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# Watching Me: The War on Crime, Privacy, and the State

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*The war on crime exemplifies how the deprivation of privacy makes one vulnerable to oppressive state social control. Scholars have severely criticized the war on crime's subordinating effects on poor urban people of color. The role that privacy deprivation plays in this subordination, however, has been under-theorized. This Article takes an initial step in addressing this gap in the literature. It argues that one important reason why the war on crime is so abusive is because it oppressively invades individuals' privacy; poor people of color have limited opportunities in the creation of their life plans, participation in mainstream political discourse, and access to social capital in part because they have limited privacy. These privacy invasions also have an expressive aspect because they send the message that the state does not trust these individuals to engage in valued activities in legitimate ways; therefore, they must constantly be watched. As a result, the deprivation of privacy also results in serious dignitary harms. This Article further argues that current criminal justice policies cannot even be justified on utilitarian grounds. Indeed, the privacy invasions this Article describes contribute to counterproductive criminal justice policies. While this Article focuses on poor people of color, it cautions that they are the canary in the mine. Whites are also currently experiencing serious privacy invasions in the form of mass surveillance and DNA collection. The practices of harsh sentencing and overcharging*

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*are making them even more vulnerable to further privacy invasions. The truth is that for all Americans, criminal justice policies are steadily minimizing the line between the individual and the state.*

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You busy watching me, watching me/That you're blind baby, you neglect to see/The drugs coming into my community/Weapons coming into my community/Dirty cops in my community/And you keep saying that I'm free/And you keep saying that I'm free/And you keep saying that I'm free.<sup>1</sup>

Those who are racially marginalized are like the miner's canary: their distress is the first sign of a danger that threatens us all.<sup>2</sup>

#### INTRODUCTION

Gloria is a middle-aged African-American woman who lives in a housing project with her family. She is constantly aware of the presence of the police. She always carries identification and a piece of mail with her so that the police will not mistake her for someone who is trespassing when she comes and goes from her housing project. Although she is extroverted by nature, she also does not take the time to make small talk with her neighbors in the project's courtyard because she wants to limit her potential exposure to the police. As it is, she is stopped and questioned by the police on a regular basis. Her husband, Charles, has made it a habit of always carrying a pay stub from his employer with him because when he is stopped and questioned by the police, they always intimate that he might be earning his income in illegitimate ways.

Gloria and Charles only leave their apartment when it is necessary. Although their teenage son, Alex, is a good kid who stays out of trouble, Gloria and Charles also discourage him from spending much time outside of their apartment in order to protect him from potential police encounters. They also forbid Alex from wearing baggy clothes and hoodies. Alex hates being cooped up inside their apartment, and he resents the fact that he cannot dress in the way that he wants.

Charles, Gloria, and Alex do not know, however, that despite their efforts the police already have Alex listed in a gang database. The police once saw Alex talking with his friend, John, whom they suspected of being involved in gang activity and drug trafficking. Thus, Alex's association with John led them to put him in their database. The reason the police suspected John of being involved in criminal activity is because his friend, Ben, "snitched" on him in order to get himself out of some legal trouble. He was facing some hefty jail

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<sup>1</sup> JILL SCOTT, *WATCHING ME* (Hidden Beach Recordings 2000).

<sup>2</sup> LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 11 (2002).

time for marijuana possession. In order to get probation, Ben provided false information on John. The police later learned that Ben was lying when they conducted a SWAT invasion of John's home and found no evidence of narcotics. Despite the police's error, Alex's and John's names are still in the gang database.<sup>3</sup>

Popular media and the academic community have heavily criticized the war on crime, and particularly the war on drugs, as heavy-handed and destructive.<sup>4</sup> Specifically, the critique often focuses on the subordinating effects that this war has had on poor urban communities of color.<sup>5</sup> The role of privacy deprivation in this subordination, however, has been under-theorized. This Article takes an initial step in addressing this gap in the literature. I argue that because privacy makes an individual less vulnerable to oppressive state social control, the deprivation of privacy can be an important aspect of one's subordination.

With respect to the war on crime, I intentionally paint with a broad brush. Each of the tactics and privacy harms that I will describe merit a much fuller analysis than I will be able to provide within the scope of this one Article.<sup>6</sup> By engaging in a more general analysis of the most salient harms these tactics cause, my goal is two-fold. First, I describe the breadth and pervasiveness of tactics used in the war on crime that affect privacy. Second, I argue that because many poor people of color experience some or all of these tactics simultaneously, the privacy

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<sup>3</sup> This is a fictionalized account based on actual cases and reports by poor urban people of color about their experiences with the criminal justice system. See generally CTR. FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK, THE HUMAN IMPACT: THE STORIES BEHIND THE NUMBERS, THE EFFECTS ON OUR COMMUNITIES (July 2012), available at <http://stopandfrisk.org/the-human-impact-report.pdf> (documenting interviews with individuals routinely subjected to similar privacy invasions).

<sup>4</sup> See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 140-77 (2010); PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 36-37 (2009); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 48-50 (2011); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 678-81 (1995); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 28-33 (2012); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks,"* 6 J. GENDER RACE & JUS. 381, 383 (2002); Wendy Ruderman, *Rude or Polite, City's Officers Leave Raw Feelings in Stops*, N.Y. TIMES (June 26, 2012) [hereinafter *Rude or Polite*], [http://www.nytimes.com/2012/06/27/nyregion/new-york-police-leave-raw-feelings-in-stops.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/06/27/nyregion/new-york-police-leave-raw-feelings-in-stops.html?pagewanted=all&_r=0).

<sup>5</sup> See ALEXANDER, *supra* note 4, at 175-204; BUTLER, *supra* note 4, at 25-40; JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 10 (2d ed. 2011); ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 6, 102-19 (2009); STUNTZ, *supra* note 4, at 48, 272, 286.

<sup>6</sup> I plan to engage in this broader project through several articles in the future.

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harms involved are an absolutely oppressive form of state abuse that leads to a harsh form of state social control.<sup>7</sup>

To provide some background on the war on crime, Part I of this Article will discuss its racialized origins. In Part II, I argue that the war on crime exemplifies how the deprivation of privacy makes one vulnerable to oppressive state social control. The state engages in an unjustifiable privacy invasion whenever the monitoring of its citizens results in the abuse of its power. This abuse can come in the form of the prohibition of activities that society views as valuable; the creation of a sense of being constantly monitored by the state, which then has a chilling effect on these activities; or the unjustifiable aggregation of data on the state's citizens. The privacy invasions that result from stops-and-frisks, motor stops, data aggregation through technology, SWAT invasions, and snitching<sup>8</sup> at minimum discourage or prohibit poor people of color from freely engaging in self-determination, self-expression, and freedom of association due to a fear of being monitored, judged, and even unjustifiably punished. Furthermore, the practices of overcharging and harsh sentencing make them vulnerable to even further privacy invasions. In other words, one important reason why the war on crime is so abusive is because it oppressively invades individuals' privacy — poor people of color have limited opportunities in the creation of their life plans, participation in mainstream political discourse, and access to social capital in part because they have limited privacy.

These privacy invasions also have an expressive aspect because they send the message that the state does not trust these individuals to engage in valued activities in legitimate ways; therefore, they must constantly be watched. The fact that these criminal justice tactics disproportionately affect poor people of color also sends the message that the state has less respect for them and values their identities and viewpoints less than those of wealthier and white individuals, who are afforded more privacy. Both of these messages result in dignitary harms.

Part III argues that not only are these tactics problematic from a moral perspective, but it is also difficult to support them on utilitarian

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<sup>7</sup> For the purposes of this Article, I will not be focusing on the war on terror or the use of the criminal justice system to curb immigration. Although both practices also affect people of color, they each involve unique privacy concerns and state interests. For this reason, I have opted to address them separately in future articles.

<sup>8</sup> The term "snitching" does not refer to law-abiding citizens or victims who report crimes to the police. Instead, it refers to the state practice of recruiting individuals, often criminals themselves, to provide information to the government in exchange for dropped charges, lenient sentences, money, or even drugs. See discussion *infra* Part II.B.

grounds. Some might argue that given the serious problem of violent crime in poor neighborhoods of color, these privacy invasions by the state are in fact justified. Evidence suggests, however, that many of the tactics discussed in this Article are not decreasing crime.<sup>9</sup> Furthermore, the provision of more privacy by the state actually promotes more effective criminal justice policy because, as an expression of respect, it encourages compliance with the law and the type of strong informal networks that are characteristic of communities with low crime rates.<sup>10</sup> For these reasons, many of the practices discussed in this Article have proven to be counterproductive. In addition, although mass surveillance has the potential to deter crime, prevent wrongful convictions, and limit racial profiling and police brutality,<sup>11</sup> a serious analysis of the privacy harms these practices cause is essential in determining under what circumstances their law enforcement value outweighs privacy concerns.

Some of the tactics discussed in this Article are beginning to threaten the privacy of whites in addition to those of color, including data aggregation through technology. For this reason, poor people of color appear to be the canary in the mine;<sup>12</sup> the truth is that all Americans should be concerned about the fact that these policies are steadily diminishing the line between the individual and the state.

## I. THE EVOLUTION OF THE WAR ON CRIME

### A. *The Drumbeats of War*

The political rhetoric of law and order has racialized roots.<sup>13</sup> Beginning in the mid-1950s, some segregationists labeled civil rights activists as “law breakers” and argued that civil rights for African-

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<sup>9</sup> See discussion *infra* Part III.

<sup>10</sup> See *infra* text accompanying notes 351-354.

<sup>11</sup> See I. Bennett Capers, *Crime, Surveillance, and Communities*, 40 *FORDHAM URB. L.J.* 959, 960 (2013) [hereinafter *Crime, Surveillance, and Communities*].

<sup>12</sup> See GUINIER & TORRES, *supra* note 2, at 11 (arguing that those who are racially marginalized are “like the miner’s canary”). “Miners often carried a canary into the mine . . . [because] [t]he canary’s more fragile respiratory system would cause it to collapse from noxious gases long before humans were affected . . . . The canary’s distress signaled that it was time to get out of the mine because the air was becoming too poisonous to breathe.” *Id.*

<sup>13</sup> See ALEXANDER, *supra* note 4, at 40; Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 *WASH. L. REV.* 581, 618-22 (2009). The contention that tough-on-crime rhetoric has racialized roots is not meant to suggest, however, that all people of color are against tough-on-crime policies. See Forman, *supra* note 4, at 36-44. Indeed, there are African-Americans that view tougher criminal justice policies as a form of racial justice. See *id.* at 42, 44.

Americans would only lead to more crime.<sup>14</sup> U.S. Representative John Bell Williams once proclaimed:

This exodus of Negroes from the South, and their influx into the great metropolitan centers of other areas of the Nation, has been accompanied by a wave of crime. . . . What has civil rights accomplished for these areas? . . . Segregation is the only answer as most Americans — not the politicians — have realized for hundreds of years.<sup>15</sup>

It is true that during the 1960s, the national crime rate soared.<sup>16</sup> Increased crime, combined with the riots and uprisings that occurred in the summer of 1964 and subsequent to the assassination of Martin Luther King Jr. in 1968,<sup>17</sup> allowed politicians to take advantage of the fears, anxieties, and resentments of poor and working-class white Americans.<sup>18</sup> Barry Goldwater laid the foundation for the “get tough on crime” movement during his 1964 presidential campaign when he argued that continued leadership under President Lyndon B. Johnson’s Administration would lead to “mobs in the street.”<sup>19</sup>

By 1968, 81% of respondents to the Gallup Poll agreed with the statement that “law and order has broken down in the country”;<sup>20</sup> the majority blamed “Negroes who start riots” and “Communists.”<sup>21</sup> That

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<sup>14</sup> See ALEXANDER, *supra* note 4, at 41-42.

<sup>15</sup> *Id.* at 41 (internal quotation marks omitted).

<sup>16</sup> “Reported street crime quadrupled in the twelve years from 1959 to 1971. Homicide rates doubled between 1963 and 1974, and robbery rates tripled.” Forman, *supra* note 4, at 35. *But see* ALEXANDER, *supra* note 4, at 41 (noting that while crimes rates did increase during this period, the accuracy of the rates reported by the Federal Bureau of Investigation has been questioned).

<sup>17</sup> The Kerner Commission determined that one of the major causes of this rioting was police harassment and brutality. See I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 33 (2010) [hereinafter *Rethinking the Fourth Amendment*].

<sup>18</sup> See ALEXANDER, *supra* note 4, at 42-45. It should be noted that African-Americans embraced tougher criminal justice policies, particularly in New York, because increased crime in their neighborhoods alarmed them. See VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* 150-52 (2009). However, these activists tended not to support harsh penalties against low-level dealers and addicts. See *id.* at 151.

<sup>19</sup> See ALEXANDER, *supra* note 4, at 41.

<sup>20</sup> See *id.* at 45.

<sup>21</sup> See *id.* While the civil rights movement was a chief cause of anxiety during this period, “the economy, protests against the Vietnam war, political mobilization on college campuses, the counter-culture movement generally, or a sense of social crisis engendered for many by the demands for women’s and gay rights” also created an anxiety about “social disorganization.” See Ian F. Haney López, *Post-Racial Racism*:

same year, Richard Nixon and George Wallace made “law and order” a central theme of their presidential campaigns and they garnered 57% of the vote.<sup>22</sup> They specifically targeted civil rights activists in their “law and order” campaign. After viewing one of his political ads that made this targeting explicit, Nixon reportedly crowed that the ad “hits it right on the nose. It’s all about those damn Negro-Puerto Rican groups out there.”<sup>23</sup>

Claiming that illegal drugs were “public enemy number one,” Nixon then declared a rhetorical “war on drugs” during his presidency that did not propose any real changes in drug policy.<sup>24</sup> President Reagan later chimed in on this rhetoric, but he waged a war with more heft.<sup>25</sup> When Reagan officially announced his war on drugs in October 1982, less than 2% of the American public actually viewed drugs as the most important issue facing the nation.<sup>26</sup> Indeed, drug crimes were actually declining in the nation at this point.<sup>27</sup> A few years after his declaration, however, Reagan’s administration was able to generate public support for his effort due to the crack phenomenon. Deindustrialization and globalization had devastated the job market for poor urban dwellers with limited skills and education during the 1970s.<sup>28</sup> When crack arrived on urban streets around 1985, the current harsh economic conditions made the sale of the drug an attractive way to make money.<sup>29</sup> As drug markets struggled to stabilize and anger due to the high unemployment rate festered, violence spiked in the inner cities.<sup>30</sup> The Reagan administration engaged in a media blitz, which

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*Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1032 (2010).

<sup>22</sup> ALEXANDER, *supra* note 4, at 46.

<sup>23</sup> PHILIP A. KINKER & ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 292 (1999). Nixon also declared a war on the welfare state: “[T]he ‘solution to the crime problem is not the quadrupling of funds for any governmental war on poverty but more convictions.’” See KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 38 (1997).

<sup>24</sup> See ALEXANDER, *supra* note 4, at 47.

<sup>25</sup> See *id.* at 49.

<sup>26</sup> See *id.* But see Nunn, *supra* note 4, at 389 (“Reagan’s declaration of war tapped into a growing public sentiment against illegal drug use. Many citizens viewed drugs as a menace and many of these same citizens were readily supportive of Reagan’s proposals to address the drug problem.”).

<sup>27</sup> See ALEXANDER, *supra* note 4, at 7; see also Nunn, *supra* note 4, at 389.

<sup>28</sup> See ALEXANDER, *supra* note 4, at 49-50; Nunn, *supra* note 4, at 421.

