November 2018

Dear USC workshop participants:

I’ve attached the third draft chapter from a book I am trying to write, tentatively entitled *The Jurisprudence of Blood: How Law Thinks About Violence.* The book will explore how law—especially criminal law, broadly conceived—is shaped by, encodes, and reinforces various ideas about violence. I’m adding this note to give you some background about the first two chapters and the plan for the rest of the book—both because it will provide context for chapter 3, and because I could use feedback not just on chapter 3 but on the book as a whole. I’ll be happy to inflict drafts of the first two chapters on anyone who is curious or a glutton for tedium; just email me at <sklansky@stanford.edu>. For the rest of you, here’s a summary.

Chapter 1 introduces the book’s themes. The book is not about the law’s thorny relationship with violence. That is already the subject of a large and growing literature, much of it inspired by Robert Cover’s 1986 article, *Violence and the Word.* Instead, my book examines the ideas about violence that the law relies upon and helps to reinforce. The book focuses on three sets of ideas: ideas about the *definition* of violence (where the line is drawn between the violent and the nonviolent), ideas about the *salience* of violence (how much it matters, and in what ways, if conduct is violent rather than nonviolent), and ideas about the *nature* of violence (how violence operates, how it starts and stops, whether it is the product of temperaments or circumstances, and so on).

The concept of violence is both highly charged and famously malleable. Often violence is defined to require physical force against a person—but not always. It’s not just academics or people on the left who talk, say, about structural, emotional, or verbal violence: an NRA recruitment video in 2017 urged Americans to fight “the violence of lies with the clenched fist of truth.” Likewise, sometimes the term “violence” refers only to acts that are illegitimate or unjustified—but not always.

One reason the concept of violence gets stretched is because it has rhetorical power. Legal definitions of violence get stretched for similar reasons. The law attaches all sorts of consequences to convictions for violent offenses: they serve as triggers for higher sentences under Three Strikes laws, they bar defendants from drug courts and other diversion programs, and they restrict eligibility for parole. So crimes that don’t involve the use of force—burglary is the most important example—often get classified statutorily as “violent.” And when criminal statutes try to rely on definitions, rather than itemized lists, to draw a line between violent and nonviolent offenses, the definitions often prove difficult or impossible to apply. At the federal level, for instance, the Armed Career Criminal Act of 1984 imposes long prison sentences on any repeat “violent” offender later found with a gun. The Supreme Court tried for two decades to clarify what counts as a “violent felony” under this statute, until it finally gave up and declared a critical part of the definition void for
vagueness. Earlier this year the Court reached the same conclusion about a statutecalling for deportation of a noncitizen convicted of a “crime of violence.”

Ideas about the definition of violence are tangled up with debates about the salience of violence. Sometimes violence gets redefined in an effort to blur the distinction between violent and nonviolent conduct: this is what motivates, for example, many discussions of “symbolic violence.” But sometimes the salience of violence is questioned more directly. It’s not always clear that violent conduct is especially bad, or even bad at all. A good amount of violence is treated as commendable, or at least not seriously blameworthy—particularly when it seems responsive to other violence, or justified for some other reason. Donald Trump’s tweets and rally speeches have provided some particularly disturbing examples of that logic, but it gets employed across the political spectrum. And while, today, violence is usually thought more serious than, say, fraud, the opposing view has a long history. The fraudulent were punished more harshly than the violent in Dante’s Inferno, and schemes to cheat victims out of their money or property—or related offenses, like embezzlement—have seemed to many people, at many times, to be especially craven and contemptible, precisely because they are not out in the open.

There are a pair of closely related and nearly ubiquitous tropes in rhetoric about violence: tit for tat, and the calling out of hypocrisy. Our side has to be violent, given the violence of our opponents. And, given their violence, their complaints about our violence can’t be taken seriously. Ideas about the relative iniquity of violence and deceit are also wrapped up with ideas about gender and class. Violence is masculine—both as a general descriptive matter, and as normative ideal. Fighting like a man is fighting physically and without subterfuge. Arrests and convictions for violent offenses also correlate negatively with wealth, and the low-class nature of violence can make it seem both less and more forgivable. Violence is crude and unsophisticated, but the dispossessed may resort to violence because they are deprived of other tools. Singling out violence for special condemnation has seems to some people like a form of class bias, a way of preserving social hierarchies.

The third set of ideas about violence addressed in chapter 1 have to do with the nature of violence: what causes it and how it can be controlled. One key question is whether violence is best understood as a property of individuals or of isolated episodes, whether it is a matter of character or of circumstances—and what aspects of character or what kinds of circumstances are most important. Another question is whether violence is self-limiting or instead builds on itself and spirals out of control—or, more realistically, when it tends to do the first and when it tends to do the second. Still a third set of questions is about American exceptionalism: in what respects, and for what reasons, the experience with violence in the United States, or certain kinds of violence, is distinctive. Is it violence in general, or—as some scholars suggest—just deadly violence, or just violent attacks from strangers? And if we could figure out what sets us apart, could we then try to correct it? Or is violence, or particular kinds of violence, connected with something deep in the American
character: our culture of rugged independence, or our distrust of government, or our respect for civil liberties?

Chapter 2 explores how these themes play out in the way that the law addresses violent crime. The idea that violent crimes are the worst kinds of crimes, and violent criminals the least sympathetic of criminal offenders, is nearly pervasive in contemporary discussions of crime and punishment, but it is relatively new. Before the 1960s, in fact, it was rare for criminal codes or treatises to draw a distinction between violent and nonviolent offenses. None of the traditional dividing lines in criminal law—between felonies and misdemeanors, between clergable and non-clergable offenses, between infamous and non-infamous crimes, or between offenses involving moral turpitude and those not involving moral turpitude—tracks the distinction between violent and nonviolent crimes, even very roughly. And until the promulgation of the Model Penal Code in 1961, none of the major codifications of criminal law treated violent offenses as categorically more serious, even as a presumptive matter. Up through 1960, there were no federal criminal statutes that referred explicitly to “violent crimes” or “crimes of violence.” There are now 28.

“Violent crime” became a subject of particular focus, both in criminal statutes and in popular discourse, in the 1960s and 1970s. Part of the explanation is that rates of violent crime, particularly in cities, rose sharply during that period. But rates of property crimes appear to have increased even more, so that can’t be the whole explanation. Another factor was the global, centuries-long decline in violence, against which the rise in violent crime in the 1960s and 1970s represented a kind of backsliding. Beyond that, a whole series of historical developments in the middle and late twentieth century made violence of all kinds seem more frightening—developments that ranged from the massive casualties of the first and second world wars, and the horrific violence of Nazi Germany and Stalinist Russia, to the trauma of the Vietnam War and the spiraling violence on city streets, college campuses, and prison blocks in the late 1960s and early 1970s. The growing salience of violence in criminal law may have owed something not just to increasing concerns about violence, but also to rising interest in nonviolence as a political method and a moral principle. Last but certainly not least, there was the factor of race. When crime rates began to soar in the 1960s and 1970s, the concentration of violent crimes in heavily black, urban neighborhoods made those crimes especially frightening to white Americans, and made it seem more natural to refer to the inner city as a “jungle” and to urban criminals as “animals.”

For all of these reasons, when mass incarceration started to become a priority issue for criminal justice reformers toward the close of twentieth century, it seemed natural to focus on “nonviolent” drug offenders. Nonviolent offenses were the least serious, and nonviolent offenders were the least threatening. At the same time, politicians were feeling ever escalating pressure to appear “tough on crime.” After Nixon’s “law and order” campaigns in 1968 and 1972, and the infamous “Willie Horton” ad that helped George H.W. Bush defeat Michael Dukakis in 1988, the center-left position on criminal justice—encapsulated in Bill Clinton’s successful
campaign for the presidency in 1992—became twofold: de-escalate the war on drugs, but give no quarter to violent crime. So drug courts and diversion programs—the cornerstone of liberal efforts to reform drug prosecutions in the 1990s—excluded violent offenders from the start. And Three Strikes laws—adopted at the same time that drug courts were spreading—mandated stiff prison sentences for repeat “violent” offenders.

