Samir Abumayyalehn and other members of his Palestinian-American family opened Cup Foods in 1989.²²³

Themselves middleman minorities, Abumayyalehn would eventually become mired in a regulatory landscape routinely deployed to "clean up" the effects of structural racism instead of its underlying causes. Samir and his brother Mahmoud own the building where Cup Foods operates, whose tenants include a barber shop, a laundromat and a mosque.²²⁴ His father and two younger brothers run the shop with the help of unrelated employees.²²⁵ Initially selling grocery and convenience items, the store's retail offerings eventually expanded to include a delicatessen, alcohol, tobacco products, and cellular services.²²⁶ In support of this expansion, Cup Foods obtained three licenses in addition to the one obtained for its grocery store in 1989: one for preparing food for the delicatessen; one for selling tobacco; and another to sell low-alcohol beer for off-premises consumption.²²⁷ All four licenses are annually renewable.²²⁸

Cup Foods began experiencing problems in and around its store soon after opening. Despite a series of abatement measures, drug-related activity, loitering, vandalism, shoplifting, and occasional gun violence persisted for a decade.²²⁹ Verbal and written warnings to observe lawful

222. See Matt Furber et al., *National Guard Called as Minneapolis Erupts in Solidarity for George Floyd*, N.Y. TIMES (May 28, 2020), <https://perma.cc/XX7G-ZMUV> ("[In Minneapolis,] African-Americans earn one-third as much as white residents. They graduate from high school at much lower rates, are much likelier to be unemployed and tend to live in households with significantly less wealth than their white counterparts.").

223. See Winter, *supra* note 221.

224. *Id.*

225. See Sara Sidner, *Inside Cup Foods, Where it Seems George Floyd Never Left*, CNN (Apr. 10, 2021), <https://perma.cc/2X8L-K6D5>.

226. See *CUP Foods Inc. v. City of Minneapolis*, 633 N.W.2d 557, 560 (Minn. Ct. App. 2001).

227. See *id.*

228. See *id.*

229. All Licenses Held by Samir Hamaden Abumayyaleh, CUP Foods, for Premises at 3579 Chicago Avenue South, Minneapolis, Minnesota, 92110126123, ¶5 (State of Minnesota Office of Administrative Hearings for the

operating hours failed to ameliorate conditions in 1992.²³⁰ In February 1993, Abumayyaleh met with the City of Minneapolis Technical Advisory Committee and agreed to several conditions, including: posting “no loitering” signs near the front of the store; removing pay phones located outside his building; hiring more experienced managers to control “hangout activity”; reporting illegal drug sales to police; hiring an off-duty police officer during the month of March 1993 to carry out evening patrols of the premises; and closing the store at its lawful hour of operation.²³¹ Abumayyaleh largely complied with these conditions, with the exception of employment of off-duty police, which he ceased eight months later due to the high cost.²³²

Conditions at the store’s intersection, however, did not improve. In 1996, local residents formed a task force in the hope of improving safety and reducing the sale of drugs at the intersection.²³³ Members of the MPD visited the store and instructed Abumayyaleh to call 911 when trouble occurred.²³⁴ Although the owner complied with these directions and placed additional “no trespassing” signs on the property,²³⁵ crime near the store’s location worsened over the next six years. There were three shootings, police used confidential informants to coordinate a string of “controlled drug buys” on the property, and a search warrant was eventually executed at the store itself.²³⁶

In the wake of these events, the Hennepin County Attorney’s Office initiated a nuisance abatement action against Cup Foods.²³⁷ This action was stayed pending a separate action filed by the Minneapolis City Attorney’s Office concerning all of the store’s licenses on November 19, 1999.²³⁸ Over six hearing

City of Minneapolis Sept. 2000) (Findings of Fact, Conclusions of Law and Recommendation) [hereinafter CUP Foods Administrative Hearing].

230. *Id.* ¶ 7.

231. *Id.* ¶ 8.

232. *Id.* ¶¶ 9–10.

233. *Id.* ¶ 12.

234. *Id.* ¶ 14.

235. *See id.*

236. *See id.* ¶¶ 19–33.