<sup>29</sup> See ALEXANDER, *supra* note 4, at 50; see also Nunn, *supra* note 4, at 421. Interestingly, although African-Americans constituted more than 80% of crack defendants, they were only a minority of regular users. See STUNTZ, *supra* note 4, at 184.

<sup>30</sup> See ALEXANDER, *supra* note 4, at 50-51.

sensationalized the emergence of crack cocaine in poor, urban neighborhoods.<sup>31</sup> These efforts worked. By 1986, *Newsweek* proclaimed that crack was the biggest story since Vietnam/Watergate; *Time* named it the issue of the year.<sup>32</sup> Furthermore, although whites and African-Americans use illegal drugs at comparable rates,<sup>33</sup> the faces of the drug problem in the United States were the black “crack whore,” the black “crack baby,” and the black “gangbanger.”<sup>34</sup> Federal budgets for federal law enforcement agencies soared during the 1980s.<sup>35</sup> In contrast, budgets for agencies responsible for drug prevention, treatment, and education plummeted.<sup>36</sup>

President George H.W. Bush continued the campaign and declared that drug use was “the most pressing problem facing the nation.”<sup>37</sup> By 1990, the New York Times/CBS News Poll reported that the number of those who thought that drugs were the most significant problem in the United States had increased to 64% of poll respondents.<sup>38</sup>

Democrats tried to convince the American public that they could be even tougher on crime than Republicans.<sup>39</sup> In 1965, President Johnson delivered his first presidential address on crime and sent a legislative anticrime agenda to Congress.<sup>40</sup> While a presidential candidate, Bill

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<sup>31</sup> See *id.* at 49.

<sup>32</sup> See *id.* at 51; Richard M. Smith, *The Plague Among Us*, NEWSWEEK, June 16, 1986, at 15.

<sup>33</sup> See NATAPOFF, *supra* note 5, at 102; STUNTZ, *supra* note 4, at 272. Studies show that white professionals may be the most likely of any group to use illegal drugs in their lifetime. See ALEXANDER, *supra* note 4, at 192.

<sup>34</sup> See ALEXANDER, *supra* note 4, at 51; see also Nunn, *supra* note 4, at 390 (arguing that it was easy to construct African-Americans, Latinos, and other people of color as the enemy of the war on drugs given the fact that the majority of white Americans always viewed these individuals as the source of vice and crime).

<sup>35</sup> See ALEXANDER, *supra* note 4, at 49. Between 1980 and 1984, antidrug funding increased from \$8 million to \$95 million for the Federal Bureau of Investigation. See *id.* Between 1981 and 1991, antidrug allocations increased from \$33 million to \$1,042 million for the Department of Defense and from \$38 million to \$181 million for the Federal Bureau of Investigations. See *id.* During that same period, the Drug Enforcement Agency’s spending grew from \$86 million to \$1,026 million. See *id.*

<sup>36</sup> Between 1981 and 1984, the budget for the National Institute for Drug Abuse decreased from \$274 million to \$57 million. See *id.* Funds allocated to the Department of Education for antidrug efforts decreased from \$14 million to \$3 million. See *id.*

<sup>37</sup> BECKETT, *supra* note 23, at 44.

<sup>38</sup> ALEXANDER, *supra* note 4, at 54 (citing New York Times/CBS News Poll from August of 1990).

<sup>39</sup> See *id.* at 54-55.

<sup>40</sup> See LYNDON B. JOHNSON, *Special Message to the Congress on Law Enforcement and the Administration of Justice*, in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON: CONTAINING THE PUBLIC MESSAGES, SPEECHES, AND STATEMENTS OF

Clinton attended the execution of Ricky Ray Rector, a mentally impaired African-American, and stated afterward, "I can be nicked a lot, but no one can say I'm soft on crime."<sup>41</sup> Once elected, he endorsed and signed a bill that imposed harsher sentencing<sup>42</sup> and authorized millions of dollars for state prison grants and the expansion of state and local police forces.<sup>43</sup> The Justice Policy Institute later observed that "the Clinton Administration's 'tough on crime' policies resulted in the largest increases in federal and state prison inmates of any president in American history."<sup>44</sup> Thus, both sides of the political aisle have taken on an intense ferocity when it comes to their rhetoric and actions regarding crime, and particularly illegal drugs.<sup>45</sup>

### B. *It's a Numbers Game*

While racial politics is one reason why the *rhetoric* regarding the war on drugs has focused on African-Americans and Latinos, there is also a more practical explanation why the war on the ground has focused on these communities: the war on drugs is a numbers game;<sup>46</sup> poor urban neighborhoods are the easiest places to increase arrest numbers.<sup>47</sup> The sale of drugs tends to be the most visible in poor urban neighborhoods with low-level dealers on street corners.<sup>48</sup> Poor African-Americans and Latinos tend to be concentrated in these

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THE PRESIDENT 1965, at 263-71 (1966); see also López, *supra* note 21, at 1033.

<sup>41</sup> Michael Kramer, *Frying Them Isn't the Answer*, TIME, Mar. 14, 1994, at 32; see also López, *supra* note 21, at 1038 (arguing that Clinton's "aggressive engagements with crime and welfare during the 1990's" was a way to pander to "white voters through coded racial appeals").

<sup>42</sup> Specifically, the bill created dozens of new federal capital offenses and imposed mandatory life sentences for some three-time offenders. See ALEXANDER, *supra* note 4, at 55.

<sup>43</sup> See *id.*

<sup>44</sup> David Guard, *Clinton Crime Agenda Shortsighted; May Hurt Poor and Minorities*, *Advocates Say*, STOP DRUG WAR.ORG (Apr. 15, 2008, 1:40 PM), [http://stopthedrugwar.org/trenches/2008/apr/15/clinton\\_crime\\_agenda\\_shortsighte](http://stopthedrugwar.org/trenches/2008/apr/15/clinton_crime_agenda_shortsighte).

<sup>45</sup> See Nunn, *supra* note 4, at 390 ("For each anti-drug measure that passed, it became necessary to further escalate the war so that no one, Democrat or Republican, executive or legislative branch, could be called soft on this critical issue."); see also Gruber, *supra* note 13, at 618 ("[B]eing tough on crime has become a sure-win platform on both sides of the political aisle."). For a discussion about why the election of Barack Obama as the first African-American president probably will not end the mass incarceration of African-Americans and Latinos, see generally López, *supra* note 21, at 1068-73.

<sup>46</sup> See BUTLER, *supra* note 4, at 93-94.

<sup>47</sup> See STUNTZ, *supra* note 4, at 54; see also BUTLER, *supra* note 4, at 93-94.

<sup>48</sup> See STUNTZ, *supra* note 4, at 54.

neighborhoods;<sup>49</sup> poor whites tend to be geographically dispersed.<sup>50</sup> In addition, abandoned, dilapidated buildings and houses in blighted areas are havens for drug sales and drug users.<sup>51</sup> In contrast, white suburban drug use and sales can be more hidden.<sup>52</sup>

It is important to note that prior to the mid-1980s, the criminal justice system was marginal to communities of color.<sup>53</sup> While poor, uneducated men of color have always had high and disproportionate rates of incarceration, it was not until the end of the last century that the exponential rate of incarceration made the penal system a “dominant presence” in disadvantaged neighborhoods.<sup>54</sup>

Beginning with President Reagan’s term in office, the federal government has offered millions of dollars to state and local agencies willing to fight drug crimes.<sup>55</sup> Many of the prolific specialized narcotics task forces that exist throughout the country today are the result of the Edward Byrne Memorial State and Local Law Enforcement Assistance Program.<sup>56</sup> In order to convince the federal government that they are putting the grant money to good use, however, these task forces are under extreme pressure to keep their arrest numbers up.<sup>57</sup> Otherwise, the federal government will not renew their grant money.<sup>58</sup>

Special forfeiture provisions also incentivize high arrest numbers because the cash and assets that state and local law enforcement agencies seize upon arrest become the property of those agencies under revenue-sharing agreements with the federal government.<sup>59</sup>

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<sup>49</sup> See *id.*; George Lipsitz, “In an Avalanche Every Snowflake Pleads Not Guilty”: *The Collateral Consequences of Mass Incarceration and Impediments to Women’s Fair Housing Rights*, 59 UCLA L. REV. 1746, 1806 (2012).

<sup>50</sup> See STUNTZ, *supra* note 4, at 54.

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> See ALEXANDER, *supra* note 4, at 183.

<sup>54</sup> *Id.*

<sup>55</sup> See *id.* at 72.

<sup>56</sup> *Id.* The program is authorized by the Anti-Drug Abuse Act of 1986 as amended in 1988. See Pub. L. No. 100-600, 102 Stat. 4329 (codified as amended in scattered sections of 42 U.S.C. §§ 3750-55 (2012)).

<sup>57</sup> See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 82 (1998); see also *United States v. Reese*, 2 F.3d 870, 874 (9th Cir. 1993) (describing the pressures experienced by members of an Oakland Housing Authority police task force to maintain strong drug arrest numbers).

<sup>58</sup> Blumenson & Nilsen, *supra* note 57, at 82.

<sup>59</sup> See ALEXANDER, *supra* note 4, at 77; see also 18 U.S.C. § 981(e)(2) (2012); 19 U.S.C. § 1616a(c) (2012); 21 U.S.C. § 881(e)(1)(A) (2012). For discussions about how federal funding of the war on drugs and asset forfeiture provisions breed

Criminal charges do not even have to be brought against the owners of this property in order for agencies to keep it.<sup>60</sup> Instead, the government only has to prove by a preponderance of the evidence that the property was involved in a commission of a drug crime.<sup>61</sup> The owner of the property then has the burden to prove that she “did not know of the conduct giving rise to the forfeiture” or that she did “all that reasonably could be expected under the circumstances to terminate such use of the property.”<sup>62</sup> Counsel is appointed only for those individuals who have been formally charged with a crime,<sup>63</sup> but the vast majority of forfeiture cases involve individuals who have not been charged with anything.<sup>64</sup> Without an appointed attorney, many choose not to challenge their forfeitures because the cost of an attorney is often more than what their property is worth.<sup>65</sup> Furthermore, individuals might fear that if they challenge a forfeiture of their property, they will risk the chance that the government will decide to file formal criminal charges in retaliation.<sup>66</sup> For these reasons, up to 90% of forfeiture cases are not challenged in some jurisdictions.<sup>67</sup>

Given the financial stakes involved, drug offenders in poor, inner city communities arguably are the most logical targets of the war on drugs. If federal grant money incentivizes high arrest rates, then the police will focus on communities where they can increase their numbers with the lowest amount of effort.<sup>68</sup> Moreover, special forfeiture provisions also incentivize high arrest rates and an intense focus on those who cannot afford to challenge the seizure of their assets.

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corruption in police departments, see generally ALEXANDER, *supra* note 4, at 80-81; Ted Conover, *A Snitch's Dilemma*, N.Y. TIMES (June 29, 2012), [http://www.nytimes.com/2012/07/01/magazine/alex-white-professional-snitch.html?\\_r=0&pagewanted=print](http://www.nytimes.com/2012/07/01/magazine/alex-white-professional-snitch.html?_r=0&pagewanted=print).

<sup>60</sup> See ALEXANDER, *supra* note 4, at 81. Women in relationships with men suspected of drug crimes are the most frequent claimants in forfeiture proceedings. *See id.*

<sup>61</sup> See 18 U.S.C. § 983(c) (2012).

<sup>62</sup> *Id.* § 983(d)(2)(A).

<sup>63</sup> *See id.* § 983 (b)(1)(A).

<sup>64</sup> See ALEXANDER, *supra* note 4, at 81.

<sup>65</sup> *See id.* at 81-82.

<sup>66</sup> *See id.*

<sup>67</sup> *Id.* at 82.

<sup>68</sup> See Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 122 (2006) [hereinafter *Race, Drugs, and Policing*] (finding “some evidence that law enforcement’s focus on outdoor drug venues does contribute to racial disparity in drug arrests”).

### C. Racial Stereotypes

The higher visibility of drug sales in poor, urban neighborhoods is probably not the only reason that poor African-Americans and Latinos have been the focus of the war on drugs. Scholars have noted that “there has always been a racial dimension to American drug policy.”<sup>69</sup> Anxiety about Chinese immigrants in the mid-1870s led to the first national campaign against narcotics, specifically opium.<sup>70</sup> The perceived threat of African-Americans after Reconstruction led to the nation’s first drug criminalization statute, which made cocaine illegal.<sup>71</sup> During the 1920s, marijuana and Mexican-Americans, who were viewed as a labor threat, became the focus of laws in the western states.<sup>72</sup> During all of these campaigns, racist stereotypes justified the focus on people of color.<sup>73</sup>

Similarly, empirical research suggests that the stereotypes regarding crack dealers, crack babies, and crack whores not only affect the public perception of the drug problem, but they also affect the discretionary decisions of law enforcement.<sup>74</sup> One study found that the Seattle Police Department ignored reports of outdoor activity in predominately white areas of Seattle, and with respect to racially mixed open-air markets, African-American dealers were far more likely to be arrested than whites.<sup>75</sup> The police also devoted their resources to open-air markets in the precinct that was the least likely

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<sup>69</sup> See Katherine Beckett et al., *Drug Use, Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419, 424 (2005) [hereinafter *Drug Use*]; Nunn, *supra* note 4, at 412.

<sup>70</sup> See Nunn, *supra* note 4, at 413.

<sup>71</sup> See *id.* at 415-16.

<sup>72</sup> See *id.* at 416-17.

<sup>73</sup> Because a significant number of Chinese-Americans used opium, the focus on opium created a justification to harass them. See *id.* at 413-14. Furthermore, “[i]t was widely believe[d] that Chinese opium dens would entrap virtuous white women who would then be available to have sex with Asian men.” *Id.* at 414. After the Reconstruction, whites believed that cocaine fortified African-Americans for criminal activities. See *id.* at 415. Whites were particularly fearful that African-Americans would forget their place, become violent, and rape white women. See *id.* at 415-16. During the 1920s, whites believed that marijuana “encouraged Chicanos to commit crimes and become more violent and dangerous.” *Id.* at 417.

<sup>74</sup> See Beckett et al., *Drug Use*, *supra* note 69, at 436 (concluding that the Seattle Police Department’s decision to focus on crack and outdoor markets in the downtown area was based on a “racialized conception of ‘the drug problem’”); see also Nunn, *supra* note 4, at 382 (“In the minds of the criminal justice system’s managers, planners and workers, drugs are frequently associated with African American citizens and their communities.”).

<sup>75</sup> See Beckett et al., *Race, Drugs, and Policing*, *supra* note 68, at 129-30.

to be identified by citizen complaints as having suspected drug activity.<sup>76</sup> In other words, they were not focusing on these open-air markets because citizens were asking them to focus on these markets. Indeed, Seattle residents were far more likely to report suspected drug activity *indoors* and not in open-air markets,<sup>77</sup> but just as was the case with open-air arrests, African-American dealers were overrepresented in indoor sale arrests.<sup>78</sup> Most importantly, the police department focused on crack, which is more likely sold by African-Americans, even though local hospital records indicated that more overdose deaths were caused by heroin, which is predominately injected by whites,<sup>79</sup> than by crack and powder cocaine combined.<sup>80</sup> The authors ultimately concluded that law enforcement's focus on crack was an important cause for the disproportionate rate of African-Americans arrested for drug delivery.<sup>81</sup> They also concluded that the focus on crack was the primary cause of racial disparity in drug possession arrests in Seattle.<sup>82</sup> Specifically, law enforcement focused on African-American and Latino users.<sup>83</sup> Regardless of whether it is conscious or subconscious,<sup>84</sup> just as it has in the past, race and racial stereotypes appear to play a role in current drug and criminal justice policy.