As violence has become increasingly salient in criminal law over the past half-century, criminal law has also come to reflect, more and more, a view of violence as characterological rather than situational—a property of individuals, not just of actions. Three Strikes laws, in particular, treat violent crime as largely a problem of violent criminals: repeat offenders who engage in criminal violence again and again, because it is in their nature. Part of what is noteworthy about modern recidivist statutes is how few episodes of violence resulting in criminal convictions are required in order to label someone as a “career” or “habitual” offender: it takes only “three strikes,” or in many cases only two. Likewise, a single conviction for a violent felony—or even an arrest for a violent felony in the case under adjudication—is often enough to disqualify a defendant from drug courts and most other diversion programs. The underlying theory is not that a small subset of murders, rapes, robberies, and aggravated assaults is carried out by people who commit violent offenses again and again; it is that someone who commits two or three violent crimes is likely to be characteristically and predictably violent. Or that this is likely to be true of at least some significant proportion of two- or three-time violent offenders, and that prosecutors will be able to tell which ones they are. Either way, modern criminal law increasingly reflects a particular idea about how violence operates: that it is driven by the dispositions and characteristic behaviors of particular, aberrational individuals; that violence is in men’s hearts, not in the situations in which they find themselves.

This isn’t a new view, obviously, but it is new for criminal law to embrace it so enthusiastically. Anglo-American criminal law has historically been committed to punishing offenders for their acts, not their natures. There is a very old idea that every crime must include an “actus reus,” a wrongful act, and that there is something fundamentally wrong with punishing someone for being a particular sort of person. Rules of evidence generally prohibit prosecutors from convicting a defendant with evidence of his criminal proclivities—and the paradigmatic example of what the rules disallow is evidence of a defendant’s violent character, introduced to show that he is likely to have committed a particular act of violence. This ban on “character evidence” has been justified by arguments that jurors will be too apt to misuse the evidence—too apt to conclude that a defendant’s past conduct reliably predicts his future conduct, and too apt to want to punish a defendant for who he is, rather than for what he does.

Recidivist sentencing laws have a long history, but until the late twentieth century they were never targeted, in particular, at violent crimes. In fact the “habitual criminals” that received the most attention from reformers were thieves and
violators of morals laws: pickpockets, dissolutes, and vagrants. Violence tended to be understood as something that flared up and passed, something that overcame rather than expressed a person’s true nature. That was why the worst murders, the ones most deserving of condemnation, were the ones that were premeditated—planned with cool deliberation. Under the wrong circumstances, even a usually law-abiding person could be expected to lash out with violence: that was why provocation could reduce the grade of a homicide from murder to manslaughter.

It isn’t clear why lawmakers have increasingly tended to treat criminal violence as characterological instead of situational, but race may be part of the answer. Khalil Gibran Muhammad has documented a sharp difference between the way that early twentieth-century reformers in the United States addressed criminality among European immigrants and the way they addressed it among African-Americans. High rates of criminal offending by Irish, Italian and Eastern European immigrants tended to be seen as the results of the situations in which those immigrants were placed, while black criminality was seen as reflecting something more intrinsic. So when violent crime became increasingly associated with black men—both as a sociological reality and, more importantly, as a widespread set of cultural understandings—it became easier to see violent crime as the expression of offenders’ fundamental nature.

Chapter 3, the chapter I’m circulating, addresses the ideas about violence that have shaped criminal procedure and police reform. In important ways those ideas differ dramatically from the ideas about violence that have shaped substantive criminal law over the past half-century.

A few words about the rest of the book. My plan is for Chapter 4 to discuss how ideas about violence have shaped the legal treatment of sexual assault and domestic violence. Chapter 5 will focus on children and violence; it will mainly be about juvenile justice but will also touch on child custody, child welfare, and corporal punishment. I think chapter 6 will be about violence in prison, chapter 7 will focus on violence in sports and other consensual activities, and chapter 8 will cover ideas about violence in First and Second Amendment law. Chapter 9 will summarize the book’s main ideas and offer concluding thoughts. But let me know if there are better ways for me to proceed.

David Sklansky
“Take the Hand Away”:
Police Violence and Criminal Procedure

On a Thursday afternoon in late May 1957, police in Cleveland, Ohio, broke into the home of a young African-American woman named Dollree Mapp. The officers thought Mapp might be running a numbers racket. They also had spotted the car of a man named Virgil Ogletree outside Mapp’s house, and they suspected that Ogletree had been involved in the recent bombing of the home of another numbers operator—Don King, the future boxing promoter. Mapp refused to let the police in without a warrant. When they returned with what they said was a warrant, she did not come to the door. So the officers tried kicking in her back door, and when that didn’t work they smashed a window and let themselves in. They met Mapp in her hallway and showed her the “warrant.” She grabbed the document and stashed it inside her dress. The police wrestled the document back from her, twisting her hand until she cried out in pain, and then handcuffed her and forced her to accompany them while they searched the house. They found some pornographic books and pictures, for which Mapp was subsequently prosecuted. In a basement apartment that Mapp rented out, they also found Virgil Ogletree.

Mapp was convicted and sentenced to prison for possession of obscene materials, but the United States Supreme Court threw the conviction out.1 It took the Court some time to figure out what bothered it most about Mapp’s treatment. Initially the Justices took the case to examine whether the prosecution infringed unconstitutionally on free expression, but ultimately they reversed Mapp’s conviction on a different ground: searching Mapp’s house without a warrant had violated her Fourth Amendment right against “unreasonable searches and seizures.” No warrant for the search was ever produced in court, and the trial judge questioned whether it had ever existed. Law students today still read the Supreme Court’s decision in Mapp v. Ohio, because it established the Fourth Amendment “exclusionary rule” for state criminal prosecutions—the rule that evidence obtained through an unconstitutional search or seizure generally cannot be introduced against at trial against a criminal defendant.2

Equally significant, though, is what the Supreme Court’s decision in Mapp v. Ohio is not about. It is not about violence. It is not about the police breaking through Mapp’s door, grabbing her, wrestling with her, twisting her hand, and handcuffing her. The Justices took note of all of that, but ultimately it was irrelevant to their decision. At first they thought the case was about free expression, and then they thought it was about warrants. They never

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thought it was about violence—despite the fact that the Ohio Supreme Court had concluded that the evidence found in the search was admissible because the police hadn’t used “brutal or offensive physical force.” Instead of rejecting that conclusion the United States Supreme Court simply ignored it. Brutality and “offensive physical force” were beside the point.3

In this respect *Mapp v. Ohio* is emblematic. There is a long history of concern with police violence—typically called “police brutality” when it is thought unjustified, and “use of force” when it is thought legitimate. Complaints about police violence are old as the nightstick and as new as “Black Lives Matter.”4 But whereas violence has become more and more salient in substantive criminal law, in criminal procedure—the rules governing what the police can and cannot do—violence has over time become less consequential. The moment of inflection in both stories is roughly the same: the early 1960s. The Supreme Court decided *Mapp* in 1961, one year before the appearance of the Model Penal Code, the first major codification of criminal prohibitions to treat violence as a significant dividing line.5 Just at the point when violence was beginning to emerge as the criminal law’s most important category for sorting serious from forgivable offenses, the law of criminal procedure, along with the instincts about policing it embodies, was moving in the opposite direction.

The two developments were related. One reason that criminal procedure focuses so little on violence is that concerns about violent crime have made police violence seem more necessary and less troubling. As Figure 4 suggests, popular discussion of police violence and “police brutality” rose sharply in the 1960s. In the 1970s and early 1980s, however, when concerns about violent crime skyrocketed, discussions of police violence and police brutality waned. This happened even as discussions of other kinds of controversial police practices—most notably, warrantless searches and seizures—continued to rise. Part of the explanation is that when violent crime is viewed as out of control, police uses of force are less likely to be seen as “brutality,” and more likely to be understood as legitimate. It is a version of the tit-for-tat logic I discussed in chapter 1, the sentiment that President Trump invoked when he urged police officers to stop protecting suspects’ heads when putting them into patrol cars: “Like when you guys put somebody in the car and you’re protecting their head ... and they’ve just killed somebody.... [Y]ou can take the hand away, okay?”6 Trump hardly invented this way of thinking. Here is Manhattan prosecutor Thomas Kane in the 1930s, for example, defending the use of “third degree” to get witnesses to talk: “What are we to do—give our baby killers ice cream?”7

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5 See chapter 2.
7 Quoted in Johnson, supra note 4, at 140.
But the low salience of violence in the modern law of criminal procedure is not entirely a byproduct of the high salience of violence in criminal law, nor does it reflect an indifference to how the police use coercive force. The “third degree,” a pervasive feature of policing in the 1930s, became rare by the late twentieth century, and it has stayed rare. It was eradicated, for the most part, by a wave of public outrage and elite condemnation. Moreover, concerns about police brutality never disappeared in the 1970s and 1980s, and by the end of the 1980s discussions of the topic were once again growing more common. This happened while the focus on violent crime in popular discourse continued its steep upward climb, and the line between violent and nonviolent offenses grew more salient than ever in criminal sentencing schemes and criminal justice reform proposals. The last decade and a half of the twentieth century, remember, was the era of Three Strikes laws; it was also the era of diversion programs narrowly targeted at “nonviolent” offenders. It was not an era, though, in which violence became significantly more salient in the legal rules governing the police. That is partly because, by the late 1980s, the Supreme Court had become far less interested in placing new legal constraints on the police, but it is also partly because, as we will see, the framework the Supreme Court constructed in the mid-twentieth century for regulation of the police—the framework erected in cases like Mapp v. Ohio—focused much less on violence than on violations of privacy.