237. *See generally* CUP Foods Inc. v. City of Minneapolis, 633 N.W.2d 557 (Minn. Ct. App. 2001).

238. *See generally* CUP Foods Administrative Hearing, *supra* note 229.

days between March 28 and May 5, 2000, the City of Minneapolis presented testimony from police and community members in support of its arguments for a temporary license revocation.²³⁹ Although Cup Foods survived these enforcement actions, surveillance of patrons and expectations of police contact as a regulatory obligation remained essential features of the store's ongoing licensure requirements.²⁴⁰

Subsequent gentrification of the area surrounding the store did not change the atmosphere or the scrutiny of Cup Foods's customers, including George Floyd, whose contact with police was precipitated by a call from an employee acting in accordance with local licensure requirements.²⁴¹ Floyd entered Cup Foods on May 25, 2020, sometime before 8:00 PM, to purchase cigarettes.²⁴² Suspecting the bill used in the transaction was counterfeit, Christopher Martin—the teenage clerk who accepted Floyd's payment—shared his suspicions with an onsite manager.²⁴³ The manager asked Martin to exit the store and confront Floyd, who was seated in a vehicle parked nearby.²⁴⁴ When Floyd repeatedly refused to return to the store or surrender the cigarettes, Mahmoud Abumayyalehn dialed 911 in keeping with the store's licensure obligations.²⁴⁵

Details of the police response merit careful retelling. They reveal the brutal disproportionality dispensed by the police in comparison to the reason for the initial 911 call, align with foregoing comments about militarism's expanded presence in community policing as a force that transforms civilians into enemies, and illustrate how nuisance laws and police violence can converge at an unacceptably high cost. The first two police officers to respond to the 911 call—J. Alexander Kueng and

239. *See id.*

240. *See* Aymann Ismail, *The Store that Called the Cops on George Floyd*, SLATE (Oct. 6, 2020) <https://perma.cc/VJ9U-GNKK>.

241. *See* Bogel-Burroughs & Healy, *supra* note 4.

242. *Id.*

243. Trone Dowd, *Teen Cashier Wanted to Put George Floyd's Purchase 'On My Tab' to Avoid Calling Police*, VICE NEWS (Mar. 31, 2021), <https://perma.cc/P26S-ZPDC>.

244. *Id.*

245. *See id.*

Thomas Lane—arrived at around 8:08 PM.²⁴⁶ They approached Floyd, who was sitting in an SUV parked near the store’s entrance.²⁴⁷ Lane drew his gun and ordered Floyd to show his hands.²⁴⁸ After re-holstering his weapon, Lane tried to pull Floyd out of the vehicle.²⁴⁹ Subsequent to handcuffing Floyd, the officers informed him of their intent to arrest him for passing counterfeit currency.²⁵⁰ Although Floyd was initially compliant, a struggle ensued when officers tried placing him in the back of their cruiser.²⁵¹ At about 8:14 PM, Floyd fell to the ground, telling officers he was claustrophobic and resisted their efforts to place him in their cruiser.²⁵² Officers Derek Chauvin and Tou Thao arrived at the scene shortly before 8:19 PM Chauvin and attempted to help place Floyd into the back of the cruiser.²⁵³ Floyd fell to the ground after Chauvin removed him from the cruiser’s passenger side.²⁵⁴ Still in handcuffs and appearing to be in distress, Floyd remained pinned to the ground.²⁵⁵ Chauvin, Kueng, and Lang applied pressure to his neck, torso, and legs, respectively.²⁵⁶ At 8:20 PM, a smartphone recording captures Floyd repeatedly telling officers he could not breathe—which he repeated sixteen times in fewer than five minutes.²⁵⁷ Footage from a teenager’s smartphone captured Chauvin threatening to spray mace on the small group of witnesses telling the officers to get off of Floyd’s neck.²⁵⁸ Chauvin did not remove his knee from Floyd’s neck until after the Emergency Medical Technicians arrived at 8:27 PM.²⁵⁹ Floyd was pronounced dead

246. Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://perma.cc/4E3D-84JF> (last updated Jan. 24, 2022).