## II. THE WAR ON CRIME AND PRIVACY

Several scholars have documented how the war on crime has had subordinating effects on poor people of color.<sup>85</sup> In this Part, I will

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<sup>76</sup> See *id.* at 126.

<sup>77</sup> See *id.*

<sup>78</sup> *Id.* at 122.

<sup>79</sup> See Beckett et al., *Drug Use*, *supra* note 69, at 425, 434.

<sup>80</sup> See *id.* at 434.

<sup>81</sup> Beckett et al., *Race, Drugs, and Policing*, *supra* note 68, at 119.

<sup>82</sup> Beckett et al., *Drug Use*, *supra* note 69, at 436.

<sup>83</sup> *Id.*

<sup>84</sup> See ALEXANDER, *supra* note 4, at 12-15 (arguing that racial indifference, rather than racial hostility or overt bigotry, has led to a criminal justice system that has replaced Jim Crow as the American racial caste system); Nunn, *supra* note 4, at 440-41, 445 (arguing that the criminal justice system is the foundation for racist attitudes and behaviors and that African-Americans and other people of color serve as a "pool of surplus criminality" in American society in that they are a criminal class ever ready to be blamed during times of national crisis); Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 95-98 (2001) (arguing that "hyper-incarceration" has replaced the ghetto as an institution of social control over under-skilled African-American men).

<sup>85</sup> See, e.g., ALEXANDER, *supra* note 4, at 20-57 (defining the current criminal justice system as the "new Jim Crow"); William H. Buckman & John Lamberth, *Challenging Racial Profiles: Attacking Jim Crow on the Interstate*, 10 TEMP. POL. & CIV.

discuss some of the most prevalent tactics used in the war on crime and argue that the fact that these tactics actually deprive individuals of privacy is an important, and often overlooked, aspect of this subordination. In fact, the war on crime exemplifies how the deprivation of privacy makes one vulnerable to oppressive state social control. The constant monitoring of poor people of color by the state at minimum has a chilling effect on their willingness to engage in self-determination, self-expression, and freedom of association. In contrast, privacy enhances an individual's ability to engage freely in these activities that society views as valuable<sup>86</sup> in part because they provide a check against overly oppressive social control. The state's provision of individual privacy also has an expressive aspect in that it is a demonstration of respect; when the state provides privacy, it sends the implicit message that the individual is "worthy" of and can be trusted with engaging in essential traits of personhood.<sup>87</sup>

#### A. What Is Privacy?

The concept of privacy is multi-faceted and covers a wide variety of contexts. There is the physical aspect of privacy, which concerns limiting physical invasions on a person or her property.<sup>88</sup> There is the emotional aspect of privacy, which concerns protecting the integrity of intimate relationships.<sup>89</sup> There is also the personal aspect of privacy,

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RTS. L. REV. 387, 387-88 (2001); Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703, 723 (2000).

<sup>86</sup> See *Katz v. United States*, 389 U.S. 347, 350 n.2 (1967) (noting that privacy is foundational to many constitutional rights because "[v]irtually every governmental action interferes with personal privacy to some degree"); see also Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1088-93 (2002) [hereinafter *Conceptualizing Privacy*] (defining privacy as a "general term that refers to the practices we want to protect and to the protections against disruptions to these practices").

<sup>87</sup> According to Anita Allen, "[t]o be a person in the moral sense is to possess traits in virtue of which one is entitled to a high standard of treatment and to be held to a high standard of conduct." ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 43 (1988). According to Anglo-American ethicists in the Kantian tradition, "[s]elf consciousness, free-will, rationality, moral agency, and the ability to form life plans are essential traits of personhood." *Id.* Privacy creates, sustains, and enhances personhood because it provides individuals with the space to develop these traits. See *id.* at 44.

<sup>88</sup> See, e.g., U.S. CONST. amend. IV (prohibiting unreasonable searches and seizures of "persons, houses, papers, and effects").

<sup>89</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (determining that the marital relationship is "within the zone of privacy created by several fundamental constitutional guarantees").

which concerns autonomy in decision-making.<sup>90</sup> All of these aspects share “family resemblances” to one another, yet they all also involve distinct activities and harms.<sup>91</sup> Furthermore, my description of these three particular aspects of privacy is incomplete. An attempt to provide a universal definition that covers all aspects of privacy would prove futile because the activities and potential harms at stake depend on the context surrounding a specific privacy invasion.<sup>92</sup>

In the criminal justice context, the state engages in an unjustifiable privacy invasion whenever the monitoring of its citizens results in the abuse of its power. This abuse can come in the form of the prohibition of activities that society views as valuable; the creation of a sense of being constantly monitored by the state, which then has a chilling effect on these activities; or the unjustifiable aggregation of data on the state’s citizens. These abuses result in serious dignitary harms because of the level of suspicion and distrust they thrust upon the individual.

According to Anglo-American ethicists in the Kantian tradition, “[s]elf consciousness, free-will, rationality, moral agency, and the ability to form life plans are essential traits of personhood.”<sup>93</sup> Privacy creates, sustains, and enhances personhood because it provides individuals with the space to develop these traits<sup>94</sup> without the fear of being monitored, judged, and sometimes even unjustifiably punished. The war on crime creates such an oppressive feeling of being watched by the state, that it at minimum has a chilling effect on poor people of color’s self-determination, self-expression, and freedom of association. Self-determination enables an individual to create the life that one wants to create. Self-expression and freedom of association allow for the free exchange of ideas and experimentation with one’s identity, which are both important for self-development. They also make it easier for one’s ideas and cultural identity to become part of mainstream political discourse. In addition, freedom of association, particularly with a diverse group of people, increases a poor person of color’s social capital and chances for upward mobility.<sup>95</sup>

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<sup>90</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (extending the right to privacy to the right to decide whether to terminate a pregnancy).

<sup>91</sup> See Solove, *Conceptualizing Privacy*, *supra* note 86, at 1096-99.

<sup>92</sup> See Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 480-81 (2006); Solove, *Conceptualizing Privacy*, *supra* note 86, at 1088-93.

<sup>93</sup> ALLEN, *supra* note 87, at 43.

<sup>94</sup> See *id.* at 44.

<sup>95</sup> See Capers, *Rethinking the Fourth Amendment*, *supra* note 17, at 23 (arguing that racial segregation limits access to the types of informal social networks that increase the likelihood of upward mobility).

Because privacy is the foundation for freedoms that enable the creation of one's identity and life plans, the more privacy one has, the less vulnerable he is to oppressive state social control.<sup>96</sup> For this reason, the level of privacy granted by the state has historically tracked the level of one's political power and status.<sup>97</sup> Wealthy, white men historically have had the greatest amount of privacy; women, the poor, and people of color have had the least amount of privacy, and, therefore, they have been vulnerable to more severe policies of state social control.<sup>98</sup> For example, there was a time when women had to adhere to certain standards of sexual and reproductive conduct in order to be entitled to welfare benefits.<sup>99</sup> Eligibility for Aid to Dependent Children was based on "suitable-home or 'man-in-the-house' rules."<sup>100</sup>

Scholars have documented the fact that the poor and people of color continue to have the least amount of privacy in our society and, therefore, they are still the most vulnerable to more extreme state social control policies.<sup>101</sup> Some argue that welfare is still a means of regulating the sexual behavior of many poor, single women.<sup>102</sup> Indeed, many women currently must participate in mandatory paternity proceedings in order to be entitled to benefits, and many jurisdictions

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<sup>96</sup> See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989).

<sup>97</sup> See Kimberly D. Bailey, *It's Complicated: Privacy and Domestic Violence*, 49 AM. CRIM. L. REV. 1777, 1803-04 (2012); Jonathan L. Hafetz, "A Man's Home Is His Castle?": *Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN & L. 175, 177-78 (2002).

<sup>98</sup> See sources cited *supra* note 97.

<sup>99</sup> See Dorothy Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931, 941-42 (1995) [hereinafter *Unconstitutional Conditions*].

<sup>100</sup> See *id.*

<sup>101</sup> See, e.g., MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY* 191 (1995); Annette Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 770 (2001); Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 118-34 (2011); Dorothy Roberts, *The Dialectic of Privacy and Punishment in the Gendered Regulation of Parenting*, 5 STAN. J. C.R. & C.L. 191, 194 (2009); Roberts, *Unconstitutional Conditions*, *supra* note 99, at 941; Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1469-70 (1991); Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 125 (2002).

<sup>102</sup> See Janet Simmonds, *Coercion in California: Eugenics Reconstituted in Welfare Reform, the Contracting of Reproductive Capacity, and Terms of Probation*, 17 HASTINGS WOMEN'S L.J. 269, 276-81 (2006) (arguing that family cap programs that limit the receipt of welfare benefits for certain children in several states is a type of social control that infringes on women's reproductive rights).

impose family caps, which limit cash benefit increases for any children conceived while the mother is receiving welfare benefits.<sup>103</sup> Recipients of state funded prenatal care often have to endure highly embarrassing and intrusive questions about their parenting history, criminal history, immigration status, contraceptive use, and finances, which middle- and upper-class women simply do not have to endure.<sup>104</sup> Furthermore, the Supreme Court has held that welfare recipients are not entitled to Fourth Amendment rights when it comes to searches in their homes.<sup>105</sup> Social workers can stop by and search a recipient's home and interview her with no warning or warrant. As will be discussed more fully below, the privacy invasions that result from current criminal justice policies also contribute to greater social control of poor people of color because of the chilling effects they have on self-determination, freedom of association, and freedom of expression.

In addition to making poor people of color more vulnerable to oppressive state social control, the war on crime has also created serious dignitary harms. When the state curtails privacy, it sends a powerful message: an individual cannot be trusted to use his privacy in legitimate ways.<sup>106</sup> For example, parents tend to give their children less privacy because they do not yet trust that the children have the maturity and wisdom not to make choices that could potentially harm themselves or others. Likewise, one reason we limit the privacy of prisoners is because their past acts suggest that we cannot trust them not to engage in criminal and potentially dangerous activities, at least for a set period of time. The lack of trust expressed by the state through the war on crime, therefore, at best resembles a form of paternalism; at worst, it resembles a form de facto criminalization of individuals simply because they are poor and of color.<sup>107</sup> These individuals logically conclude that the state does not respect them nor

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<sup>103</sup> See *id.*; Smith, *supra* note 101, at 123, 174.

<sup>104</sup> Bridges, *supra* note 101, at 118-34.

<sup>105</sup> *Wyman v. James*, 400 U.S. 309, 326 (1971).

<sup>106</sup> Cf. Scott E. Sundby, "Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?", 94 COLUM. L. REV. 1751, 1784 (1994) ("A government-citizen metaphor in the context of the Fourth Amendment is consistent with the Court's recognition in cases such as *Brown* and *Loving* that rights are not simply enclaves of protection from government interference but also affect the citizen's view of his or her role in society.").

<sup>107</sup> One man interviewed by the Center for Constitutional Rights actually described the militarization of his neighborhood by the police as an "outside prison." CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 3, at 19.

does it view their identities and viewpoints as equal to those of white and wealthier citizens.<sup>108</sup>

### B. *The War on Crime's Impact on Individual Privacy*

#### 1. Stops-and-Frisks and Motor Stops

The myopic focus of the war on drugs on arrest and conviction rates, combined with the racialized view of illegal drug use, creates an environment where police officers feel free to subject poor urban African-Americans and Latinos to intrusive stops-and-frisks on a daily basis.<sup>109</sup> In 2011, 84% of stops-and-frisks conducted in New York were on African-Americans and Latinos.<sup>110</sup> Eighty-eight percent of these stops did not result in an arrest or a summons being given.<sup>111</sup> Contraband was found in only 2% of these stops.<sup>112</sup> In other words, although the vast majority of residents of poor urban neighborhoods are law-abiding citizens, many of them still have to tolerate these intrusions.<sup>113</sup> Indeed, particularly for young, African-American and Latino males, they are a regular part of life.<sup>114</sup> For example, between January 2006 and March 2010, the police stopped 52,000 individuals in an eight-block minority area in Brooklyn.<sup>115</sup> This amounted to an average of one stop per resident per year.<sup>116</sup> The average increased to five stops per person for males fifteen to thirty-four years of age.<sup>117</sup>

Some of those who have been stopped by the New York Police Department describe a hornet-like invasion where they are barraged with questions such as “where’s the weed?” and “where’s the guns?”<sup>118</sup> These exchanges are sometimes laced with profanity, racial epithets,

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<sup>108</sup> See *id.* at 11, 14; see also Capers, *Rethinking the Fourth Amendment*, *supra* note 17, at 47-48.

<sup>109</sup> See CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 3, at 3.

<sup>110</sup> In 2010, Blacks made up 23% of New York City’s population; Latinos made up 29% of the population. See *id.* at 27 n.2.

<sup>111</sup> *Id.* at 27 n.3.

<sup>112</sup> *Id.* at 27 n.4.

<sup>113</sup> See ALEXANDER, *supra* note 4, at 69.

<sup>114</sup> CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 3, at 17-22.

<sup>115</sup> Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES, July 12, 2010, at A1. Approximately 14,000 residents lived in this area. *Id.*

<sup>116</sup> Less than 1% of the stops resulted in arrest. Only twenty-five firearms were recovered during these stops. *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Ruderman, *Rude or Polite*, *supra* note 4.

and name-calling like “immigrant,” “old man,” or “bro.”<sup>119</sup> Other exchanges are more polite where the police officer asks whether they can talk with the individual; asks him a series of questions such as what he is doing, where he lives, and whether he has anything on him; and then lets the individual go.<sup>120</sup> In either type of exchange, the subjects of these stops often report “feeling intruded upon and humiliated.”<sup>121</sup> A college student from Brooklyn describes, “They talk to you like you’re ignorant, like you’re an animal.”<sup>122</sup> Another man from Queens describes feeling “belittled,” even though he once experienced a more polite exchange.<sup>123</sup> Individuals often feel shame after these interactions and fear that others who witness the stop-and-frisk will assume that they are criminals.<sup>124</sup> Even young children are not immune from this practice. One New Yorker reports,

There’s a junior high school [where] almost all the kids are either of Arabic [sic] descent or Latino. There [were] days when you’d see all these little kids lined up, with their legs spread, holding [onto] the wall, and the cops are going through their pockets and stuff. It’s just like a terrible, disgusting, horrible thing to see.<sup>125</sup>

Furthermore, police often engage in abusive and inappropriate behaviors via the stop-and-frisk including forcibly stripping individuals down to their underclothing in public, “inappropriate touching, physical violence and threats, extortion of sex, sexual harassment and other humiliating and degrading treatment.”<sup>126</sup> Objecting to inappropriate touching can lead to a charge of resisting arrest.<sup>127</sup>

What is most striking about this practice is that residents of particular communities have had to modify their everyday activities in order to lessen the risk associated with police encounters.<sup>128</sup> New Yorkers of color describe refraining from wearing stereotypical “ethnic” clothing and hair styles to make themselves less likely to be

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 3, at 6.

<sup>125</sup> *Id.* at 13.

<sup>126</sup> *Id.* at 5.