The relative unimportance of violence in criminal procedure therefore is not simply the flip side of the heavy emphasis placed on violence in criminal law; it has its own history

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8 See, e.g., JOHNSON, supra note 4.
9 See id.
and its own drivers. One of those drivers has been the very idea of the police: our underlying notions about what the police are for and our expectations about how they should operate. There is a longstanding sense, particularly strong in the United States, that the fundamental point of the police is to enforce the law and maintain order through the actual or threatened use of physical force. The police themselves have embraced this idea for most of their history. Line officers have long prized their ability to “take care” of themselves on the street, and that is the quality that, more than any other, has gained them respect among their fellow officers.

“Police brutality” is often described as the illegal exercise of violence by law enforcement officers, but the line between authorized and unauthorized uses of force by the police has often been hazy. The police have often understood their role to include the use of unofficial, “extralegal” force; they have assumed, often with justification, that this is what the public expected of them. The New York Police Department, with the support of local newspapers, encouraged “nightstick rule” in the early twentieth century, and in the 1930s the department’s commissioner, Lewis Valentine, explicitly called on officers to “muss up” gangsters. As late as 1947, then-commissioner Arthur Wallender instructed NYPD detectives to give “the proper treatment” to “hoodlums,” “loafer,” and “easy money men.” In the early 1950s, the pioneering police ethnographer William Westley found that officers in Gary, Indiana, understood that local residents wanted them to give “extremely rough treatment” to homosexuals and other “deviants,” but to do so unofficially and out of view. Complying with those expectations, Westley argued, accustomed the police “to use violence as a general resource.” And then there is Trump urging officers to “take the hand away” when putting suspects in the back of patrol cars.

None of this is to suggest that attitudes about police violence have stayed constant, either among the public or among officers themselves. The third degree was once widely accepted; now it is not. Police violence in response to “contempt of cop” remains widespread, but departments are less like today than they once were wink at street justice meted out to idlers or suspected sexual offenders. Fifty years ago few police departments

10 “The role of the police,” wrote the criminologist Egon Bittner in a widely quoted passage, “is best understood as a mechanism for the distribution of non-negotiably coercive force employed in accordance with the dictates of an intuitive grasp of the situational emergencies.” Egon Bittner, The Capacity to Use Force as the Core of the Police Role, in Moral Issues in Police Work 15, 23 (Frederick Elliston & Michael Feldberg eds., 1985).
14 Johnson, supra note 4, at 101, 121, 202, 211.
15 Westley, supra note 13, at 38.
had written policies regarding the use of force; now the vast majority do.\textsuperscript{16} It has become common over the past several decades for police officers to study “verbal judo” and other techniques of de-escalation,\textsuperscript{17} and brawling skills are not as central as they once were to an officer’s reputation within a department. Many departments provide officers with “crisis intervention” training, to help them avoid violence in encounters with people suffering from flare-ups of mental illness.\textsuperscript{18} And in recent years, cellphone videos and the Black Lives Matter movement have brought renewed scrutiny to police violence, especially but not only the use of deadly force.

Nonetheless licit and illicit uses of force in law enforcement remain widespread, even routine, and to a remarkable extent police violence remains lightly regulated, a peripheral topic in the law of criminal procedure.\textsuperscript{19} This chapter will explore why that is, and whether and how it should change. The legal rules governing police conduct, like the rules of substantive criminal law, reflect ideas about the salience of violence, the definition of violence, and the workings of violence. The low salience of violence in criminal procedure provides a telling contrast with the very high salience of violence in modern sentencing codes and punishment schemes.

Because criminal procedure doctrines place little emphasis on violence, the definition of violence—or of “brutality” or “force”—matters much less than in substantive criminal law. But in ways that this chapter will explore, language and definitions matter here as well. The term “police brutality,” for example, has important and unfortunate overtones, suggesting that police violence is a form of animalism, driven by individual or group character rather than training, protocols, and workplace culture. It can lead to understandings of police violence that over-emphasize the significance of “bad apples” or the otherness of police officers as a whole.

The terminology we use to describe police violence therefore reflects and helps to shape our ideas about how violence operates in policing. And just as in substantive criminal law, ideas about how violence operates matter a great deal in regulation of the police. It matters whether violence is understood to be characterological or situational—and, if it is situational, which aspects of an officer’s situation are thought to be most important in leading the officer to use force. It matters, too, whether violence is thought to

\textsuperscript{18} See, \textit{e.g.}, Garrett & Stoughton, \textit{supra} note 16, at 367-68.
\textsuperscript{19} On the whole police are probably less violent today than they used to be, although it is hard to be sure, because the available statistics on uses of force by the police are fragmentary and often unreliable—far more fragmentary and far less reliable than statistics on violent crimes. \textit{See, e.g.}, \textit{id.}, at 245, 249; FRANKLIN E. ZIMRING, \textit{When Police Kill} 23-40 (2017).
be self-limiting or self-reinforcing: whether tit-for-tat is understood to be the best way to keep violence in check, or a dynamic that is apt to spin out of control. Police violence has long been defended, by officers and others, as a necessary corrective to private violence. But there is also long tradition of worrying that police violence breeds further violence: that “[l]awlessness begets more lawlessness,” that violence “travels through the bodies and minds of young people” assaulted by the police, and that violent policing produces more, not less, violent crime.

In criminal procedure, as in substantive criminal law, it is impossible to unravel these various ideas about violence without taking account of race, gender, and class. People of color—particularly young men of color—are disproportionately the victims of police violence, and for this reason the problem has long been understood differently in minority communities than in white communities. Excessive violence by police officers has often been blamed on the heavily masculine culture of law enforcement, and—on the other side—tough tactics by the police have been defended and celebrated as a form of manliness. Class figures here, as well—not just because the victims of police violence are disproportionately poor or working class, but because the police themselves are viewed as working class, by officers themselves and by the public. The association of the police with the working class has influenced how police violence is understood and how the law approaches it; it has lent credence, for example, to the notion that police are violent because of the kind of people they are, not because of how they are trained or deployed.

The Insignificance of Violence in Criminal Procedure

To get some perspective on the role that violence now plays in substantive criminal law, we turned to history. We traced how ideas about the relative gravity of criminal offenses have evolved since the eighteenth century. It is harder to do with that criminal procedure, the set of rules governing the police, because those rules are largely a twentieth-century invention. Modern police forces themselves date back only to the middle of the nineteenth century, and constitutional criminal procedure did not develop in earnest until the middle of the twentieth century, when federal law enforcement agencies began to develop, and the Supreme Court began to regulate state law enforcement officers. There is no real analog to our current law of criminal procedure before, essentially, the 1930s.

Still, criminal procedure has a kind of pre-history: the ragtag collection of statutory restrictions, judicial pronouncements, and received understandings about criminal

21 JOHNSON, supra note 4, at 141 (quoting early twentieth-century police reformer Ernest Hopkins).
22 Remarks by Prof. Nikki Jones, Symposium on Race, Policing, and Public Health Symposium, Stanford Medical School, Mar. 6, 2017.
investigations that served as background to, and helped to motivate, the Fourth, Fifth and Sixth Amendments to the United States Constitution. Calling this miscellany “common law,” as the Supreme Court often does, suggests that it had more cohesion and consistency than it actually did. Nonetheless some generalizations are possible, and they are instructive. Eighteenth- and early nineteenth-century limitations on law enforcement did not categorize official conduct based on whether or not it was violent, but it did focus particular attention on conduct that was violent—similar to the way that substantive criminal law focused particular attention on violent offenses like murder, rape, mayhem, and assault. That focus was sharper with regard to police conduct, though, than it was for private behavior.