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

at a nearby hospital at around 9:25 PM.²⁶⁰ One irony of this tragedy is that much of it was filmed with the help of surveillance equipment Cup Foods installed in accordance with one of its earliest abatement orders.²⁶¹

Following Floyd's death, Cup Foods found itself at the center of debates about its viability in south Minneapolis.²⁶² Besides its infamous ties to Floyd's murder—which became a catalyst for protests and rioting in Minneapolis and across the United States²⁶³—larger questions emerged surrounding the store's solidarity with its immediate community.²⁶⁴ Narratives that the store was a magnet for crime collided with resentment toward the owners for inviting police involvement—all of which eclipsed ongoing pressures to comply with nuisance laws.²⁶⁵ Once a site of ongoing complaints, the store's location became a makeshift shrine where activists gathered to express their opposition to the reopening of Cup Foods on August 3, 2020.²⁶⁶ One local resident expressed his emotions in a way that revealed a new misalignment between expressions of community will and third-party policing's application to Cup Foods:

In times of crisis like this we see what sort of control they have over our young people that they employ and we need our young people to see bigger than what Cup Foods can offer them We want young people to understand the other side of this is much bigger for all of us.”²⁶⁷

C. *Imagining Nuisance Abatement Praxis as an Incident Property in Whiteness*

Viewed through the lens of Critical Race Theory, Floyd's killing is the logical outcome of extending proprietary and

260. *Id.*

261. *See* Bogel-Burroughs & Healy, *supra* note 4.

262. *See id.*

263. *See* Furber et al., *supra* note 222; ‘Absolute Chaos’ in Minneapolis as Protests Grow Across U.S., N.Y. TIMES (May 29, 2020), <https://perma.cc/U6H7-TGEH> (last updated May 20, 24, 2021).

264. *See* Winter, *supra* note 221.

265. *See id.* (“[Activists] accuse the immigrant-owned store of exploiting the community for over 30 years and being a crime magnet.”).

266. *See id.*

267. *Id.*

relational expressions of whiteness into the sphere of commercial regulation.²⁶⁸ In her groundbreaking article titled *Whiteness as Property*, Cheryl Harris captures the complex relationship between law, race, property, and status:

Whiteness is not simply and solely a legally recognized property interest. It is simultaneously an aspect of self-identity and of personhood, and its relation to the law of property is complex. Whiteness has functioned as self-identity in the domain of the intrinsic, personal, and psychological; as reputation in the interstices between internal and external identity; and, as property in the extrinsic, public, and legal realms.²⁶⁹

Harris's framing of this complexity reaches into her analysis of *Plessy v. Ferguson*,²⁷⁰ a landmark case originating from a plaintiff's challenge to the Separate Car Act of 1890,²⁷¹ which mandated the racial segregation of railway operations throughout Louisiana following Reconstruction.²⁷² The case's facts are foundational reading for law students learning about early constitutional jurisprudence upholding a "separate but equal" interpretation of the Fourteenth Amendment's Equal Protection Clause. However, Homer Plessy also argued that he was entitled to sit in a railway car reserved for white passengers by virtue of his being "seven-eighths Caucasian," thereby possessing signs of Blackness that were not discernable to him.²⁷³ As Harris notes, Plessy couched denial of the right to sit with white passengers as the deprivation of a property interest in being white, and argued that severe reputational injury would result were he suddenly removed from membership in the white race without due process.²⁷⁴ Without articulating any test

268. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1731 (1993) ("When the law recognizes, either implicitly or explicitly, the settled expectations of whites built on the privileges and benefits produced by white supremacy, it acknowledges and reinforces a property interest in whiteness that reproduces Black subordination.").

269. *Id.* at 1725.

270. 163 U.S. 537 (1896).

271. 1890 La. Acts No. 111, p. 152.

272. *Id.*

273. *Plessy*, 163 U.S. at 541.