<sup>127</sup> *Id.*

<sup>128</sup> *See id.* at 17.

accosted by the police.<sup>129</sup> They also describe taking public transportation and avoiding walking altogether to avoid encounters with law enforcement on the street.<sup>130</sup> Others describe how young people have to stay indoors and cannot play outside.<sup>131</sup> Adults feel like they cannot sit on the porch or go to the store or interact with their neighbors.<sup>132</sup>

The police have particularly focused on public housing sites for heightened surveillance,<sup>133</sup> but the city of New York also has a special program, Operation Clean Halls, which involves private buildings.<sup>134</sup> Under this program, owners of private buildings sign contracts with the New York Police Department, which allows the police to patrol these buildings.<sup>135</sup> African-Americans and Latinos are disproportionately stopped by police as part of this program.<sup>136</sup>

In order to avoid the accusation of trespassing, many New Yorkers report always carrying identification or a piece of mail verifying that they live in a particular building.<sup>137</sup> Some report that residents of a building may even have to produce a lease in order to avoid arrest.<sup>138</sup> For many, they daily must endure police inquiries of, “Do you live here?”<sup>139</sup> New Yorkers report that they also carry pay stubs to prove that they have a legitimate source of income.<sup>140</sup>

In Chicago, police cars patrol public housing projects and when they stop, every young African-American man in the area automatically places his hands against the car and spreads his legs to be searched.<sup>141</sup> This automatic reflex to “assume the position” happens

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<sup>129</sup> *Id.* at 7. One woman laments, “It got to the point where I have agreed to myself not to get any ethnic hairdos for a while . . . because I have been harassed by the police while wearing hair like in dreadlocks or cornrows.” *Id.* at 28 n.34.

<sup>130</sup> *Id.* at 18.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 19; see Rivera et al., *supra* note 115, at A1 (noting that a broken lock on a housing project building can lead to anyone who enters that building being stopped as a potential trespasser).

<sup>134</sup> See Colleen Long, *NYPD Operation Clean Halls Challenged in Court; Program Allows Police Inside Private Buildings*, HUFF. POST (Mar. 11, 2013), [http://www.huffingtonpost.com/2013/03/11/nypd-operation-clean-halls\\_n\\_2852097.html](http://www.huffingtonpost.com/2013/03/11/nypd-operation-clean-halls_n_2852097.html).

<sup>135</sup> See *id.*

<sup>136</sup> In 2012, 55% of those stopped were black, 32% were Hispanic, and 10% were white. *Id.*

<sup>137</sup> CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 3, at 17.

<sup>138</sup> *Id.* at 19.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 17.

<sup>141</sup> See ALEXANDER, *supra* note 4, at 122-23.

in poor communities of color across the nation,<sup>142</sup> and it underscores how constant police presence and surveillance have become woven into the everyday fabric of poor, urban life. It is not surprising, therefore, that residents in these communities describe this constant presence as a type of “military occupation”<sup>143</sup> or “outside prison.”<sup>144</sup>

A variation of the stop-and-frisk is the “stop-and-sniff.” New York police officers will stop individuals drinking from cups in public.<sup>145</sup> They then ask to sniff the contents of the individual’s cup to see if it contains alcohol.<sup>146</sup> If it smells like alcohol, they are issued a summons for public drinking.<sup>147</sup> The penalty for the offense is small at twenty-five dollars per ticket, but the real purpose for these stops is to have an excuse to check to see if an individual has any outstanding warrants.<sup>148</sup> As is the case with stop-and-frisk practices, residents are angry and resentful when police officers demand to sniff the contents of their cups.<sup>149</sup> Furthermore, one judge found that 85% of the summonses that were issued during one month in Brooklyn were to African-Americans and Latinos.<sup>150</sup>

Just as is the case with stops-and-frisks, motor vehicle stops are a numbers game.<sup>151</sup> As a result, tens of thousands of innocent individuals are pulled over every year as part of the war on drugs.<sup>152</sup> Unfortunately, a disproportionate number of these individuals are African-American and Latino.<sup>153</sup> Indeed, many are familiar with the terms “driving while black” or “driving while brown,” which refer to the disproportionate effects of traffic stops on African-Americans and Latinos.<sup>154</sup> Some New Yorkers report that they avoid driving altogether

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<sup>142</sup> See *id.* at 122.

<sup>143</sup> *Id.* at 122-23; CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 3, at 19.

<sup>144</sup> CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 3, at 19.

<sup>145</sup> Joseph Goldstein, *Sniff Test Does Not Prove Public Drinking, a Judge Rules*, N.Y. TIMES, June 14, 2012, at A32 [hereinafter *Sniff Test*].

<sup>146</sup> See *id.*; see also Rivera et al., *supra* note 115, at A1 (describing an incident where twenty police officers surrounded a man because he refused to let an officer smell the contents of his orange juice container).

<sup>147</sup> See Goldstein, *Sniff Test*, *supra* note 145, at A32.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See *People v. Figueroa*, 948 N.Y.S.2d 539, 542 (N.Y. Crim. Ct. 2012).

<sup>151</sup> See ALEXANDER, *supra* note 4, at 70 (quoting a California police officer as confirming, “You’ve got to kiss a lot of frogs before you find a prince”).

<sup>152</sup> See *id.*

<sup>153</sup> See *id.*

<sup>154</sup> See Capers, *Rethinking the Fourth Amendment*, *supra* note 17, at 16-17; Nunn, *supra* note 4, at 401.

and opt for public transportation in order to avoid these confrontations.<sup>155</sup>

The current state of Fourth Amendment law legitimates these stops. Under *Terry v. Ohio*, a police officer may stop a person if he has reasonable suspicion that a crime is afoot.<sup>156</sup> The Supreme Court did not take great pains to define “reasonable suspicion” other than to state that it has to be something more than just a “hunch.”<sup>157</sup> A police officer has to be able to articulate specific reasonable inferences drawn “from the facts in light of his experience.”<sup>158</sup> Once a police officer has stopped an individual under reasonable suspicion, he also may conduct a frisk if he reasonably believes that the person may have a weapon that could potentially harm the officer.<sup>159</sup> The Court’s rationale behind *Terry* was to balance law enforcement’s interest in investigating and preventing potential crimes with an individual’s Fourth Amendment right to not be subject to unreasonable searches and seizures.<sup>160</sup> Its holding also was intended to minimize the potential safety risks police officers face during the pursuit of their duties.<sup>161</sup> Although *Terry* provides law enforcement with a great deal of discretion, there are still cases where the police abuse or outright violate it.<sup>162</sup> Moreover, a police officer does not even need to rely upon *Terry* if an individual consents to answer his questions or to be searched.<sup>163</sup> Most individuals do not feel free *not* to give such consent, especially if they are poor or of color.<sup>164</sup>

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<sup>155</sup> See CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 3, at 18.

<sup>156</sup> 392 U.S. 1, 30 (1967).

<sup>157</sup> *See id.* at 27.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *See id.* at 19-22.

<sup>161</sup> *See id.* at 23-24.

<sup>162</sup> It has been documented that as recently as 2010, some New York Police Department officers “were under the mistaken impression that they ‘were entitled to stop and question anyone inside’ public housing.” Joseph Goldstein, *Prosecutor Deals Blow to Stop-and-Frisk Tactic*, N.Y. TIMES, Sept. 26, 2012, at A1 [hereinafter *Prosecutor Deals Blow*].

<sup>163</sup> *See Florida v. Bostick*, 501 U.S. 429, 434 (1991).

<sup>164</sup> *See Capers, Rethinking the Fourth Amendment*, *supra* note 17, at 21 (“In short, the law-abiding minority is likely to feel less able to claim or assert [the right to refuse to consent to a search.]”); Tracey Maclin, “Black and Blue Encounters” *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 249-50 (1991) (“Common sense teaches that most of us do not have thechutzpuh or stupidity to tell a police officer to ‘get lost’ after he has stopped us and asked for identification or questioned us about possible criminal conduct.”).

With respect to traffic stops, the Supreme Court has approved the use of these stops as a pretext for drug investigations; as long as a motorist has actually violated a traffic law, the police may stop him, even if their actual motivation is to search him for drugs.<sup>165</sup> Indeed, under the federal program Operation Pipeline, local and state agencies are trained on how to use a minor traffic violation as a pretext for drug searches.<sup>166</sup> Once a traffic stop is made, an officer may ask the motorist to consent to a search of his vehicle.<sup>167</sup> In some cases, a person's car is literally torn apart.<sup>168</sup> In most cases, a motorist will feel that he has no choice but to consent to this type of search;<sup>169</sup> the Supreme Court has refused to require the police to inform motorists of their right not to consent.<sup>170</sup> Operation Pipeline, in fact, trains officers on how to get consent from reluctant motorists.<sup>171</sup> If a motorist does refuse to consent, the police may also opt to bring a drug-sniffing dog to the scene. Under these circumstances, the police do not even need the motorist's permission to use the dog because a dog sniff of one's car in a public area is not considered a "search," and it therefore does not trigger Fourth Amendment protection.<sup>172</sup>

It is important to stress just how intrusive stops-and-frisks and motor stops are; they are more than just minor annoyances. Many individuals, particularly young men of color, must endure these stops monthly, weekly, and sometimes even daily.<sup>173</sup> The intensity and frequency of these stops makes these individuals feel as if they are constantly being watched by the state. As a result, some inner-city residents of New York have reported that they limit the amount of time that they spend on the street and that they go outside only when necessary in order to mitigate constant monitoring by the police and to maintain some sense of anonymity from the state.<sup>174</sup> This limitation on their mobility necessarily undermines their ability to create the types of lives that they want to create through self-determination. This

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<sup>165</sup> See *Whren v. United States*, 517 U.S. 806, 813-14 (1996).

<sup>166</sup> ALEXANDER, *supra* note 4, at 69.

<sup>167</sup> See *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996).

<sup>168</sup> ALEXANDER, *supra* note 4, at 70.

<sup>169</sup> See *Maclin*, *supra* note 164, at 249-50.

<sup>170</sup> *Robinette*, 519 U.S. at 39-40.

<sup>171</sup> ALEXANDER, *supra* note 4, at 69; see also U.S. DEP'T OF JUST., DRUG ENFORCEMENT ADMIN., *Operations Pipeline and Convoy* (Nov. 2009), <https://web.archive.org/web/20091130185156/http://www.justice.gov/dea/programs/pipecon.htm>.

<sup>172</sup> *Illinois v. Caballes*, 543 U.S. 405, 409 (2005).

<sup>173</sup> CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 3, at 17-19; see ALEXANDER, *supra* note 4, at 124-25.

<sup>174</sup> See *supra* notes 129-131 and accompanying text.

limitation also has a chilling effect on their associations with their neighbors,<sup>175</sup> and it makes associations with those outside of their neighborhood, particularly those who are of other races, very difficult.<sup>176</sup> In addition, the fact that some poor people of color feel the need to look less “ethnic” in order to avoid being a target for constant monitoring, because of racial and socioeconomic biases,<sup>177</sup> shows that the war on crime has led some to severely limit their sense of self-expression out of desire to keep some of their privacy. This fact is significant because how one dresses and how one wears one’s hair are important expressions of one’s personal and cultural identity.<sup>178</sup>

Freedom of association and expression are important aspects of self-development because they allow for the free exchange of ideas and experimentation with one’s identity. These freedoms also enable minority viewpoints and cultural identities to become part of mainstream political discourse. In addition, it has been documented that residential racial segregation limits the access that people of color have to the types of informal social networks that increase the likelihood of upward mobility.<sup>179</sup>

These stops are also problematic because this constant barrage of questioning regarding one’s activities and comings and goings expresses the lack of trust that the state has for poor people of color. It does not matter that innocent individuals do not have anything to hide,<sup>180</sup> this lack of trust shows a suspicion that these individuals need to be constantly watched in order to keep them in line. The fact that this sentiment is often expressed in a public setting intensifies the insult to their dignity because these individuals must bear the shame that others might assume that the stops confirm that poor people of color must always be watched. Furthermore, the fact that white and

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<sup>175</sup> See *supra* note 132 and accompanying text.

<sup>176</sup> See Capers, *Rethinking the Fourth Amendment*, *supra* note 17, at 27 (arguing that the heightened surveillance of individuals in neighborhoods “racially incongruent” from themselves by the police reifies residential segregation).

<sup>177</sup> See *supra* note 129 and accompanying text.

<sup>178</sup> For an analysis of the economic, physical, and psychological costs to African-American women when they attempt to conform their natural hair to white American norms, see Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1110-20 (2010).

<sup>179</sup> See also I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 49-52 (2009).

<sup>180</sup> But see Daniel J. Solove, “I’ve Got Nothing to Hide” and Other Misunderstandings of Privacy, 44 SAN DIEGO L. REV. 745, 772 (2007) (arguing that the “I’ve got nothing to hide” argument against more robust privacy protections does not address all of the problems that a lack of privacy potentially creates).

wealthier individuals do not have to endure these stops with the frequency that poor people of color do expresses that whites and wealthier individuals are worthy of more privacy, and, therefore, more trust and respect.

This indignity is further heightened by the fact that most individuals do not feel free to speak out against these stops-and-frisks.<sup>181</sup> Refusal of consent to a search or speech against an officer's actions could potentially result in retaliation in the form of a resisting arrest charge, physical violence, or future harassment.<sup>182</sup> For this reason, most individuals opt to endure this treatment in silence. Silence, however, can often make one feel complicit in his subordination.<sup>183</sup> In other words, it can make one feel like he is agreeing with the state that it has to monitor his constant movements. This feeling leads to further feelings of shame, anger, and resentment, particularly if one is being dressed down in front of others, including one's children.

In addition, the fact that the state does not appear to be concerned about the chilling effect that these privacy invasions have on self-determination, self-expression, and freedom of association suggests that minority viewpoints and identities are less worthy of recognition. For example, criminal justice policies that discourage an African-American woman from wearing her hair in braids or clothing that is viewed as stereotypically "black," because the state actors following those policies tend to focus on women who choose to express themselves in these ways, send the message that "ethnic" identities are undesirable.<sup>184</sup> Furthermore, if these practices discourage her from venturing beyond her neighborhood or even her home, the state is expressing that she "belongs" in the poor, segregated neighborhood where she resides and nowhere else.

There is also a strange paradox that is occurring surrounding the home. Both rhetorically and constitutionally speaking, the home has been particularly revered as a place where one is entitled to the utmost privacy.<sup>185</sup> Even during the era of Prohibition, the law gave homes

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<sup>181</sup> Capers, *Rethinking the Fourth Amendment*, *supra* note 17, at 22; Maclin, *supra* note 164, at 249-50.

<sup>182</sup> CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 3, at 5.

<sup>183</sup> Dorothy E. Roberts, *The Paradox of Silence: Some Questions About Silence as Resistance*, 33 U. MICH. J.L. REFORM 343, 355-56 (2000).

<sup>184</sup> The number of women stopped by police in New York in 2011 represented 6.9% of all stops. Wendy Ruderman, *For Women in Street Stops, Deeper Humiliation*, N.Y. TIMES, Aug. 7, 2012, at A1.

<sup>185</sup> See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring in part and dissenting in part) ("[P]rivacy and security in the home are central to the Fourth Amendment's guarantees as explained in our decisions and as

special protection.<sup>186</sup> In fact, the Volstead Act only covered alcohol *sales* in the home, not alcohol served to guests or kept for personal consumption.<sup>187</sup> Furthermore, the Act imposed criminal sanctions against any law enforcement officer who conducted unlawful searches in the home.<sup>188</sup>

On the one hand, stops-and-frisks on the street do not infringe upon the privacy that one enjoys in one's home. Indeed, it seems that some poor people of color are retreating and staying in their homes in order to have some semblance of privacy.<sup>189</sup> Yet because some anonymity in public space is essential for a greater amount of freedom of self-determination, self-expression, and freedom of association, privacy solely in the home is inadequate to fully engage in these freedoms.