The common-law crime of burglary, for example, did require a kind of violence—a “breaking” of a house. But the breaking could consist simply of opening a door or window; any use of force sufficed. From a very date, moreover, common law authorities recognized “constructive” breaking of house, involving no use of force whatsoever: for example, when entry was obtained by fraud, or by persuasion of a child or other innocent agent. The restrictions on criminal investigations, however, focused more heavily on actions that could be characterized as violent: arrests of suspected criminals, which typically involved physical capture, and forcible entries into homes. Searches of homes, for offenders or for evidence, received significantly greater scrutiny when they involved breaking open doors. The influential early nineteenth-century treatise by the English lawyer Joseph Chitty, for example, stressed that although officers seeking to take an offender into custody could break into a house without a warrant, this was “so violent, obnoxious, and dangerous a proceeding” that “it should be adopted only in extreme cases, where an immediate arrest is requisite.” Even with an arrest warrant, doors could broken open only “if admittance cannot otherwise be obtained,” and probably only in cases of “treason, felony, or breach of the peace.” “[I]n all cases whatever,” Chitty emphasized, “it is absolutely necessary that a demand of admittance should be made, and be refused, before outer doors can be broken.”

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24 See, e.g., Perry Miller, The Life of the Mind in America: From the Revolution to the Civil War 121 (1965) (characterizing pre-industrial common law as “a haphazard accumulation of precedents, quirks, and obscurities ... fundamentally irrational by its inherent nature”); David A. Sklansky, The Fourth Amendment and Common Law, 100 Colum. L. Rev. 1739, 1794-1807 (2000) (showing that common-law restrictions on search and seizure changed over time and varied from place to place).


26 See Wright, supra note 25, at 412 & n.3 (citing Coke, Hale, Blackstone, and East).

27 1 Joseph Chitty, A Practical Treatise on the Criminal Law *54 (1816).

28 Id. at *56.

29 Id.
Two decades ago the United States Supreme Court concluded that this “knock and announce principle” was such a basic part of the common-law restrictions on law enforcement that violating it could make a search or seizure “unreasonable” and hence unconstitutional under the Fourth Amendment.\textsuperscript{30} The Supreme Court explained that the rule served three purposes: it avoided unnecessary damage to property, it safeguarded “privacy and dignity” of residents, and, perhaps most important, it protected “human life and limb”—“because an unannounced entry may provoke violence in supposed self-defense by the surprised resident.”\textsuperscript{31} Because the rule was not aimed at helping to hide evidence, though, the Court concluded that the exclusionary rule would not be triggered by its violation.\textsuperscript{32} And the Supreme Court made clear that there would be no violation to begin with if the officers had a good reason not to wait before entering: if, for example, the officers “reasonably believed that a prior announcement would [place] them in peril,” or if they had “reason to believe that evidence would likely be destroyed if advance notice were given.”\textsuperscript{33}

The knock and announce principle thus survives in modern search and seizure law, but only vestigially. And the rest of search and seizure law places little weight on violence in sorting permissible from impermissible police conduct. That wasn’t always the case. When the Supreme Court first began to regulate evidence gathering by state law enforcement officers, in 1952, violence was very much on its mind. The case was \textit{Rochin v. California}, and it involved three Los Angeles deputy sheriffs who broke into the bedroom of a suspected drug dealer. The suspect, Antonio Rochin, swallowed what the deputies assumed were illegal pills, so they jumped on him, “squeeze[ed] his throat,” and stuck their fingers in his mouth in an effort to recover the contraband. When those efforts failed, the deputies handcuffed Rochin, took him to an emergency room, strapped him to an operating table, and had his stomach pumped against his will.\textsuperscript{34} The capsules were recovered; they turned out to contain morphine. Rochin was convicted of drug possession, but the Supreme Court reversed. The Justices reasoned that the force used against Rochin was “so brutal and so offensive to human dignity” as to violate the constitutional guarantee of due process. It was “too close to the rack and the screw.” Sanctioning this kind of police violence, the Court said, would “brutalize the temper of [our] society.”\textsuperscript{35}

The Supreme Court analogized the forcible pumping of Rochin’s stomach to coercing a confession—an investigative tactic the Justices had earlier found to violate due process. That conclusion, too, was first reached in a case involving police violence. The violence in \textit{Brown v. Mississippi}—the first case ever in which the Supreme Court found that the Constitution had been violated by state law enforcement officers—was horrifyingly worse than in \textit{Rochin v. California}. Ed Brown and his two co-defendants were Black tenant farmers convicted in 1934 of murdering white planter. They were convicted based entirely

\textsuperscript{32} Id.
\textsuperscript{33} Wilson v. Arkansas, 514 U.S. at 936-37; see also Richards v. Wisconsin, 520 U.S. at 391.
on confessions that had been obtained from them by torture: all three defendants had been whipped, and one had been struck up from a tree by his neck. The deputy sheriffs who had carried out the torture freely admitted it in court. When asked how badly one of the defendants had been whipped, one of the deputies testified, "Not too much for a negro; not as much as I would have done if it were left to me."36 The Supreme Court had never before reversed a state criminal conviction because of the actions taken by law enforcement personnel, but it unanimously concluded in 1936 that "brutal treatment" of Brown and his co-defendants, and the use of the resulting confessions in court, violated due process. "It would be difficult to conceive," the Justices said, "of method more revolting to the sense of justice."37

At its origins, then, the Supreme Court’s regulation of state law enforcement tactics focused explicitly on police “brutality.” This was true when the Supreme Court first applied the Constitution to state interrogation practices in 1936, and it was true in 1952 when the Justices began to review searches and seizures by state law enforcement officers. The attention the Justices paid to police violence in Brown v. Mississippi and Rochin v. California reflected attention the issue received outside of the courts in the first half of the twentieth century. Most famously, the Wickersham Commission on Law Observance and Enforcement—a blue-ribbon panel assembled by President Herbert Hoover, which conducted the first-ever federal review of policing and prosecution in the United States—strongly condemned the use of the “third degree” in interrogation rooms, a practice the Commission made clear was common throughout the country.38 The Commission’s report on “Lawlessness in Law Enforcement,” issued in 1931, helped solidly public opposition to coerced confessions in the years leading up to Supreme Court’s 1936 decision in Brown v. Mississippi.39 The Commission paid less attention to police violence outside of the interrogation room, but it didn’t ignore that problem, either. In fact the Commission blamed gun violence by police officers for much of the unpopularity of Prohibition, which the Commission concluded had gotten off to a “bad start” in part because “[h]igh-handed methods, shootings and killings, even when justified, alienated thoughtful citizens, believers in law and order.”40 The Wickersham Commission itself was the product of growing concerns about law enforcement in the early twentieth century, concerns that were amplified by Prohibition, and that often centered around police violence.41 Even before the Supreme Court overturned the convictions in Brown v. Mississippi, state courts had repeatedly complained about the “third degree”—although they still allowed prosecutors to use any confessions that seemed reliable, no matter how they had been obtained.42

36 297 U.S. 278, 282-84 (1936).
37 Id. at 286.
38 WICKERSHAM COMMISSION, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931); see, e.g., JOHNSON, supra note 4, at 133-42.
39 See OLIVER, supra note 3, at 80-81.
40 WICKERSHAM COMMISSION, REPORT ON THE ENFORCEMENT OF PROHIBITION LAWS OF THE UNITED STATES 46 (1931); see OLIVER, supra note 3, at 52.
41 See JOHNSON, supra note 4.
42 See OLIVER, supra note 3, at 7, 64-81.
The focus on violence in *Brown* and *Rochin* didn’t last. The Supreme Court repeatedly reaffirmed the central holding of *Brown*—that prosecutors could not rely on coerced confessions—but did so in cases involving haranguing rather than physical torture. The central question was whether the defendant’s “will was overborne by official pressure.” When the Court decided *Miranda v. Arizona* in 1966, it replaced that amorphous standard with a set of bright-line rules requiring police to advise suspects of their rights, offer to provide them with lawyers, and stop questioning whenever the suspect requested. By then the focus had firmly shifted away from violence in interrogation rooms to the “inherently compelling pressures” of “a police dominated atmosphere.” Although the “third degree” had not been eradicated, the Court stressed that it was now the exception rather than the norm, and interrogation practices had become “psychologically rather than physically oriented.” The *Miranda* rules were intended to counteract “the compulsion inherent in custodial surroundings.”