274. See Harris, *supra* note 268, at 1747; *Plessy*, 163 U.S. at 549 ("It is claimed by the plaintiff . . . that, in any mixed community, the reputation of

for establishing racial membership or classification, the court concluded:

If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called 'property.' Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.²⁷⁵

Harris characterizes the Court's treatment of Plessy's argument as a critical milestone in the social and proprietary constructions of race in relation to property and status:

At one level, the Court's opinion amounted to a wholesale evasion of the argument that, as a matter of federal constitutional law, Plessy's assignment to a railway car for Blacks, in the absence of a clear standard defining who was white, was an arbitrary and unauthorized taking of the valuable asset of being regarded as white. At another level, the Court's decision lent support to the notion of race reputation as a property interest that required the protection of law through actions for damages.²⁷⁶

Another important element emerging from Harris's work is the way white supremacy looked to the law as a coercive instrument—one that would demand merchant participation in shaping racial hierarchies in the marketplace without regard for the cost.²⁷⁷ These demands reflected an unwillingness to rely on custom and usage within commercial practices burdened by the increased cost of maintaining racial segregation.²⁷⁸ By using law to extend its reach into private commerce, white supremacy's apologists could ensure merchant alignment with its ideological priorities under the aegis of regulation.

belonging to the dominant race, in this instance the white race, is 'property,' in the same sense that a right of action or of inheritance is property.”).

275. *Plessy*, 163 U.S. at 549.

276. Harris, *supra* note 268, at 1749.

277. *See id.* at 1746–47 (“[I]t is evident that Plessy's arrest was arranged as part of a strategy that included the tacit cooperation of railway officials, many of whom were displeased with the separate car law due to the increased expense of operation.” (citation omitted)).

278. *See id.*

The legal conscription of business activity in aid of overt white supremacy has evolved alongside shifts in property's meanings. Whereas classical notions of property entailed "everything that is valued and to which a person has a right," modern concepts of property consider the social relationships arising from ownership interests as social constructs and as vessels for "power, selection, and allocation."²⁷⁹ The law's role in sustaining spatial oppression through regulations that combine policing with commerce services contemporary expressions of whiteness and manifests in third-party policing and the militarization of law enforcement. This marriage represents a set of intentional policy choices that continue to subvert Black humanity.²⁸⁰ Their design, implementation, and deployment from street to street are only possible through the participation of locally-elected public officials.²⁸¹ This participation supports two important claims rooted in relationships between regulation, state violence, and the localized geography of racism. First, racism's historical sweep is acutely experienced at the community level—at the interface between local government and the subjects of its regulation. This is apparent in longstanding patterns of racialized access to hospitals, swimming pools, libraries, cemeteries, and other places²⁸²—and also exists in the form of majoritarian demands to "contain" the legacy of such access, particularly in cities with sizeable Black populations.²⁸³

A second and related claim recognizes the ongoing importance of who is in proximity to the levers of local power. Just as home rule has operated alongside the exercise of federal

279. *Id.* at 1728–29.

280. *See id.* at 1762 ("Although the substance of race definitions has changed, what persists is the expectation of white-controlled institutions in the continued right to determine meaning—the reified privilege of power—that reconstitutes the property interest in whiteness in contemporary form.").

281. *See* Jack Greenberg, *Brown v. Board of Education: An Axe in the Frozen Sea of Racism*, 48 ST. LOUIS U. L.J. 869, 885–86 (2004) (describing the various locus-based arguments offered to preserve school segregation, which focused on local control, "unfavorable community attitude," local schoolboard opposition, the "likelihood of violence," the potential for financial problems, and the specter of school abolishment (citations omitted)).

282. *See supra* notes 9–18 and accompanying text.

283. *See supra* notes 72–79 and accompanying text.

power to support white flight from inner cities, redlining, and the razing of Black neighborhoods to support highway construction,²⁸⁴ it is also available to reshape formulations of community used to craft nuisance ordinances²⁸⁵ and support militarizing police departments.²⁸⁶ More robust engagement in local politics is therefore a critical determinant of the policies whose previous architects either failed to sufficiently consider their racially-disparate impacts or deliberately disregarded them. Those who signal concern for racism's impact on Black bodies while enjoying the warmth of white supremacy's quilt-work betray halfhearted social justice commitments through consciousness of their unused power to challenge institutions purporting to act in their name.