Stops-and-frisks, however, do not even give poor people of color unfettered access to privacy in their homes. It is quite significant that many inner-city residents, particularly those who live in public housing, must endure stops-and-frisks and general police harassment right outside of their homes or within the hallways of their apartment buildings.<sup>190</sup> Given the significance that the home has in our culture, it is downright demoralizing that poor individuals of color have to carry identification or mail to prove that they actually live where they claim that they live or have to carry a pay stub to prove that they make money in a legitimate way.<sup>191</sup> Even though the home arguably can provide a respite from the state's eyes, some individuals first have to let the state take a quick peek into their lives in order to prove that they have a right to gain access to the threshold of that respite.

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understood since the beginnings of the Republic.”); *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (Breyer, J., dissenting) (“[I]t is beyond dispute that the home is entitled to special protection as the center of the private lives of our people.” (quoting *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring))); *Payton v. New York*, 445 U.S. 573, 589 (1980) (“The Fourth Amendment protects the individual’s privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home — a zone that finds its roots in clear and specific constitutional terms . . . .”); *Silverman v. United States*, 365 U.S. 505, 511 (1961) (“The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”).

<sup>186</sup> STUNTZ, *supra* note 4, at 180-81; Hafetz, *supra* note 97, at 176, 200.

<sup>187</sup> STUNTZ, *supra* note 4, at 180-81; Hafetz, *supra* note 97, at 200.

<sup>188</sup> Hafetz, *supra* note 97, at 200.

<sup>189</sup> See *supra* notes 129-131 and accompanying text.

<sup>190</sup> CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 3, at 18-19; see Goldstein, *Prosecutor Deals Blow*, *supra* note 162, at A1.

<sup>191</sup> See *supra* notes 137-140 and accompanying text.

## 2. Technology and Data Aggregation

Another troubling aspect of the war on crime is the practice of data collection through technology. One example of this is the creation of gang databases throughout the country. Not only do the police subject young African-American and Latino males to constant stops-and-frisks and harassment, but they also often use these stops to gather information about them to put into a database.<sup>192</sup> This information can include monikers, tattoos, names of associates, schools attended, home addresses, and photographs.<sup>193</sup> While the police are purportedly recording the information of only suspected gang members, the criteria for determining membership or association with a gang is highly subjective and often based on racial and ethnic stereotypes regarding the clothing, tattoos, and music choices believed to be associated with gangs.<sup>194</sup> For example, in Denver, a young person can get entered into the database by displaying any two of a list of attributes, which include, “slang, ‘clothing of a particular color,’ pagers, hairstyles, or jewelry.”<sup>195</sup> It was revealed in November 1993 that Denver had compiled a list of 6,500 “suspected” gang members.<sup>196</sup> Though African-Americans accounted for less than 5% of Denver’s population, they accounted for 57% of those on the list.<sup>197</sup> What is most stunning is that well over two-thirds of all African-American youths and young men between the ages of twelve and twenty who lived in Denver were on the list.<sup>198</sup> Latinos accounted for another one-third of the list; whites, who represented 80% of Denver’s population, only accounted for fewer than 7% on the list.<sup>199</sup> In Los Angeles, mass stops of African-American males led to the creation of a database that had their names, addresses, and other biographical information.<sup>200</sup> This practice was so prevalent that the database contained information on nearly half of all young, African-

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<sup>192</sup> Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 42 UC DAVIS L. REV. 79, 125-26 (2009).

<sup>193</sup> Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. C.R. & C.L. 115, 121 (2005).

<sup>194</sup> See ALEXANDER, *supra* note 4, at 133; Mitnick, *supra* note 192, at 125-26; Wright, *supra* note 193, at 127.

<sup>195</sup> ALEXANDER, *supra* note 4, at 133.

<sup>196</sup> MILLER, *supra* note 5, at 34-35 (citing Dirk Johnson, *2 Out of 3 Young Black Men in Denver Are on Police List of Gang Suspects*, N.Y. TIMES (Dec. 10, 1993), <http://www.nytimes.com/1993/12/11/us/2-of-3-young-black-men-in-denver-listed-by-police-as-suspected-gangsters.html>).

<sup>197</sup> *Id.* at 35.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> ALEXANDER, *supra* note 4, at 133.

American males in the city.<sup>201</sup> Similar lists, which disproportionately affect young men of color, are kept in cities across the country.<sup>202</sup> Furthermore, because state and local agencies often do not update these databases on a regular basis, once an individual is documented, his information tends to stay in a database indefinitely.<sup>203</sup> Many individuals do not even know that they are in these databases because the government is under no obligation to inform them of this fact.<sup>204</sup>

Another potentially invasive and troubling form of data collection and aggregation is the use of geolocation and social networking technology. In 2011, law enforcement agencies in the United States made more than 1.3 million requests to wireless carriers for their subscribers' information.<sup>205</sup> Between January and June 2013, they made 10,918 requests for information from Google and YouTube.<sup>206</sup> Google reports that there is a trend of increasing government surveillance of its sites.<sup>207</sup> In the first half of 2012, Twitter received 679 user information requests.<sup>208</sup> This was more requests than Twitter received during the entirety of 2011.<sup>209</sup>

It is unclear whether the police legally must obtain a warrant in order to obtain online communications and geolocation data,<sup>210</sup> but

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<sup>201</sup> *Id.*; Mitnick, *supra* note 192, at 126.

<sup>202</sup> MILLER, *supra* note 5, at 35; Mitnick, *supra* note 192, at 125-26.

<sup>203</sup> See Mitnick, *supra* note 192, at 79, 126.

<sup>204</sup> *Id.*

<sup>205</sup> See REP. ZOE LOEFGREN, FACT SHEET ON INTERNET FREEDOM LEGISLATIVE PACKAGE (Sept. 21, 2012), [http://www.lofgren.house.gov/images/user\\_images/gt/stories/pdf/fact%20sheet%20for%20ecpa%202.0%20and%20global%20free%20internet%20-%20rep%20lofgren%20-%20092112.pdf](http://www.lofgren.house.gov/images/user_images/gt/stories/pdf/fact%20sheet%20for%20ecpa%202.0%20and%20global%20free%20internet%20-%20rep%20lofgren%20-%20092112.pdf) (discussing Representative Loeffgren's introduction of H.R. 6529 and H.R. 6530 to the 112th Cong. (2012)).

<sup>206</sup> *Google Transparency Report*, GOOGLE, <http://www.google.com/transparencyreport/userdatarequests/countries/?p=2013-06> (last visited Mar. 12, 2014). Google reported that it complied with these requests either fully or partially 83% of the time. *Id.*

<sup>207</sup> *Transparency Report: Government Requests on the Rise*, GOOGLE (Nov. 13, 2012), <http://googleblog.blogspot.com/2012/11/transparency-report-government-requests.html>.

<sup>208</sup> *Twitter Transparency Report*, TWITTER (July 2, 2012), <http://blog.twitter.com/2012/07/twitter-transparency-report.html>. Twitter complied with these requests either fully or partially 75% of the time. *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> The Third Circuit has held that the Stored Communications Act allows access to cell site data with an order from a magistrate based on "reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." *In re Application of U.S. for an Order Directing a Provider of Electronic Communication Service to Disclose Records to Government*, 620 F.3d 304, 313 (3d Cir. 2010) (quoting 18 U.S.C. § 2703(d) (2012)). This standard is less than a probable cause standard. See *id.* The court did provide, however, that there may be some

many agencies habitually make warrantless requests for this information.<sup>211</sup> Some police departments have even invested in their own cell tracking technology.<sup>212</sup> There are also cases where the police have used a person's Facebook friends to obtain access to that individual's personal page, comments, and list of friends.<sup>213</sup> Furthermore, a few cities have begun using the Naval Postgraduate School's Lighthouse, a computer program that analyzes geographical and social relationships.<sup>214</sup>

A few police departments also are considering the use of surveillance drones,<sup>215</sup> but it is no secret that many cities and towns in the United States already engage in mass surveillance of public spaces using both private and public video cameras.<sup>216</sup> As part of former Mayor Giuliani's war on crime, cameras were placed in "Central Park, subway stations, and numerous 'high crime' public housing projects."<sup>217</sup> Since that time, the number of cameras has increased to such a degree that anyone who is in a public space in lower Manhattan right now is likely being watched.<sup>218</sup> The same is true with respect to Times Square.<sup>219</sup> The most recent surveillance system in New York

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circumstances when a magistrate could require a warrant showing probable cause. *Id.* at 319. In *United States v. Skinner*, the Sixth Circuit determined that the defendant did not have a reasonable expectation of privacy in the geolocation data emitted from his pay-as-you-go cell phone, and, therefore, the police's use of that data was not a Fourth Amendment violation. 690 F.3d 772, 777 (6th Cir. 2012). Various members of Congress have introduced federal legislation to require warrants for stored electronic and geolocation data. *See, e.g.*, 2012 ECPA 2.0 Act, H.R. 6529, 112th Cong. (2012). In November 2012, the Senate Judiciary Committee approved amendments to the 1988 Video Privacy Act and the 1986 Electronic Communication Privacy Act, which would require the government to obtain a warrant to obtain e-mail communications, social media postings, and other electronic private data. *See* H.R. 2471, 112th Cong. (2012).

<sup>211</sup> AM. CIVIL LIBERTIES UNION, *Cell Phone Location Tracking Public Records Request*, ACLU (Sept. 10, 2012), <http://www.aclu.org/protecting-civil-liberties-digital-age/cell-phone-location-tracking-public-records-request>.

<sup>212</sup> *Id.*

<sup>213</sup> *See, e.g.*, *U.S. v. Meregildo*, 883 F. Supp. 2d 523, 526 (S.D.N.Y. 2012).

<sup>214</sup> *See* Erica Goode, *With Green Beret Tactics, Combating Gang Warfare*, N.Y. TIMES, May 1, 2012, at A10.

<sup>215</sup> Spencer Ackerman, *Homeland Security Learns to Love Small Spy Drones*, WIRED.COM (Oct. 8, 2012), <http://www.wired.com/dangerroom/2012/10/robotic-aircraft-public-safety/>.

<sup>216</sup> *See* Capers, *Crime, Surveillance, and Communities*, *supra* note 11, at 962 (documenting that "according to a 2006 survey, at least 200 towns and cities in 37 states reported either actual use of video cameras, or plans for their use").

<sup>217</sup> *Id.* at 961.

<sup>218</sup> *See id.* at 961-62.

<sup>219</sup> *Id.* at 962.

City is the Domain Awareness System, which “aggregates and analyzes information from approximately 3,000 surveillance cameras around the city and allows the police to scan license plates, cross-check criminal databases, measure radiation levels, and more.”<sup>220</sup> In Washington, D.C. the police have plans to consolidate all cameras owned by city agencies, including the public school system, the public housing system, and the parks system.<sup>221</sup> This consolidation is estimated to include more than 5,200 cameras.<sup>222</sup> Chicago’s system involves 2,250 cameras, 250 of which have biometric technology.<sup>223</sup> Many cameras in these jurisdictions have face recognition software.<sup>224</sup>

In addition, local law enforcement, state crime labs, and the Federal Bureau of Investigation have created DNA databases of potential suspects. This practice will probably be on the rise given the Supreme Court’s recent decision in *Maryland v. King*, which held that it is constitutional to collect a DNA swab from a person who is arrested for a serious offense.<sup>225</sup> State and national databases are regulated and typically require a conviction or arrest before someone’s DNA can be collected.<sup>226</sup> Local agencies, however, have taken a broader approach. Some agencies collect the DNA of innocent victims without telling them that the samples will be saved for future searches.<sup>227</sup> Some collect samples from low-level offenders in exchange for plea bargains or in exchange for having charges dropped against them.<sup>228</sup> Some agencies are taking samples “on the mere suspicion of a crime, long before an arrest, and holding on to it regardless of the outcome. Often detectives get DNA samples simply by asking suspects for them.”<sup>229</sup> Some secretly collect DNA from discarded trash.<sup>230</sup>

Further research is needed to explore how pervasive data collection through geolocation technology and social networks is with respect to the war on crime and whether there are disproportionate effects on communities of color.<sup>231</sup> Mass surveillance through video cameras

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<sup>220</sup> *Id.* at 961.

<sup>221</sup> *Id.* at 962.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *See id.* at 963-64.

<sup>225</sup> 133 S. Ct. 1958, 1980 (2013) (5–4 decision) (Scalia, J., dissenting).

<sup>226</sup> *See* Joseph Goldstein, *Police Agencies Are Assembling Records of DNA*, N.Y. TIMES, June 13, 2013, at A1.

<sup>227</sup> *See id.*

<sup>228</sup> *See id.*

<sup>229</sup> *Id.*

<sup>230</sup> *See id.*

<sup>231</sup> It is not yet clear whether geolocation and other technologies will

obviously involves citizens other than just poor people of color, although the focus on public housing sites and “high crime” areas in some neighborhoods potentially could have disproportionate effects on poor people of color. Similarly, because poor people of color suffer disproportionate arrest and stop-and-frisk rates,<sup>232</sup> they potentially are more vulnerable to DNA collection. With respect to those jurisdictions that collect DNA from victims, poor people of color are also vulnerable given the fact that they disproportionately are the victims of violent crime.<sup>233</sup>

Not only are gang databases problematic because they sometimes lead to inaccurate data,<sup>234</sup> but they are also problematic because they potentially discourage young African-American and Latino males from spending much time outside of the home out of the fear that the state will collect personal information about them, which could then lead to them being targeted for further surveillance. This chilling effect limits their mobility and the creation of their life plans. It also means that their abilities to create robust social capital and to be part of mainstream political discourse are also limited. Gang databases also discourage poor men of color from dressing and speaking as they see fit, since part of the criteria for determining whether someone belongs in the database is how an individual dresses and whether they use slang.<sup>235</sup> How one dresses and speaks is an important aspect of self-identity and expression. In addition, gang databases potentially discourage poor young men of color from associating with one another out of a fear of guilt by association, which heightens one’s vulnerability to further surveillance. These types of friendships can be critical to a young man’s development, self-esteem, and general well-being. Furthermore, the fact that gang databases focus mainly on African-American males expresses that these individuals must be constantly monitored; they are not worthy of respect and their viewpoints and identities must be managed and cabined.

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disproportionately affect people of color in the United States, but it has been confirmed that the use of surveillance technologies in Great Britain has disproportionately affected blacks. See JAY STANLEY & CATHERINE CRUMP, AM. CIVIL LIBERTIES UNION, PROTECTING PRIVACY FROM AERIAL SURVEILLANCE: RECOMMENDATIONS FOR GOVERNMENT USE OF DRONE AIRCRAFT 12 (2011).

<sup>232</sup> See NATAPOFF, *supra* note 5, at 5 (discussing the disproportionate number of drug arrests and snitches in African-American and Latino neighborhoods); *supra* note 110 and accompanying text.

<sup>233</sup> See STUNTZ, *supra* note 4, at 272.

<sup>234</sup> See Wright, *supra* note 193, at 119-20, 127.

<sup>235</sup> See *supra* note 194 and accompanying text.