The shift in focus in interrogation cases, away from violence and toward psychological pressure, partly reflect the striking success that the Wickersham Commission and other early twentieth-century reformers achieved in combatting the use of the third degree. But the focus has also shifted away from violence in the law of search and seizure, where there is much less reason to believe that the underlying problem of violence has been largely eradicated. In interpreting and applying the Fourth Amendment to the United States Constitution, which bans “unreasonable searches and seizures,” the Supreme Court has concentrated heavily on protecting informational privacy—the ability to keep secrets from the police. That is why the Supreme Court ultimately ignored the violence in *Mapp v. Ohio* and hinged its decision on the fact that the police had entered Dollree Mapp’s house without a warrant. Most of Fourth Amendment law is about where the police can look and what they can monitor. The late legal scholar William Stuntz complained with justification that “we have a large and detailed body of law to tell police when they may open paper bags or the trunks of cars,” but the “the law speaks softly (or not at all) when it come to the level of force that may be used in making an arrest or conducting a search.”

Stuntz traced this emphasis on privacy to a late nineteenth-century decision by the Supreme Court, *Boyd v. United States*, which ruled that a company could not constitutionally be forced to turn over documents showing its failure to pay import duties. The Court later abandoned that holding, along with much of the reasoning in *Boyd*. *Boyd* relied both on the Fourth Amendment and on the Fifth Amendment privilege against compelled self-incrimination, but the Supreme Court has since ruled that

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43 Spano v. New York, 360 U.S. 315, 323 (1959); see also Oliver, supra note 3, at 86.
44 384 U.S. 436.
45 *Id.* at 445, 448, 467.
46 *Id.* at 458.
47 See Johnson, supra note 4, at 148.
49 See id. at 107-18; Boyd v. United States, 116 U.S. 616 (1886).
businesses don’t have a Fifth Amendment privilege, and that a subpoena for documents is not equivalent to a “search” under the Fourth Amendment. Another part of the reasoning in *Boyd* proved ahead of its time, though. The essence of an unconstitutional search, the Supreme Court suggested in *Boyd*, was “not the breaking of ... doors and the rummaging of ... drawers,” but violating “the sanctity of a man’s home and the privacies of life.”

Justice Brandeis leaned heavily on *Boyd* when he dissented from the Supreme Court’s decision in 1928 that wiretapping was not a “search” or “seizure” regulated by the Constitution. Brandeis argued that the Fourth Amendment should be read to prohibit “every unjustifiable intrusion by the government upon the privacy of the individual.”

Four decades later a majority of the Supreme Court took essentially the same view. In *Katz v. United States*, decided in 1967, the Supreme Court reversed itself and concluded that the Fourth Amendment did in fact regulate electronic eavesdropping on telephone conversations. Although the Court in *Katz* continued to deny that Fourth Amendment created any “general constitutional ‘right to privacy,’” it stressed that what an individual “seeks to preserve as private, even in an area accessible to the public may be constitutionally protected.” In subsequent decisions the Court clarified that under *Katz* the Fourth Amendment regulated any government infringement of “reasonable expectations of privacy.”

Ever since *Katz* the jurisprudence of the Fourth Amendment has focused overwhelmingly on protecting privacy. And in this respect *Katz* was prefigured by a series of earlier decisions earlier in the 1960s—including, as we have seen, the case of Dollree Mapp. The facts of *Mapp v. Ohio* “seemed to cry out for limitation on police force,” points out the legal historian Wesley Oliver, but the Supreme Court reversed her conviction only because the police appeared to have lacked a warrant to enter her house.

It is no accident that the defendants in *Brown v. Mississippi, Rochin v. California*, and *Mapp v. Ohio* all were nonwhite. Police violence has always been directed overwhelmingly at marginalized groups—especially people of color, but also poor whites, political dissidents, and violators of prevailing sexual norms. The restrictions the Supreme Court imposed on state and local law enforcement in the twentieth century were plainly motivated, in large part, by concerns about how the police treated marginalized groups—particularly African Americans in the states of the former Confederacy. But the Court almost never placed legal significance on the race of the defendants in criminal procedure cases, and it rarely dwelt on the nexus between race and police brutality. *Brown, Rochin,* and *Mapp* were typical in this regard.

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50 116 U.S. at [*].
55 Oliver, supra note 3, at 127.
And if the Court placed little weight on race in criminal procedure, it had nothing at all to say about the policing of sexuality. When William Westley carried out his pioneering ethnography of policing in Middle America, he found that the officers thought it was part of their job to beat up "deviants"—a category in which he lumped together homosexuals, exhibitionists, peeping toms, and rapists. Westley wrote in the early 1950s, in the middle of a nationwide panic over "perverts" and "sexual psychopaths, labels that in practice often wound up serving as code for homosexual. The "extralegal" violence that police visited on homosexuals was an open secret in middle decades of the twentieth century, but it was rarely viewed as an important part of the broader problem of police brutality. Westley was unusual in suggesting that the experience of the police in sex cases helped to teach them view violence as a "general resource." The Supreme Court, in particular, never talked this way. When the Court talked about police violence, it rarely touched on the connection with race, and it never mentioned the connection with sexuality. And as the constitutional rules regulating law enforcement proliferated in the second half of the twentieth century, few of them focused on violence. They focused on privacy. The Katz test for what counts as a "search" was a particularly important example, but far from unique.

In recent years the Supreme Court has slightly modified the Katz rule regarding the scope of the Fourth Amendment. The amendment applies, the Court now says, if there is either an invasion of a "reasonable expectation of privacy"—the test derived from Katz—or a trespass on a suspect’s person or his house, papers, or effects. By its terms, the Fourth Amendment bars only "unreasonable searches and seizures" of "persons, houses, papers, and effects," and when the Supreme Court decided in 1928 that wiretapping wasn’t regulated by the Fourth Amendment, it did so, in large part, because there had been no physical trespass on anything falling within these four categories. For decades, Katz was understood to have supplanted the so-called "trespass test" for whether there had been a search or seizure, but the Court now says that Katz simply "added to" the earlier test, rather than replacing it. As a consequence, Fourth Amendment law focuses somewhat less relentlessly on privacy than it did until recently. The focus on privacy has been supplemented with attention to trespasses, and violence is of course a kind of trespass on a person. But privacy remains by far the dominant focus. Moreover, the trespasses that have caught the Supreme Court’s eye have been trespasses on property—the undercarriage of a car, and the area around a house—not trespasses on persons. Violence remains a peripheral topic in the law of search and seizure.

Part of the reason may be precisely that police violence is heavily targeted at people on the margins—poor people, nonconformists, and people of color. Invasions of privacy

56 Westley, supra note 13, at 37.
58 Westley, supra note 13, at 38.
59 See Sklansky, supra note 57.
60 Olmstead v. United States, 277 U.S. 438 (1928).
are also experienced disproportionately by people on the margins. All kinds of policing are. But the invasions of privacy associated with policing are at least somewhat more widely shared. Everyone gets pulled over for traffic violations; everyone has their bags searched at sporting events. But most upper- or middle-class white Americans have never been struck by a police officer, and they may not know anyone who has. The lack of first-hand experience may explain, for example, the insignificance of violence in the legal treatment of “stop and frisk,” a mainstay of urban policing since the 1960s.

**Stop and Frisk, Police Shootings, and the Continuum of Force**

Here is how the legal scholar Paul Butler describes the stop-and-frisk tactic, as experienced by young African American men: Police jump out of a car with their guns drawn and order you face wall with your hands up, then “they put their hands roughly all over your body.” Or “[t]hey kick your feet to spread your legs wider” and then “pat you up and down” and “touch your private parts.” Here are a few examples collected by law professor Kami Chavis: an officer shoves a suspect against a wall when he reaches for identification; an officer pulls a suspect’s arm behind his back and threatens to punch in the face; an officer smashes a suspect’s head into a wall, leaving a gash that requires stitches. These are extreme examples, but they are not outliers. Professor Chavis notes that that nearly half of young people surveyed in an intensively patrolled area of New York City said a police officer had used force against them, and the New York Police Department’s own statistics show that a decade ago force was being used in tens of thousands of stop-and-frisk encounters every year. Since then, police in New York City have dramatically reduced their use of stop-and-frisk, largely in response to complaints about—and court challenges to—its disproportionate used against young men of color. But the tactic is still used hundreds of times a day.