Consistent with modernist constructions of whiteness as property, these claims have the combined effect of placing racist expressions of state power in the hands of local communities, where de facto accommodations of spatial oppression form part of racism's normative, relational presence while serving as a source of political power. For example, as protests against police brutality became a fixture of the 2020 presidential campaign, Donald Trump sought to stoke fear among white suburbanites about the prospect of living in proximity with occupants of low-income housing.²⁸⁷ The signaling behind this communication strategy was clear. It implied that danger inhered in living in proximity to poor—read Black—neighbors who would destroy their “suburban lifestyle dream”; reinforced the perception that those living in the suburbs still enjoy political capital derived from their distance from the places where minorities have historically been trapped due to structural racism; and reaffirmed voting's strategic importance

284. See *The Costs and Consequences of Progress*, *supra* note 216.

285. See *supra* Part I.

286. See *supra* Part II.

287. See Annie Karni et al., *Trump Plays on Racist Fears of Terrorized Suburbs to Court White Voters*, N.Y. TIMES, (July 29, 2020), <https://perma.cc/BX2R-TR7R> (last updated Jan. 20, 2021)

Mr. Trump said on Twitter that “people living their Suburban Lifestyle Dream” would “no longer be bothered or financially hurt by having low income housing built in your neighborhood.” The president was referring to the administration's decision last week to roll back an Obama-era program intended to combat racial segregation in suburban housing.

as a pathway to preserving a vital incident of property in whiteness: the intangible, highly valuable benefit of racialized geography.²⁸⁸

CONCLUSION: DECENTERING POLICE INFLUENCE WITHIN THE
ARCHITECTURE OF STATE OR LOCAL BUSINESS REGULATION

More than just a strategy to contain the effects of structural racism's legacy, George Floyd's murder signals commercial regulation's capacity to preserve intangible property rights inherent in spatial oppression and in the state violence lurking behind it. Translating this recognition into local action demands rethinking third-party policing's unquestioned influence within the framework of local rulemaking, particularly at the local level. Nuisance provisions mask the full breadth of policing powers sitting behind them—powers that become more apparent through attorney recommendations and abatement agreements. By uncritically atomizing these powers across a broad range of settings without regard for their potential harm, these recommendations and agreements amplify the potentially fatal effects of flawed policing through various arms of the regulatory state. These considerations will only have meaningful impact once attorneys serving at state and local levels reevaluate the terms under which they initiate nuisance actions and the abatement conditions they craft.

When the combined effect of these forces enter the business environment, merchants must choose between losing their business or exposing their customers to state violence. In submitting to the conditions required to keep their operating licenses, merchants who are expected to influence occupant conduct in their spaces have no control over police who must be called when nuisances occur. George Floyd's killing tragically demonstrates the potential consequences of this risk—both crystalizing it into something more than abstract speculation and crying out for a substantial reassessment of how nuisance frameworks operate.

Preserving a central role for police in nuisance actions poses three problems: (i) it presumes police presence remains the only antidote for disorder, and that nuisance conditions will

288. *Id.*

inevitably worsen otherwise; (ii) it continues to assume police retain the skills to deal with the myriad problems that give rise to site-management issues—particularly the larger systemic and structural problems not of their making; and (iii) it imposes no prerequisites on police participation in order maintenance, such as a commitment to using force commensurate with situations where respondents are required to call police as conditions of their abatement agreements.

The response to Floyd’s killing also warrants rethinking who informs the formulation of “community will” in nuisance abatement frameworks so as to treat social problems as nuisances and, by extension, short-term responses to longstanding consequences of structural inequality. This paradigm animates theories of “minority threat” and diverts majoritarian focus away from the more demanding and long-term project of dismantling systems of inequity. The enforcement history of Cup Foods preceding Floyd’s death illustrates why this approach is futile and how it enables historical expressions of racism.²⁸⁹ The City of Minneapolis responded to each wave of “nuisances” on the store’s premises as if its owners were a primary *source* of problems simply because they were a *site* where crimes occurred.²⁹⁰ As business regulations, the nuisance laws targeting Cup Foods could not dismantle the larger ecosystems in which crime occurs—a fact that is evident in their repeated failure to ameliorate conditions around the store and in the chain of events leading to George Floyd’s death.

289. See *supra* Part IV.B.

290. See *supra* Part IV.B.