Data aggregation through geolocation technology and social networking sites is also problematic. Cell phones have become a necessity in our society. Indeed, many people, particularly poor people, do not even own landlines in their homes anymore.<sup>236</sup> If people have to worry about the tracking of their comings and goings through their cell phones, geolocation technology could have a chilling effect on their mobility and creation of life plans. In addition, it could affect their freedom of expression and association if individuals have to worry about the state having easy access to the names of whom they are calling. This aggregation of data could also have a chilling effect on discussions and connections made via social media sites. Similar chilling effects on self-determination, freedom of association, and freedom of expression are also implicated with respect to mass surveillance given the fact that more and more public spaces are being tracked twenty-four hours a day, seven days a week.<sup>237</sup>

Some may think it alarmist to consider whether the aggregation of data through technology will really have such a chilling effect, especially for innocent individuals who have nothing to hide or for those who do not even know that the data collection is happening. The problem is that even innocent conduct can sometimes be embarrassing or simply politically unpopular. This type of information could potentially affect one's job prospects, housing opportunities, and social relationships if made public. Furthermore, the volume of information that the state can gather through technology is much greater than traditional police surveillance techniques. For these reasons, some anonymity from the state via technology is essential in order to prevent this type of information from providing opportunities for state abuse. We should be particularly troubled by the potential chilling effect that law enforcement practices could have on social media activity given the fact that it has been shown to be an important catalyst for political expression and change. Data aggregation also expresses that the state distrusts that targeted individuals are engaged in legitimate activity.

Finally, although the DNA samples collected for criminal databases currently only provide information about the identification of a particular individual, and not his genetic traits, technology could

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<sup>236</sup> See Nomaan Merchant & Alan Fram, *Landline Phone Use Plumets Among Poor Households*, HUFF. POST (Apr. 20, 2011), [http://www.huffingtonpost.com/2011/04/20/landline-phones-poor-households\\_n\\_851802.html](http://www.huffingtonpost.com/2011/04/20/landline-phones-poor-households_n_851802.html).

<sup>237</sup> See Capers, *Crime, Surveillance, and Communities*, *supra* note 11, at 966, 971.

advance in the future to allow for this type of determination.<sup>238</sup> The state's access to this type of medical information could allow for wide-ranging abuse, including discrimination in housing, employment, and health benefits.

### 3. SWAT and No-Knock Entries

The militarization of law enforcement also has led to less respect for individual privacy, which is most evident in the increased use of paramilitary police units, most commonly known as Special Weapons and Tactics ("SWAT") units.<sup>239</sup> Prior to the war on drugs, SWAT teams were primarily used during highly volatile situations such as bank robberies or hostage situations.<sup>240</sup> Now, however, SWAT teams are used for routine drug arrests.<sup>241</sup> In some jurisdictions, drug warrants are *only* served by SWAT teams.<sup>242</sup>

Under the common law, the police were required to announce themselves before breaking in the doors of someone's home.<sup>243</sup> The Supreme Court has held that the "knock and announce" rule is part of the reasonableness inquiry under the Fourth Amendment.<sup>244</sup> One of the purposes of this rule is to protect "those elements of privacy and dignity that can be destroyed by a sudden entrance" by the police.<sup>245</sup> In other words, a knock and announce allows a home's occupants to gather and present themselves in a modest manner.<sup>246</sup> If it is in the

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<sup>238</sup> See *Maryland v. King*, 133 S. Ct. 1958, 1966-67, 1979 (2013).

<sup>239</sup> See RADLEY BALKO, *OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA* 1 (Cato Inst. 2006). President Reagan's administration persuaded Congress to pass the Military Cooperation with Law Enforcement Act, which encouraged the Pentagon to give military weapons, equipment, intelligence, and access to research and military bases to these agencies to help investigate drug crimes. See *id.* at 7-8. The Military Cooperation with Law Enforcement Act created an exception to the Posse Comitatus Act, which prohibits the use of the military for civilian policing. ALEXANDER, *supra* note 4, at 77. The partnership between law enforcement and the military continues, and "[i]n 1997 alone, the Pentagon handed over more than 1.2 million pieces of military equipment to local police departments." BALKO, *supra*, at 8.

<sup>240</sup> See BALKO, *supra* note 239, at 4.

<sup>241</sup> See *id.*; Nunn, *supra* note 4, at 404-05.

<sup>242</sup> See BALKO, *supra* note 239, at 4.

<sup>243</sup> See *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995).

<sup>244</sup> See *id.*

<sup>245</sup> *Hudson v. Michigan*, 547 U.S. 586, 594 (2006). The knock and announce rule also protects "human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident." *Id.* It also protects an arrestee's property from unnecessary damage. *Id.*

<sup>246</sup> See *id.*

middle of the night, a knock and announce allows a person to get out of bed and put on some clothes before the police enter.<sup>247</sup>

The Court has made it clear, however, that a knock and announce is not always required by the Fourth Amendment.<sup>248</sup> Examples of situations when this rule may not apply include when there is a risk that an arrestee may escape, when there is a risk of violence, or when there is a risk that an arrestee might destroy evidence.<sup>249</sup> In addition, the police are free to apply for a no-knock warrant before making an arrest.<sup>250</sup> The Court requires, however, that the determination as to whether the knock and announce rule applies must be made on a case-by-case basis.<sup>251</sup> In other words, the police or a magistrate cannot determine that a knock and announce is not necessary simply because the case involves a drug crime.<sup>252</sup> Nevertheless, judges in many states routinely approve no-knock warrants in drug cases,<sup>253</sup> and the police often execute drug warrants without announcing themselves.<sup>254</sup> This practice is bolstered by the fact that the Supreme Court has held that the exclusionary rule does not apply to violations of the knock and announce requirement.<sup>255</sup> For this reason, even if a court determines that the police should have knocked and announced themselves before entering someone's home, any evidence they seized during an otherwise legal search can still be used against a defendant.<sup>256</sup>

Yet, even when a court determines that a knock and announce is required, the time required between the announcement and entry is quite small. Police typically wait no more than ten or fifteen seconds before entering a person's home.<sup>257</sup> In *United States v. Banks*, the Supreme Court determined that fifteen to twenty seconds after a knock and announce was potentially enough time for the defendant to dispose of cocaine, and therefore, the police's entry within that time period was reasonable.<sup>258</sup> This small amount of time clearly does not

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<sup>247</sup> See *id.*

<sup>248</sup> See *Wilson*, 514 U.S. at 934.

<sup>249</sup> See *id.* at 936.

<sup>250</sup> See *Richards v. Wisconsin*, 520 U.S. 385, 396 n.7 (1997).

<sup>251</sup> See *id.* at 394-95.

<sup>252</sup> See *id.* at 395-96.

<sup>253</sup> See *id.* at 396 n.7.

<sup>254</sup> See ALEXANDER, *supra* note 4, at 74-75; Sharon Dolovich, *Invasion of SWAT Team Leaves Trauma and Death*, L.A. TIMES, Sept. 22, 2000, at B9, available at <http://articles.latimes.com/2000/sep/22/local/me-24904>.

<sup>255</sup> See *Hudson v. Michigan*, 547 U.S. 586, 594-99 (2006).

<sup>256</sup> See *id.*

<sup>257</sup> See BALKO, *supra* note 239, at 33.

<sup>258</sup> 540 U.S. 31, 38 (2003).

give individuals much of a chance to prepare for a police entry, especially if they are fast asleep at night. Regardless of this fact, the police use surprise home entries regularly to arrest low-level drug suspects, including those who possess small amounts of marijuana.<sup>259</sup>

What is most troubling about the militarization of drug arrests and searches, however, is the attitude that it creates among police officers. The U.S. military routinely conducts training operations with civilian police departments.<sup>260</sup> The indoctrination of military ethos into law enforcement makes it so that, with respect to drug crimes, the job of the police is no longer to serve and to protect; instead, their job is to destroy the enemy.<sup>261</sup> Descriptions of the types of slogans on the t-shirts that officers wear at SWAT conventions and competitions across the country are telling. “We don’t do drive-by shootings. We stop.” and “Operation: Ghetto Storm” are just a couple of examples.<sup>262</sup>

The tactics that these SWAT units use are similar across jurisdictions. To seize upon the element of surprise, the police often wait until late at night or just before dawn to conduct an arrest or search.<sup>263</sup> Often dressed in black, and armed with their assault weapons and sometimes a no-knock warrant, they break down an individual’s front door.<sup>264</sup> They sometimes use diversionary devices like flash bang grenades that cause temporary blindness and deafness.<sup>265</sup> Awaking in a stupor, the suspect and his family are pelted with screaming and guns in their faces.<sup>266</sup> If they are lucky, they are in their pajamas. But it is also quite likely that they are wearing very little or no clothing.<sup>267</sup> There also are likely to be children around, frightened by the commotion.<sup>268</sup> Some home occupants, sleepy and

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<sup>259</sup> See ALEXANDER, *supra* note 4, at 74-75; BALKO, *supra* note 239, at 20.

<sup>260</sup> See BALKO, *supra* note 239, at 14.

<sup>261</sup> See *id.* at 15-17.

<sup>262</sup> *Id.* at 17.

<sup>263</sup> See *id.* at 19.

<sup>264</sup> See *id.*

<sup>265</sup> *Id.*

<sup>266</sup> See *id.* at 19-20.

<sup>267</sup> See, e.g., *L.A. Cnty. v. Retelle*, 550 U.S. 609, 614-15 (2007) (finding it reasonable for officers to order naked couple out of bed given the fact that weapons could have been under the blankets of the bed); BALKO, *supra* note 239, at 45 (describing the case of Ellis Elliott who was dragged out of his home naked after a no-knock raid).

<sup>268</sup> See, e.g., BALKO, *supra* note 239, at 44 (describing how Brooklyn police mistakenly raided Williamae Mack’s home in a drug raid, pulled one of her frightened thirteen-year-old twin boys out from under his bed and put a gun to his head, and then handcuffed both boys at gunpoint).

confused about what is happening, get in defensive mode and pull out their own weapons because they mistake the police for illegal intruders.<sup>269</sup> As a result, these raids sometimes lead to deaths.<sup>270</sup> Even barking pets have been killed during some of these raids.<sup>271</sup> The risk of violence created by these surprise entries might be legitimate for the capture of violent offenders, but the vast majority of these arrests are conducted on low-level drug offenders with no history of violence.<sup>272</sup>

As already discussed, the home has traditionally been revered as the one place where one's privacy should be respected.<sup>273</sup> SWAT invasions, however, are the epitome of a lack of respect of one's privacy in the home. Not only are these surprise attacks on mostly nonviolent, and often innocent, individuals frightening and dangerous, but they also deprive residents of the opportunity for modesty and a space for intimate interactions in their homes. These violations are the highest form of disrespect because they express that the state has so much distrust for the individual, it has circumvented the norm of heightened privacy in the home. Furthermore, if a person cannot engage in self-determination, self-expression, and freedom of association in one's home, it is hard to imagine where one can engage in such activity. For this reason, the potential chilling effect of military type invasions of one's home could be quite devastating.

#### 4. Snitching

Another weapon in the war on crime arsenal is the snitch. It is important to differentiate snitches from law-abiding citizens who report crime in their communities. A snitch is someone who engages in crime and then reports criminal activity to the government in order to obtain lesser punishment or no punishment at all.<sup>274</sup> A reduction in sentencing is particularly enticing for drug defendants because federal drug charges involve severe mandatory minimum sentences that can

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<sup>269</sup> See *id.* at 19-20; Nunn, *supra* note 4, at 406.

<sup>270</sup> See BALKO, *supra* note 239, at 20. For example, in 1998, six police from an anti-gang task force in Houston raided Pedro Oregon Navarro's home based on a bad tip from a snitch. *Id.* at 22. Awakened and startled by the men's entry, Navarro pulled out his gun. *Id.* The police shot him twelve times and killed him in response. *Id.*

<sup>271</sup> See *id.* at 73; April Witt, *Deadly Force*, WASH. POST (Feb. 1, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/23/AR2009012302935.html?sid=ST2009020400177>.

<sup>272</sup> See BALKO, *supra* note 239, at 20.

<sup>273</sup> See, e.g., *supra* note 186 and accompanying text (discussing a law that gave homes special protection during the Prohibition Era).

<sup>274</sup> See BUTLER, *supra* note 4, at 93-94; NATAPOFF, *supra* note 5, at 15.

only be reduced by cooperating with the government.<sup>275</sup> The U.S. Sentencing Commission estimates that snitches provided information in 40% of drug cases that resulted in sentences of ten years or more.<sup>276</sup> Snitches also sometimes receive cash.<sup>277</sup> Indeed, forfeiture statutes authorize paying informants a percentage of the value of assets seized as the result of their tips.<sup>278</sup> Non-U.S. citizens can sometimes obtain visas in exchange for cooperation with the government.<sup>279</sup> There are even “professional” snitches who seek out drug users and dealers in order to provide tips to the police for cash or even drugs.<sup>280</sup>

Often, however, the government recruits snitches. The police might engage in an “informed bluff” where they do not have enough evidence to indict an individual, but they are still able to use the evidence that they do have to scare that person into cooperating.<sup>281</sup> The police also sometimes engage in illegal behavior in order to recruit a snitch.<sup>282</sup> They will target a particular individual and wait until he is suspected of possessing illegal contraband.<sup>283</sup> The police then “arrest” the individual based on what is usually an illegal search or seizure.<sup>284</sup> Fearful of going to jail, the individual agrees to cooperate.<sup>285</sup> In local and state systems, the deal may be either oral or written; the Federal Bureau of Investigation requires that all informant agreements be in writing.<sup>286</sup> An informant may help out with one particular case or with several cases; the state may also use him to “[keep] feelers” out in a particular community.<sup>287</sup> Snitches put back on the street often are permitted to continue to commit serious crimes with impunity.<sup>288</sup> A disturbing trend involves the recruitment of teenagers as criminal informants, which “often involves risks that are incommensurate with the charges that they are facing.”<sup>289</sup> Indeed,

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<sup>275</sup> See NATAPOFF, *supra* note 5, at 29.

<sup>276</sup> BUTLER, *supra* note 4, at 82.

<sup>277</sup> See BUTLER, *supra* note 4, at 84; NATAPOFF, *supra* note 5, at 27.

<sup>278</sup> See sources cited *supra* note 277.

<sup>279</sup> See NATAPOFF, *supra* note 5, at 29.

<sup>280</sup> See BALKO, *supra* note 239, at 3; NATAPOFF, *supra* note 5, at 15, 28.

<sup>281</sup> See NATAPOFF, *supra* note 5, at 18.

<sup>282</sup> See *id.*

<sup>283</sup> See *id.*

<sup>284</sup> *Id.* at 18-19.

<sup>285</sup> See *id.* at 19.

<sup>286</sup> See *id.*

<sup>287</sup> See *id.* at 20.

<sup>288</sup> See BUTLER, *supra* note 4, at 93; NATAPOFF, *supra* note 5, at 16.

<sup>289</sup> Sarah Stillman, *The Throwaways*, NEW YORKER 1, 2 (Sept. 3, 2012), [http://www.newyorker.com/reporting/2012/09/03/120903fa\\_fact\\_stillman](http://www.newyorker.com/reporting/2012/09/03/120903fa_fact_stillman).

because they lack training, experience, and maturity, the use of these children, sometimes as young as fourteen or fifteen, often has led to their brutal deaths.<sup>290</sup>

Sometimes prosecutors will incentivize an individual to become a snitch by agreeing to lessen or drop criminal charges against a family member.<sup>291</sup> Or, if a family member has better access to information that a prosecutor wants, the prosecutor might allow the family member to act as the snitch in order to work off the individual's charges.<sup>292</sup>

Because drug arrests disproportionately affect African-Americans and Latinos, there are a disproportionate number of snitches in their neighborhoods as "criminal offenders actively [seek] information in order to 'work off' their own charges."<sup>293</sup> In addition, the use of teenage snitches disproportionately occurs in poor African-American and Latino communities.<sup>294</sup> One study found that African-American and Latino neighborhoods were disproportionately the target of bad search warrants in San Diego, 80% of which relied upon snitches.<sup>295</sup> Many bad searches are in the form of intrusive SWAT and no-knock entries.<sup>296</sup> The reasons that snitches have become such a powerful tool, however, is because of the prevalent practice of overcharging. As will be discussed in the next section, overcharging allows prosecutors to scare suspects into cooperating through snitching in order to avoid hefty sentences.<sup>297</sup>

The use of snitching instills the realistic fear that one's neighbors, family members, or friends might be spying on him. Snitching, therefore, potentially chills freedom of expression and association because individuals do not know whom they can trust with knowledge about their thoughts, feelings, and conduct. Anything they say or do

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<sup>290</sup> See Andrea L. Dennis, *Collateral Damage? Juvenile Snitches in America's "Wars" on Drugs, Crime, and Gangs*, 46 AM. CRIM. L. REV. 1145, 1147 (2009); Stillman, *supra* note 289, at 2. Of course, these sting operations are dangerous for all inexperienced criminal informants, regardless of age. See, e.g., Gloria Gomez, *Slain Mom Was Working for Sheriff's Office*, MY FOX TAMPA (Sept. 5, 2012), <http://www.myfoxtampabay.com/story/19466008/2012/09/05/slain-mom-was-working-for-sheriffs-office> (detailing how a family suspected that a young mother of two was killed because of her work as a confidential informant).