And it is inherently violent, as Professor Chavis points out: it isn’t like having a wand passed over your body at the airport. Professor Butler likens stop-and-frisk to sexual assault. He calls it a low-grade, sexualized form of police brutality. Butler is

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63 BUTLER, supra note 23, at 82-82.
65 Id. at 860, 862 (citing CENTER FOR CONSTITUTIONAL RIGHTS, NYPD STOP-AND-FRISK STATISTICS, 2009 AND 2010 (2011) and JENNIFER FRATELLO, ANDRÉS F. RENGIFO & JENNIFER TRONE, VERA INST. OF JUSTICE, COMING OF AGE WITH STOP AND FRISK: EXPERIENCES, SELF-PERCEPTIONS, AND PUBLIC SAFETY IMPLICATIONS (2013)).
66 See, e.g., BUTLER, supra note 23, at 114.
67 Simmons, supra note 64, at 860.
68 BUTLER, supra note 23, at 97-98, 105-06.
neither the first nor the last scholar to notice the sexual overtones of stop-and-frisk. Seth Stoughton, once a police officer and now a law professor, had a standard phrase he used during a stop-and-frisk: “I don’t mean to feel you up or nothing, but I’m about to.” He explains that “I may have had to grope people, but I didn’t want to be unprofessional about it.”

Very little of this makes it into judicial discussions of stop-and-frisk, and it doesn’t shape how the law treats the tactic. Courts treat “frisks”—like the “stops” that accompany them—as “brief,” “slight,” “narrowly circumscribed intrusions.” It is true that the Supreme Court has required more justification for a frisk than for a stop: a stop requires “reasonable articulable suspicion” that a suspect has committed or is about to commit a crime, whereas a frisk requires both a lawful stop and “reasonable articulable suspicion” that the suspect is “armed and dangerous.” And Terry v. Ohio—the 1967 Supreme Court decision that is the source for these requirements—stressed that a frisk “is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment.” Three years earlier, New York’s highest court had called a frisk “a minor inconvenience and petty indignity,” which police were justified in carrying out whenever they lawfully stopped someone for questioning. But Chief Justice Earl Warren, who wrote the majority opinion for the Supreme Court in Terry, called that suggestion “simply fantastic.” He called the very term “stop and frisk” a euphemism.

Still, what Warren emphasized about “frisks” in Terry was the toll that they could take on dignity: the demeaning, disrespectful nature of “a careful exploration of the outer surfaces of a person’s clothing all over his or her body in an attempt to find weapons.” He didn’t describe the procedure as violent, or discuss how it could be violent. John Terry, the lead defendant in the case, hadn’t just been patted down; the officer had “grabbed” him and “spun him around.” But Warren made nothing of that; it was mentioned but then ignored, like the police “[r]unning roughshod” over Dollree Mapp. Nor did he address the ways in which frisks could involve considerably more force than what Terry had experienced.

73 Dunaway, 442 U.S. at 212.
74 392 U.S. 1, 18 (1968).
75 People v. Rivera, 14 N.Y.2d 441, 464 (1964).
76 Terry, 392 U.S. at 16-17.
77 Id. at 10.
78 Id. at 16-17.
79 Id. at 7.
80 Mapp v. Ohio, 367 U.S. at 645.
Ever since *Terry*, courts have largely read violence out of the stop-and-frisk. More precisely, they have read violence out of the *execution* of a stop-and-frisk. In judicial parlance, “frisk” is more or less a synonym for “pat-down,” and that is how the procedure is typically envisioned. On the other hand, violence is very much part of the *justification* for stop-and-frisk. The deadly violence that threatens law enforcement officers—the danger that “[t]he answer to the question propounded by the policeman may be a bullet”81—is the reason why the frisk is permitted, and the reason why the Supreme Court conditioned its legality on an officer’s articulable basis for worrying that a suspect is armed and dangerous. But the complete absence of violence from the other side of the ledger may be part of the reason that in practice this legal standard has proven undemanding, why anything beyond a bare intuition of danger, or an uncorroborated anonymous tip that a suspect has a gun, usually suffices to justify a frisk.

Violence isn’t *entirely* absent from the law of criminal procedure. The Supreme Court ruled in 1985 that the Fourth Amendment imposes special limitations on the use of deadly force: stopping a fleeing suspect by shooting him, or using any other kind of deadly force, is an “unreasonable” and hence unconstitutional seizure unless the police have probable cause to believe the suspect poses a risk of death or serious bodily harm to officers or the public.82 For uses of nondeadly force, though, the only restriction the Supreme Court has imposed is the general, open-ended rule that the police must act reasonably, under all of the circumstances.83 The vagueness of this legal standard, combined with judicial reluctance to second-guess the police, has meant that almost any violence that police employ—grabbing, shoving, tackling, or striking people, brandishing weapons, using tasers, breaking down doors, running cars off the road—is lawful as long as the officers could plausibly think it was necessary. We really don’t have rules for police uses of nondeadly force; instead, we have deferential, after-the-fact, case-by-case review, asking whether the police acted reasonably under all of the circumstances, as they seemed to the officers at the time. And we emphatically do not have, in criminal procedure, what we have in substantive criminal law: an understanding of violent conduct as a category apart, deserving of special treatment.84

I have been focusing on judicial decisions, and especially on rulings of the Supreme Court, but the low salience of violence in criminal procedure is a broader phenomenon. It is a feature of the legal system as a whole, an aspect of contemporary legal consciousness.

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81 *E.g.*, People v. Batista, 88 N.Y.2d 650, 654 (1996) (quoting *Rivera*, 14 N.Y.2d at 446); *see also, e.g.*, *Terry*, 392 U.S. at 8.
84 “One constitutional word—seizures—encompasses a wide range of police activity, from the brief investigative stop short of a full arrest, all the way to the killing of a suspect. And one other word—unreasonable—is all that the constitutional text itself offers to distinguish licit from illicit seizures.” Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1184 (2017). In practice, Ristroph notes, “[t]he constitutional law of police force is not indeterminate, but determinately permissive.” *Id.* at 1189.
It is reflected and reinforced, for example, in how police departments themselves regulate the use of force by their officers. Police departments do regulate violence by police officers, and they pay a good deal more attention to it than they did, say, in the 1950s and early 1960s. Virtually every department, though, does through a “use of force continuum.” The details vary, but every use of force continuum arranges degrees of force along a spectrum, starting with mere presence, and then progressing through verbal instructions and steadily increasing degrees of physical coercion. The continuum ends with deadly force. Officers are supposed to start at the bottom of the continuum and work their way upward, going only as far as necessary to get compliance.85

The most important feature of a use of force continuum is not the substitution of “force” for “violence,” although this nomenclature certainly matters. Actually, some departments even avoid the language “use of force,” preferring the still more euphemistic phrase, “response to resistance.”86 I’ll return to questions of terminology below. The most important thing about a use of force continuum, however, is that it is a continuum. When it comes to police tactics, there is no sharp line dividing violence from nonviolence. There are more forceful tactics and less forceful tactics, but they are arranged on a continuous scale. The whole point of a continuum is that we are dealing with differences of degree, not of kind. It’s the opposite of the categorical distinction drawn in substantive criminal law between crimes of violence and nonviolent offenses.

The “continuum” approach is reflected in legal scholarship, as well. Stuntz was unusual in arguing for more rules addressing police violence. Most legal scholarship on policing focuses on what the Supreme Court has focused on: invasions of privacy. In the wake of the Black Lives Matter movement, a few scholars have placed the issue of police violence front and center, but even they, often as not, share the central idea of the use of force continuum. Rather than treat violence as a special category of police conduct deserving special rules, they stress the need to regulate and restrict low-level interventions by law enforcement—the entry points of the continuum—in order to minimize the opportunities for the use of force to escalate.87

The Ebb and Flow of Public Concern About Police Violence

Part of the reason criminal procedure pays so little attention to violence is that it focuses on privacy instead. Another part of the reason, though, is that the level of public concern about police violence has fluctuated. As Figure 4 suggests, concerns about police violence soared in the 1960s but receded in the 1970s and 1980s.88 In recent decades, the issue of police violence has once again started to receive increased attention, but the trend

85 See, e.g., id. at 1212; BUTLER, supra note 23, at 49-51; Garrett & Stoughton, supra note 16, at 279.
86 See Garrett & Stoughton, supra note 16, at 291; Ristroph, supra note 84, at 1214.
88 See supra p. 3.
has been slow and uneven, reflecting the conflicting intuitions Americans have about uses of force by the police.