<sup>291</sup> See NATAPOFF, *supra* note 5, at 22.

<sup>292</sup> See *id.*

<sup>293</sup> *Id.* at 5.

<sup>294</sup> See Stillman, *supra* note 289, at 4.

<sup>295</sup> See NATAPOFF, *supra* note 5, at 5.

<sup>296</sup> See BALKO, *supra* note 239, at 21.

<sup>297</sup> See *infra* Part II.B.5.

might later be used against them by the state. Indeed, snitches increase the access that the state has to an individual's private information because they supplement the limited resources the state typically has to monitor its citizens. The harms caused by snitching are heightened by the fact that a snitch might be a family member.<sup>298</sup> Snitching is another way that poor people of color feel mistrust and suspicion from the government. Furthermore, creating an atmosphere where individuals mistrust members of their own household expresses complete contempt for the privacy of poor people of color, since privacy in the home is supposed to be highly valued.

##### 5. Overcharging and Harsh Sentences

One of the most startling results of the war on crime is the exponential growth in arrest and incarceration rates, especially of African-Americans.<sup>299</sup> In fact, "[i]f jail inmates are included, per capita black incarceration is 80 percent higher than the rate at which Stalin's regime banished its subjects to the Gulag's many camps."<sup>300</sup> Nearly 60% of all incarcerated drug offenders are African-American, and African-Americans and Latinos comprise nearly 75% of drug offenders in state prisons.<sup>301</sup> In many major cities as many as 80% of young African-American men have criminal records.<sup>302</sup> As a result, the vast majority of individuals of color in poor urban neighborhoods have family members who are a part of the criminal justice system, either as prisoners or parolees.<sup>303</sup>

While the war on drugs is one cause of the increase in arrest and imprisonment rates, the chief cause is an increase in the number of individuals charged and convicted of crimes.<sup>304</sup> A common practice is to charge an individual with as many crimes as possible in order to nudge, or even coerce, a defendant into a plea agreement.<sup>305</sup> The more charges levied against a defendant, the higher his potential sentence

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<sup>298</sup> See NATAPOFF, *supra* note 5, at 107.

<sup>299</sup> See ALEXANDER, *supra* note 4, at 7; NATAPOFF, *supra* note 5, at 101-02; STUNTZ, *supra* note 4, at 48.

<sup>300</sup> STUNTZ, *supra* note 4, at 48.

<sup>301</sup> See NATAPOFF, *supra* note 5, at 102.

<sup>302</sup> See ALEXANDER, *supra* note 4, at 7.

<sup>303</sup> See Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1165 (1998).

<sup>304</sup> See STUNTZ, *supra* note 4, at 47.

<sup>305</sup> See *id.* at 81-82, 263-64. See generally ALEXANDER, *supra* note 4, at 88 (explaining that prosecutors pressure individuals into plea bargains under the threat of harsh sentences).

is.<sup>306</sup> Moreover, harsh sentences that are attached to certain crimes because of mandatory minimum and three-strikes laws also create an incentive for a defendant to plea bargain.<sup>307</sup> When prosecutors file these charges, they know full well that they do not desire to convict these defendants with the vast majority of these crimes nor do they seek such high levels of punishment.<sup>308</sup> If a defendant believes that he could be subject to death or a long prison sentence, however, he will often be more willing to plead guilty to the crime and sentence that is the actual goal of the prosecutor.<sup>309</sup> This practice of overcharging to induce guilty pleas is aided by the fact that, as part of the political war on crime over the last few decades,<sup>310</sup> state and federal legislators have both increased the number of crimes on the books and broadened the liability of criminal defendants under various crimes that already existed.<sup>311</sup> First, they have increased the number of overlapping crimes, which enable a prosecutor to charge a defendant with multiple crimes for the same conduct.<sup>312</sup> In addition, they have redefined criminal offenses in such a way that less serious conduct is criminalized more severely now than it was in the past.<sup>313</sup> As a result, the guilty plea rate in felony cases is now 96%.<sup>314</sup>

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<sup>306</sup> See STUNTZ, *supra* note 4, at 263.

<sup>307</sup> See ALEXANDER, *supra* note 4, at 88; STUNTZ, *supra* note 4, at 259.

<sup>308</sup> See STUNTZ, *supra* note 4, at 82. See generally ALEXANDER, *supra* note 4, at 88 (discussing the common practice of threatening “unbelievably harsh sentences” to induce defendants into plea bargains).

<sup>309</sup> See STUNTZ, *supra* note 4, at 82.

<sup>310</sup> In addition to political pressure on legislators to be tougher on crime, William Stuntz also cites a desire to evade the procedural hurdles created by the criminal procedure jurisprudence of the Warren Court and the influence of textualism in legal thought and theory as contributing to change in how criminal offenses were defined in the late twentieth century. See *id.* at 264-65.

<sup>311</sup> See *id.* at 81-82, 259-64.

<sup>312</sup> See *id.* at 263. Examples of this phenomenon are sections 922 and 924 of Title 18 of the U.S. Code, which create fifty-two distinct offenses for three basic types of conduct (violations of registration requirements, illegal gun possession, and the use of guns while committing a crime), and rape law, which has been transformed in many states into a broader category of several different types of coercive sexual conduct. See *id.* The California Penal Code now has sixteen sexual assault offenses. See *id.* at 263-64.

<sup>313</sup> For example, “[t]hefts that once had to be charged as larceny, a lesser offense that carried more modest penalties, can now be punished as burglaries and robberies, which lead to more substantial sentences.” *Id.* at 262. Burglary used to require violent entry into a building, but now burglary can often be established simply with a showing that one entered a room, even through an open doorway. See, e.g., *People v. Sparks*, 28 Cal.4th 71, 79-82 (2002) (stating that the entry element of burglary is met even when a defendant enters a room through an unlocked door).

<sup>314</sup> STUNTZ, *supra* note 4, at 264.

Overcharging and harsh sentencing make inner-city residents more vulnerable to privacy invasions. They have exponentially increased the number of individuals who are labeled as “criminal,” including innocent people convicted based on pressured plea deals.<sup>315</sup> Once a person has this stigma, the police feel even more entitled to engage in stops-and-frisks, motor stops, data collection, SWAT invasions, and perpetual surveillance and harassment of him.<sup>316</sup> Harsh sentencing and overcharging also encourage snitching, which, as already has been discussed, is a privacy invasion in and of itself.

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Each of the tactics I have described in this Part is troubling in its own right. Yet, many individuals, particularly poor, young urban males of color, endure many of them simultaneously. They endure constant stops-and-frisks, which could potentially lead to their personal information being placed in a gang database. They might also have to provide a DNA swab in order to terminate their encounters with the police. Law enforcement might track them further through their cell phones and social networking pages. Due to oppressive overcharging policies regarding minor offenses, they are in more danger of being convicted of crimes, which also leads to heightened surveillance. Even if a young man of color avoids a conviction, he still has to worry about a close friend or neighbor snitching on him so that he might avoid his own potentially hefty sentence. As already described, the aggregation of these forms of monitoring by the state have the potential for substantial chilling effects on activities we typically value in our democratic society, and they also create serious dignitary harms.

### III. IN SEARCH OF A BETTER APPROACH

Thus far this Article has critiqued the privacy invasions experienced under the war on crime on moral grounds. In this Part, I will further argue that they cannot even be supported on utilitarian grounds. It cannot be denied that crime is a serious problem in poor urban communities of color. Indeed, the level of violence in these communities is staggering and disturbing. In 2006, the murder rate for whites was 3 per 100,000; for African-Americans, it was 24.<sup>317</sup>

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<sup>315</sup> See ALEXANDER, *supra* note 4, at 141-44.

<sup>316</sup> See *id.* at 94; CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 3, at 8.

<sup>317</sup> STUNTZ, *supra* note 4, at 272.

Furthermore, although I am critiquing the war on crime, I certainly do still believe that the state, and law enforcement in particular, has an important role in reducing the level of violence in these communities. Many poor people of color share this sentiment particularly because their victimization has historically been ignored by the police.<sup>318</sup>

According to liberal theorists, the state may limit an individual's rights to the extent that those rights infringe upon the rights or security of other members of society.<sup>319</sup> If one's privacy threatens a community to an excessive degree, therefore, liberal principles suggest that it is acceptable for the state to curb that privacy. One might argue that a decrease in crime, and particularly in violence, is worth some loss of individual privacy.<sup>320</sup> Furthermore, while criminal justice policies disproportionately affect poor urban people of color, the fact is that they are the ones who are the most victimized by violent crime.<sup>321</sup> For these reasons, theoretically, these individuals should be willing to experience less privacy than their middle-class and white counterparts, if this loss means that their streets can be safer.<sup>322</sup>

The problem with this line of argument in this context, however, is that many of the tactics discussed in this Article severely violate individual privacy rights,<sup>323</sup> but many do not appear to be all that effective in combatting crime.<sup>324</sup> It has been documented that the high number of street and traffic stops conducted by law enforcement across the country yield low results. Eighty-five percent of

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<sup>318</sup> See Rivera et al., *supra* note 115, at A1.

<sup>319</sup> See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 332-33 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); JOHN STUART MILL, ON LIBERTY 70-71 (David Spitz ed., W.W. Norton & Co. 1975) (1859).

<sup>320</sup> See, e.g., Akhil Reed Amar, *Fourth Amendment Principles*, 107 HARV. L. REV. 757, 808 (1994) ("To justify a search or seizure that lands with disproportionate impact on poor persons, or persons of color, the government may at times claim that the poor or the non-white are also disproportionate *beneficiaries* of the scheme, because the government search is designed to reduce the risk that they will be victimized by violent crime, or drugs, or what have you."); Kahan & Meares, *supra* note 303, at 1184 (arguing that residents of high crime neighborhoods, and not the judiciary, should determine whether practices such as curfews, anti-loitering laws, and housing searches infringe too much on their liberty).

<sup>321</sup> See STUNTZ, *supra* note 4, at 272-73.

<sup>322</sup> See Kahan & Meares, *supra* note 303, at 1184 (arguing that residents of high crime neighborhoods, and not the judiciary, should determine whether practices such as curfews, anti-loitering laws, and housing searches infringe too much on their liberty).

<sup>323</sup> See *supra* Part II.

<sup>324</sup> See ALEXANDER, *supra* note 4, at 224; BUTLER, *supra* note 4, at 31-33; NATAPOFF, *supra* note 5, at 119.

documented stops-and-frisks conducted in New York are on African-Americans and Latinos.<sup>325</sup> Yet, the police confiscate weapons and contraband in only 1.14% of these stops.<sup>326</sup> Furthermore, it is estimated that 95% of motor stops conducted through Operation Pipeline stops yield no illegal drugs.<sup>327</sup> One study found that up to 99% of traffic stops result in no citation; 98% of searches were based on the consent of the driver with no other legal justification for the search.<sup>328</sup> Moreover, data consistently show that the success rates for finding contraband during the stops-and-frisks of whites are higher than those for stops-and-frisks of African-Americans.<sup>329</sup> In other words, the disproportionate number of stops-and-frisks of African-Americans is inefficient. The inefficiency of these stops is not surprising given the subjective and contradictory drug courier profiles that law enforcement officers use in determining whom to search:

The profile can include . . . driving an expensive car, driving a car that needs repairs, driving with out-of-state license plates, driving a rental car, driving with “mismatched occupants” acting too calm, acting too nervous, dressing casually, [and] wearing expensive clothing or jewelry . . . .<sup>330</sup>

On the Los Angeles Police Department’s website, it is noted that wearing the color green can mean either that the “gang member” is declaring neutrality for the moment or is a drug dealer.<sup>331</sup> As a result

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<sup>325</sup> See CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 3, at 3. I use the term “documented” because the police do not have to report “consensual encounters,” which do not implicate *Terry* and the Fourth Amendment. See Capers, *Rethinking the Fourth Amendment*, *supra* note 17, at 39. As already discussed, whether these encounters are truly consensual is suspect. See *supra* note 164 and accompanying text.

<sup>326</sup> CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 3, at 4. See also *supra* notes 115-116 and accompanying text (discussing how of the 52,000 stops in an eight-block minority area conducted over four years, only 1% resulted in arrest and only twenty-five firearms were confiscated).

<sup>327</sup> ALEXANDER, *supra* note 4, at 70.

<sup>328</sup> See *id.*

<sup>329</sup> See L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2037-38 (2011) (“In Minnesota, for example, the hit rates for finding contraband are 11.17 percent for blacks and 23.53 percent for whites. In Los Angeles, frisked blacks are forty-two percent less likely than whites to be found with weapons, twenty-five percent less likely to be found with drugs, and thirty-three percent less likely to be found with other contraband. Similar results have been obtained in New York, Illinois, Rhode Island, Missouri, and West Virginia.”).

<sup>330</sup> ALEXANDER, *supra* note 4, at 70.

<sup>331</sup> *How Are Gangs Identified*, OFFICIAL WEBSITE OF L.A. POLICE DEP’T, [http://www.lapdonline.org/get\\_informed/content\\_basic\\_view/23468](http://www.lapdonline.org/get_informed/content_basic_view/23468) (last visited June 20, 2013).

of these broad criteria, the police really have an excuse to stop anyone they please, including those who fit certain racial or ethnic stereotypes.<sup>332</sup>

The fact that gang databases are also based on highly subjective criteria, including racial and ethnic stereotypes,<sup>333</sup> suggests that they also are probably unreliable. Furthermore, some of the information that is collected in the databases is based on self-reporting, which is also unreliable because poor urban youths often claim to be a member of a gang in order to protect themselves or to make themselves seem tougher and more important.<sup>334</sup> As already mentioned, these databases are rarely updated,<sup>335</sup> which also increases their unreliability. For these reasons, studies have shown that gang databases tend to be of little value.<sup>336</sup>

With respect to snitching, one of the chief criticisms of this practice is that snitches are often unreliable.<sup>337</sup> A person who is facing a hefty jail sentence may be more than willing to point his finger in another direction in order to reduce his own sentence.<sup>338</sup> Moreover, a person with few material resources or a serious drug habit is also willing to give the police a few names in order to score some extra cash or drugs.<sup>339</sup> Lying snitches lead to mistaken SWAT invasions, which sometimes end in death.<sup>340</sup> They also lead to the conviction of the innocent, either because juries believe their false stories or because innocent defendants plead guilty because they fear that the jury will believe the false stories.<sup>341</sup> Studies show that twenty-one to 50% of wrongful capital convictions were based on false informant testimony.<sup>342</sup>

Furthermore, because the drug war in particular is a numbers game, the best snitches often are the most dangerous actors at the highest level of a drug operation, not the lowest level and least violent

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<sup>332</sup> See ALEXANDER, *supra* note 4, at 70.

<sup>333</sup> See *supra* note 194 and accompanying text.

<sup>334</sup> See Wright, *supra* note 193, at 127.

<sup>335</sup> See *supra* note 203 and accompanying text.

<sup>336</sup> See Wright, *supra* note 193, at 119-20.

<sup>337</sup> See BUTLER, *supra* note 4, at 84; NATAPOFF, *supra* note 5, at 69-72.

<sup>338</sup> See ALEXANDER, *supra* note 4, at 88; BUTLER, *supra* note 4, at 79-81; NATAPOFF, *supra* note 5, at 70-71.

<sup>339</sup> NATAPOFF, *supra* note 5, at 27-29; see also ALEXANDER, *supra* note 4, at 88; BUTLER, *supra* note 4, at 83-84.

<sup>340</sup> See *supra* notes 270, 295-296 and accompanying text.

<sup>341</sup> See NATAPOFF, *supra* note 5, at 70, 78-80.

<sup>342</sup> See *id.* at 70.

actors.<sup>343</sup> These individuals tend to have the most information in terms of how a particular drug ring operates, who is involved in that drug ring, and who the drug users are.<sup>344</sup> As a result, they are able to give the police a higher number of names than those at the lower end of the totem pole.<sup>345</sup> Moreover, asset forfeiture provisions favor the big kingpins who can essentially buy their freedom by offering a share of drug profits in exchange for leniency.<sup>346</sup> This is the reason that low level, nonviolent drug offenders and drug users tend to go to jail and not the violent kingpins.<sup>347</sup> Indeed, 80% of drug arrests are for possession, not for sales, and 80% of the growth of drug arrests in the 1990s was for marijuana possession.<sup>348</sup> Focusing on nonviolent users of marijuana surely will not curb the violence in inner cities, which is purportedly one of the aims of the war on drugs.

One might argue that getting any drug dealer off of the street, no matter his level in a drug organization, makes neighborhoods safer. Yet, the reality is that when one dealer goes to jail, he makes room for the next dealer to take his place.<sup>349</sup> In addition, when law enforcement breaks up one drug ring, the market in a particular neighborhood destabilizes, which leads to turf wars and increased violence.<sup>350</sup> As a result, scholars scathingly note that we now have a criminal justice system of high quantity with low quality.<sup>351</sup> In other words, overcharging and harsh sentencing have led to higher arrest and imprisonment rates, but this increase has not led to a proportionate decrease in violent crime.<sup>352</sup>

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<sup>343</sup> See BUTLER, *supra* note 4, at 94; William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2564-65 (2004).

<sup>344</sup> See BUTLER, *supra* note 4, at 94; Stuntz, *supra* note 343, at 2564-65.

<sup>345</sup> See BUTLER, *supra* note 4, at 94.

<sup>346</sup> ALEXANDER, *supra* note 4, at 79-80.

<sup>347</sup> *Id.* at 203.

<sup>348</sup> *Id.* at 59.

<sup>349</sup> *Id.* at 78; see also BUTLER, *supra* note 4, at 32; NATAPOFF, *supra* note 5, at 119; Nunn, *supra* note 4, at 384.

<sup>350</sup> ALEXANDER, *supra* note 4, at 123.

<sup>351</sup> See BUTLER, *supra* note 4, at 93-94; STUNTZ, *supra* note 4, at 264.

<sup>352</sup> During the 1990s, the imprisonment rate increased by 50%. See STUNTZ, *supra* note 4, at 278. Yet scholars estimate that this increased imprisonment accounted for only one-tenth to one-fifth of the drop in violent crime. *Id.* The end of the crack boom, changes in the abortion rate in the 1970s, changes in the fertility rate in teenage girls, and cyclical forces probably also contributed to the decrease of violent crime during this time. *Id.* at 277-78. Interestingly, Kansas, New York, Michigan, and New Jersey all managed to reduce their prison populations and crime rates at the same time. Forman, *supra* note 4, at 65 n.177.

Respecting individual privacy, however, could actually help make the criminal justice system become more effective in combatting crime. Social science research suggests that individuals are more apt to follow the law and to respect law enforcement officers when they feel that they have been treated fairly and respectfully.<sup>353</sup> For this reason, if the state begins to acknowledge the personhood of residents in poor, urban communities of color by decreasing the overwhelming feeling of being constantly watched, these residents could become more law abiding. They also could become more cooperative in helping the police target those individuals who actually are posing the most danger to the community.<sup>354</sup> Furthermore, if individuals no longer feel like the state is “occupy[ing] and preoccupy[ing]”<sup>355</sup> their neighborhoods through oppressive surveillance, they will have more freedom of expression and association. This greater freedom will encourage strong friendships and networks within the community, which are also characteristic of neighborhoods with reduced rates of crime and violence.<sup>356</sup> For these reasons, criminal justice policies that enhance privacy can lead to a more positive and effective dynamic between the state and the individuals in these communities; this type of dynamic could ultimately lead to a more effective criminal justice system.

One could argue that it is the violence in these neighborhoods, and not the criminal justice tactics discussed in this Article, that is undermining the creation of informal social networks in these neighborhoods. If one is afraid she is going to be shot, that fear will certainly inhibit her willingness to leave her home and socialize with

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<sup>353</sup> See Capers, *Rethinking the Fourth Amendment*, *supra* note 17, at 47; Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 213 (1998); *see also* Sundby, *supra* note 106, at 1778 (“When . . . distrust occurs, the disenchanted group will view the government as illegitimate and be inclined to look to means outside the formal political process to have its voice heard.”).

<sup>354</sup> See Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 263-67 (2008). Indeed, the use of snitching has actually undermined relations between the community and the police and led to a “stop snitching” movement that has sometimes led to retaliation and violence. See NATAPOFF, *supra* note 5, at 121-38.

<sup>355</sup> Rubinfeld, *supra* note 96, at 784 (defining privacy as “the fundamental freedom not to have one’s life too totally determined by a progressively more normalizing state”).

<sup>356</sup> See Tracey L. Meares, *Praying for Community Policing*, 90 CALIF. L. REV. 1593, 1602-08 (2002); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1285-88 (2004); Deborah M. Weissman & Marsha Weissman, *The Moral Politics of Social Control: Political Culture and Ordinary Crime in Cuba*, 35 BROOK. J. INT’L L. 311, 362-64 (2010).

her neighbors. Obviously more than access to privacy is needed to address violent crime. Yet as has already been discussed, many policies that deprive individuals of privacy do not seem that effective in curbing violence. Since privacy is an important tool in fostering the types of informal networks that are present in neighborhoods with low crime rates, these policies instead appear to be counterproductive.

It cannot be denied that there is a dark side to privacy, however. While privacy allows access to greater freedoms, it also can be a means for hiding oppression. Indeed, radical feminists have argued that we should “explode the private,” because privacy historically was used as a shield for batterers and rapists from state intervention.<sup>357</sup> Bennett Capers has argued that cameras in public spaces have the potential of deterring crime, unveiling police brutality and racial profiling, and preventing wrongful convictions.<sup>358</sup> DNA databases also have the potential of preventing wrongful convictions.<sup>359</sup> These arguments are particularly compelling given the fact that crime in poor communities of color is often under-enforced<sup>360</sup> and that there are high numbers of individuals who are wrongfully convicted.<sup>361</sup>

I am not advocating, therefore, for a wholesale removal of video surveillance, DNA databases, and any of the other tactics discussed in this Article. Instead, I want to highlight the privacy invasions that extreme forms of these tactics create and the role that these invasions play in the state’s subordination of its citizens. These harms should be balanced against their law enforcement value. A complete analysis of this balancing is beyond the scope of this Article,<sup>362</sup> but given the importance of privacy, these harms should be taken quite seriously and not simply dismissed in the name of crime prevention.

Some legal actors have already begun taking steps to restore the dignity and privacy of citizens disproportionately affected by the war on crime. In the Bronx, the district attorney’s office no longer prosecutes residents of housing projects who were arrested for trespassing unless an attorney from the office first determines that there is a legitimate basis for pressing charges, based on an interview

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<sup>357</sup> See Bailey, *supra* note 97, at 1782-83, 1802.

<sup>358</sup> See Capers, *Crime, Surveillance, and Communities*, *supra* note 11, at 960.

<sup>359</sup> See *Maryland v. King*, 133 S. Ct. 1958, 1964 (2013).

<sup>360</sup> See RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 19 (1997); Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1716-18 (2007).

<sup>361</sup> See NATAPOFF, *supra* note 5, at 70.

<sup>362</sup> See generally Capers, *Crime, Surveillance, and Communities*, *supra* note 11 (providing a Fourth Amendment balancing approach to mass surveillance).

with the police officer who made the initial arrest.<sup>363</sup> If adopted by other jurisdictions, this type of practice ideally will limit the amount of harassment these residents must endure to prove that they have a right to be in and around their own homes. Furthermore, a Brooklyn judge recently declared that he will dismiss any public intoxication case brought before him unless the police officer who made the arrest can prove, in a manner other than by a sniff, that the open container actually contained alcohol.<sup>364</sup> Concerned that the city's public drinking law is being disproportionately enforced against African-Americans and Latinos, Judge Noach Dear hoped that his ruling would encourage the New York Police Department to "reconsider its enforcement of the ordinance."<sup>365</sup> If more judges took similar types of actions, the police would have less incentive to harass residents with frequent *Terry*, and even illegal, stops in the hopes of adding to their tallies of arrests.

The "it takes a lot of frogs"<sup>366</sup> mentality must cease. Criminal justice success needs to be measured in ways other than high arrest and prosecution rates.<sup>367</sup> When the police and prosecutors focus so much on numbers, privacy goes to the wayside. Law enforcement agencies need to find innovative policies that actually reduce violence and crime, but that do not undermine individual privacy. For example, assigning specific police officers to public housing sites on a permanent basis, so that they can really get to know residents in a personal way, could be a better practice in combatting crime than the common practice of simply harassing every person who attempts to enter a building. It is time to create policies that incentivize high quality, not high quantity criminal justice where police officers must articulate more concrete reasons for their privacy invasions than just "furtive movement" or minor violations.<sup>368</sup> Furthermore, police

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<sup>363</sup> See Goldstein, *Prosecutor Deals Blow*, *supra* note 162, at A1.

<sup>364</sup> Goldstein, *Sniff Test*, *supra* note 145, at A32.

<sup>365</sup> *Id.* Judge Dear asked his staff to review a month's worth of public-drinking summonses issued in Brooklyn. *Id.* Eighty-five percent of the summonses were issued to African-Americans and Latinos. *Id.* Only 4% were issued to whites, even though whites make up 36% of Brooklyn's population. *Id.*

<sup>366</sup> See *supra* note 151 and accompanying text.

<sup>367</sup> See Deborah M. Weissman, *Law, Social Movements, and the Political Economy of Domestic Violence*, 20 DUKE J. GENDER L. & POL'Y 221, 250 (2013) (advocating for progressive criminal justice models that address the social, political, and economic structures that contribute to crime and that do not just apply the "existing template of 'punishment-as-deterrence'").

<sup>368</sup> See Rivera et al., *supra* note 115, at A1 (discussing how residents of Brownsville, Brooklyn welcome a strong police presence that focuses on more accurate performance and stops based on "better descriptions of suspects" and better communication regarding the reason for a stop).

officers need to become more conscious of the implicit racial biases that we all share<sup>369</sup> during their interactions with poor citizens of color.<sup>370</sup>

Although this Article focuses on the aggregate effect of the war on crime on poor people of color, all citizens should be concerned about this phenomenon not just as a matter of racial and socioeconomic justice, but also because the tactics I discuss are a potential threat to everyone. Indeed, poor people of color appear to be the canary in the mine. Surely some, if not most, of the 1.3 million wireless services subscribers whom the police targeted in 2011 were neither poor nor of color. In addition, “although whites are underrepresented as drug offenders, the percentage of offenders who are white has risen since 1999, and the percentage of offenders who are African-American has declined.”<sup>371</sup> There are a rising number of whites who are serving mandatory sentences for methamphetamine abuse.<sup>372</sup> In addition, the practice of overcharging and harsh sentencing is not limited to the war on drugs. Prosecutions of all crimes, including those with offenders who are mostly white, have increased as part of the war on crime.<sup>373</sup> Specifically, offenders of sexually explicit material offenses tend to be middle-aged white men; these prosecutions have risen by more than 400% since 1996.<sup>374</sup> Finally, everyone is a potential target of mass surveillance and DNA databases.

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<sup>369</sup> Even if a person does not consciously intend to discriminate based on race, “[t]he science of implicit social cognition demonstrates that individuals of all races have implicit biases in the form of stereotypes and prejudices that can negatively and non-consciously affect behavior towards blacks.” See Richardson, *supra* note 329, at 2039.

<sup>370</sup> See Capers, *Rethinking the Fourth Amendment*, *supra* note 17, at 42 (suggesting that police officers can be motivated to set aside inappropriate biases through random audits of stop and frisk data or through “switching exercises” where an officer self-examines whether he would treat a suspect the same regardless of his racial identity); Richardson, *supra* note 329, at 2089-91 (suggesting that officers be educated with classes on the science of implicit bias, that they be provided with hit-rate data, and that they take the Implicit Association Test to learn about their personal implicit attitudes and stereotypes).

<sup>371</sup> Forman, *supra* note 4, at 59-60.

<sup>372</sup> Erica Goode, *Incarceration Rates for Blacks Have Fallen Sharply, Report Shows*, N.Y. TIMES (Feb. 27, 2013), <http://www.nytimes.com/2013/02/28/us/incarceration-rates-for-blacks-dropped-report-shows.html>.

<sup>373</sup> See Forman, *supra* note 4, at 58-61.

<sup>374</sup> *Id.* at 59.

## CONCLUSION

The war on crime has a racialized history, and scholars have documented the various ways that it has had subordinating effects on poor urban people of color.<sup>375</sup> This Article contributes to this account by arguing that privacy makes one less vulnerable to oppressive state subordination and social control. In the aggregate, the privacy invasions caused by stops-and-frisks, motor stops, SWAT invasions, snitching, and data aggregation through technology inhibit self-determination, self-expression, and freedom of association. Overcharging and harsh sentencing make individuals even more vulnerable to these privacy invasions. As a result, poor people of color are obstructed in the creation of life plans, are left out of mainstream political discourse, and have limited access to social capital. These tactics also send the message that poor people of color cannot be trusted to engage in legitimate activities and that the state disrespects them and values their identities and viewpoints less than those of white and wealthier individuals. Both of these messages result in dignitary harms.

While these tactics purport to combat crime, they entail privacy invasions that discourage law-abiding behavior and stymie the creation of the strong relationships and networks that are characteristic of neighborhoods with low crime rates. For these reasons, the criminal justice system's assault on poor people of color's privacy simply cannot be justified. Furthermore, poor people of color are the canary in the mine. Whites are now also experiencing serious privacy invasions. For this reason, everyone has a stake in this matter because these policies have deep implications for how the line ultimately will be drawn between all individuals and the state in the criminal justice context and beyond.

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<sup>375</sup> See, e.g., ALEXANDER, *supra* note 4, at 6-7, 175-203; BUTLER, *supra* note 4, at 36-37; NATAPOFF, *supra* note 5, at 6, 102-19; STUNTZ, *supra* note 4, at 48, 272, 286.