There is a long history of complaints about police brutality and efforts to rein in violence by the police, but there is also a long history of looking the other way—and of vocal defenses of tough, aggressive police tactics. Progressive reformers of the late nineteenth century and early twentieth century, for example, took aim at police corruption but often saw nothing wrong with encouraging officers to use their nightsticks liberally against criminals and reprobates. Newspapers praised “beneficial clubbing” by the police. Many reformers linked police corruption with toleration of vice; they wanted the police to get tough with lawbreakers. This was notably true of Theodore Roosevelt during his tenure on the New York City Police Commission; “speak softly but carry a big stick” wasn’t just a metaphor. Roosevelt opposed restrictions on the use of nightsticks, and under his leadership the Commission gave police officers new, more powerful weaponry, and plenty of leeway to use it.

Outside of New York, as well, early twentieth-century Americans often explicitly called for “pugilistic police.” Wesley Oliver notes that reformers of the time tended to champion “appropriate violence” in law enforcement. They took the view “that police violence was not necessarily a bad thing so long as it was directed against the criminal element.” This was a common opinion during Prohibition, as well, when there were explicit calls for the police to “muss up” gangsters. This approach always had critics, and the Wickersham Commission, with its attacks on the “third degree,” reflected and strengthened public opposition to illegal—or “extralegal”—police violence. But support for “strong-arm” tactics by the police never went away. That is why, for example, William Westley found in the early 1950s that police officers in Gary, Indiana, believed that the public expected and wanted them to beat up sex offenders.

Police violence attracted lots of attention in the 1960s, in part because violence in general attracted lots of attention in the 1960s, and in part because of the role the police played in the era’s distinctive politics. The police were the face of the state. For student protesters and other leftwing activists, police officers personified the Establishment, and police violence was simply the domestic manifestation of the violence the United States government was carrying out in Indochina. So, too, for African Americans in the impoverished neighborhoods of America’s inner cities, the police often seemed, as James

89 JOHNSON, supra note 4, at 35.
90 See, e.g., id., at 88-93.
91 OLIVER, supra note 3, at 25.
92 Id. at 24.
93 JOHNSON, supra note 4, at 121.
94 See, e.g., id. at 121-33; OLIVER, supra note 3, at 80.
Baldwin put it, like “occupying soldier[s] ... at the very center of the revolution now occurring in the world.”

Police officers in the United States in the 1960s were overwhelmingly white, overwhelmingly male, and overwhelmingly conservative, culturally as well as politically. These demographics heightened the insularity of the police, pushed them toward reactionary politics, and made it easier for minorities and anti-war activists to see the police as the enemy. The police often reacted clumsily and heavy-handedly to political protests and the wave of urban riots in the late 1960s, which in turn fueled the perception that they were violent and out of control. More and more people were afraid of the police, and what they feared, mostly, was police brutality: “the gun in the holster, and the swinging club.” When Baldwin wrote that he knew from firsthand experience how it felt to be “at the mercy of the cops,” he meant that in a very tangible, bodily sense: he knew “the thunder and fire of the billy club, the paralyzing shock of spittle in the face, and ... what it is to find oneself blinded, on one’s hands and knees, at the bottom of the flight of steps down which one has just been hurled.” When antiwar protesters chanted “the whole world is watching” outside the 1968 Democratic Convention in Chicago, what the world was watching was the protesters getting pummeled and teargased by the police.

Unsurprisingly, then, much of the criticism of the police in the 1960s, and much of the energy of police reformers at the time, focused on limiting and controlling police violence. When civilian oversight boards for police departments began to be established in the 1960s and 1970s, they were aimed, above all else, at the problem of police brutality. Scholars who wrote about policing focused on violence, too. The criminologist Jerome Skolnick called his widely influential, 1966 study on the police Justice Without Trial: placing, at the very center of his account, the ability of the police to inflict punishment outside of any legal process. William Muir, a political scientist who published a celebrated analysis of policing in 1977, thought the central problem of law enforcement was the wise and humane use of coercive force—i.e., demands backed by threats of violence. Contemporary with Muir’s research, a team of academics led by the criminologist Hans Toch explored the possibilities for involving rank-and-file officers in the

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95 James Baldwin, Fifth Avenue, Uptown, ESQUIRE, July 1960, at [*], reprinted in James Baldwin, Nobody Knows My Name: More Notes of a Native Son [*], [*] (1962); see also James Baldwin, A Report from Occupied Territory, Nation, July 11, 1966, at [*].
96 See, e.g., David Alan Sklansky, Democracy and the Police [*] (2008).
97 Baldwin, Fifth Avenue, Uptown, supra note 95, at [*].
98 Baldwin, A Report from Occupied Territory, supra note 95, at [*].
design and implementation of police reform; the problem the group chose to attack, naturally enough, was violence between officers and civilians.103

Public attention to police violence waned in the 1970s and 1980s, for several reasons. First and foremost was the growing concern about violent crime, which made many people tolerant of—or even eager for—“rough tactics” by the police. Just as in earlier eras, there was a growing sentiment that it was time for the police to take their gloves off. It was gun violence associated with Prohibition Era gangsters that led prosecutors like Thomas Kane to defend the use of the “third degree” during interrogations: “What are we to do—give our baby killers ice cream?”104 It was the spiraling crime rates of the 1970s and 1980s that made a box office hero of Dirty Harry Callahan, the rouge, gun-happy officer played by Clint Eastwood in five movies between 1971 and 1988. The Dirty Harry movies were part of a whole wave of escapist entertainment in the 1970s and 1980s that celebrated vigilantism, sometimes by rule-bending police officers and sometimes by crime victims—or friends or relatives of crime victims—that had been pushed too far. These on-screen stories reflected a broad appreciation for fighting fire with fire: using justified violence, whether legal or illegal, to avenge unjustified violence and to bring it under control.105

Rising crime rates were not the only reason that concerns about police violence receded in the 1970s and 1980s. The police themselves became less frightening, at least to many Americans. Litigation over hiring and promotion policies forced many metropolitan police forces to become less monolithically white and monolithically male during this period; the number of minority officers and female officers rose dramatically. So did the number of minority and female police chiefs, albeit more slowly. Civilian oversight boards, which police departments initially fought tooth and nail, gradually became commonplace. And the community policing movement changed the way police departments all across the country thought about and talked about themselves. Rhetoric about the “thin blue line” gave way to calls for partnership with the community. Police departments grew less insular, less defensive, and more sophisticated about and responsive to the diverse communities they served.106

In the process, the police also became better at controlling crime. But crime rates did not begin to drop until the 1990s, and it was even longer before fear of crime began to

104 See supra p. 2.
decline. In the mid to late 1970s and throughout the 1980s, public attitudes toward the police were shaped by, on the hand, a sense that crime, and particularly violent crime, was getting worse and worse, and, on the other hand, a sense that the police were getting smarter, fairer, more open, and more diverse. All of these perceptions were based in reality. Crime, including violent crime, really did spiral upward in the 1970s and 1980s, and the police really did improve.

By the 1990s and early 2000s, all of this had led to a certain degree of complacency about the police. There was a sense that law enforcement had been broken, but it was now largely fixed, or at least that we knew how to fix it. The problem of police brutality, in particular, dropped off the radar screen. Early in 2008, a large group of thoughtful and accomplished police chiefs from around the country sat in a university conference room with a smattering of academics, one of whom was me. We had been called together to try to figure out what the next big thing in policing should be. The remarkable thing, in retrospect, was that few of the chiefs thought that there was any need for a next big thing. Most of them thought that the problem of policing had been solved, that all that remained was implementation. Plenty of people outside policing thought that, too. It was common for scholars of law and public policy, for example, to use the reformed police departments of the 1990s and early 2000s as models for how other governmental agencies should be overhauled.

It’s difficult to find scholars, reformers—or, for that matter, police chiefs—who are so sanguine today about the state of American policing. The more sober outlook is largely the result of three controversies that have dogged police departments over the past decade. The first has to do with complaints about stop-and-frisk, particularly in New York City, complaints that have belatedly brought attention to the violence often associated with “frisks,” particularly when the suspects are young men of color. The second has to with the militarization of policing: the increased use of military-style equipment and tactics by police departments. The third, and most important, is the renewed focus that the Black Lives Matters movement has brought to police shootings. What all three of these issues have in common is that they sit at the intersection of concerns about racial bias in policing and concerns about violence in policing. And all three received relatively little notice until five to ten years ago.

This is particularly true of the latter two issues, law enforcement militarization and police shootings. The militarization of policing over the past half-century began with SWAT—“special weapons and tactics”—teams, which large departments began forming in the 1970s. Initially these units were reserved for rare but highly volatile situations: riots, hostage takings, barricaded suspects, and so on. Over time, though, SWAT teams began to be used heavily in drug searches, and they became something that even smaller departments thought they needed. The “war on drugs” in the 1980s accelerated the expansion and repurposing of SWAT teams, and it gave new plausibility to the idea that police should look and act like warriors. Then the federal government got involved, donating surplus military equipment to police departments and, especially after the terrorist attacks of September 11, 2001, giving them money to buy advanced weaponry and
other battlefield equipment.107 SWAT team and other militarized forms of policing were used disproportionately in communities of color, which was one reason the violence associated with them went under the radar.108 [* add discussion of Obama pullback, Trump reversal]

This was true, as well, of police shootings. In the 1990s and early 2000s, few scholars or reformers concentrated on the use of deadly force by the police. Even Paul Chevigny, a stalwart campaigner against police brutality in New York City since the 1960s, believed by the 1990s that “the principal problem of police violence for the present day” was nondeadly force.109 Throughout the first decade of the twenty-first century, police shootings received far less press coverage and far less scholarly attention than official executions, even though statistics maintained by the federal government indicated that more than ten times as many people were killed each year by police than by applications of the death penalty.110 And the official statistics, it turns out, undercounted police killings and downplayed the reasons to worry about them—omitting more than half of them, and classifying all of the rest as “justifiable homicide.”111 Around a thousand people are killed by police every year in the United States, vastly more than in any country to which we would care to compare ourselves. This is true even after adjusting for population: the odds of getting killed by the police are roughly five times higher in the United States than, for example, in Canada, Australia, England, Italy or Germany.112

The victims of police shootings, moreover, are disproportionately African American. Blacks comprise roughly 12% of the American population, but more than a quarter of all people killed by the police.113 As with the use of military equipment and tactics by the police, it is hard to escape the conclusion that the problem of police killings received relatively little attention throughout the 1990s and early 2000s in part because the problem was experienced disproportionately by people of color. Police killings did not become a subject of national discussion until late 2014, and what brought attention to the issue then, more than anything else, was the Black Lives Matter movement, and especially the protests held in the wake of the deaths of Michael Brown, who was shot by a police officer in Ferguson, Missouri, and Eric Garner, who was suffocated by a police officer on Staten Island. The protests were what turned police killings from a largely forgotten issue into what the Associate Press called “the top news story of 2014.”114

108 See American Civil Liberties Union, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING (2014); Mummolo, supra note 107.
110 See Zimring, supra note 19, at 4-9.
111 Id. at 23-40.
112 Id. at 35, 75-76.
113 Id. at 46.
The Black Lives Matter movement didn’t come out of nowhere. It was made possible by two technological developments: cell phones with video cameras, and social media. But it also was the product of political and intellectual developments. It was the coming of age of a new generation of racial justice activists, and—more importantly for our purposes—it reflected a reorientation of thinking about race, a renewed focus on the tangible and corporeal complaints of people of color, the way that racism operated not just as a system of abstract advantages and disadvantages, but as a history of violence, a history of assaults and trespasses on physical bodies, often at the hands of the police. This is why Paul Butler, for example, argues that the damage done by stop-and-frisk is “more like police brutality than racial microaggression.” It is why the sociologist Nikki Jones emphasizes the ways in which violence “travels through the bodies and minds” of minority youth subjected to police harassment.

**Force, Brutality, and Theories of Police Violence**

Police violence usually isn’t called violence. It is usually called either “use of force” (the phrasing employed by the police and those sympathetic to them) or “police brutality” (the language used by their critics). Both terms are worth unpacking, because they can influence how people think about police violence: how much to worry about it, the pathways that produce it, and the best ways to control it.

The reason the police don’t describe what they do as “violence” is that the term has a pejorative connotation. It often, although not always, is understood to refer to the illegitimate or unjustified use of force. So describing police conduct as “violent” can suggest that it is necessarily wrongful. As I discussed in chapter 1, this is the strongest argument for defining violence differently: for keeping the concept of violence value-neutral. Making wrongfulness part of the definition of violence makes it impossible to have a discussion about, for example, whether and when the violence of war is justified—or about the circumstances under which we want the police to be violent.

That difficulty is averted by using the term “use of force” rather than the term “violence” to describe what the police do when they tackle a suspect, break through a door, or fire their weapons. But “use of force” has a euphemistic quality. It sounds measured and methodical, rather than explosive and hard to control. It downplays the elements of danger and destruction, the “thunder and fire.” “Use of force” is not by definition legitimate and justified; no one thinks that “wrongful use of force” is a contradiction in terms. But the language of “force” does tend to make police violence seem less frightening and troubling than it otherwise might be. This is even truer of the phrase that some departments now prefer: “response to resistance.”

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115 See, e.g., Ta-Nehisi Coates, Between the World and Me (2015).
116 Butler, supra note 23, at 97.
“Police brutality”—a term that opponents of police violence have used since the mid-nineteenth century—has different problems. It is unmistakably pejorative: no one talks about “legitimate” or “justified” brutality. In fact police brutality is usually defined as the “use of unlawful violence” by the law enforcement officers. The bigger problem with the phrase “police brutality” is the suggestion it conveys that violent officers are acting not as human beings but as beasts. It is similar in this way to calling violent criminals “animals,” or calling an impoverished urban neighborhood a “jungle.” Historian Marilynn Johnson points out that “in highlighting the animal-like traits of policemen—most of whom came from working-class backgrounds”—Progressive-Era critics of “police brutality” tapped into and reinforced longstanding tendencies of elites to think of laborers as “bestial or subhuman.” She notes that this kind of thinking proved remarkably persistent, “with middle-class radicals of the 1960s casting police as ‘pigs’ and ‘brutes.’”

Class bias is a long and troubling feature of criminal procedure law, and it is not restricted to discussions of police violence. Complaints about government searches in the Colonial Era, for example, routinely appealed to class privilege; officers were denounced as “dirty,” “insolent,” “impertinent,” “rude,” and so on. But the rhetoric of “police brutality,” and the wider practice of comparing police to animals, does not just encode class prejudice. It also may subtly shape how the legal system thinks about the origins of police violence and the best ways to control it.

Describing violence as brutality, or describing police as “brutes” or “pigs,” reinforces the tendency to view police violence as characterological rather than situational: the consequence of individual officers’ dispositions, rather than the circumstances in which they find themselves. And that is a deeply entrenched tendency. It long been common to trace all forms of police illegality, not just unlawful violence, to rogue officers—“bad apples” that spoil the barrel. That intuition helps to explain the Supreme Court’s strong reluctance to penalize officers for “good faith” violations of the law, either with evidence suppression or with money damages. The Justices have steadily expanded the “good faith” exception to the rule calling for suppression of evidence obtained in violation of the Fourth Amendment—the principle means of enforcing constitutional restrictions on the search and seizure powers of the police. And the Court has immunized police officers from civil suits based on constitutional violations, as long as they acted in the reasonable, good-faith belief that their actions were lawful. Part of the rationale for the good faith exception to the exclusionary rule has been skepticism that “innocent” mistakes by the police can be deterred, but a deeper justification, the Court has made clear, is its belief that the exclusionary rule should be reserved for “flagrant” violations, and shouldn’t be something

118 See JOHNSON, supra note 4, at 37.
119 UNITED STATES COMM’N ON CIVIL RIGHTS, supra note 12, at 5.
120 JOHNSON, supra note 4, at 37.
121 Id.
that “conscientious ... responsible law enforcement officers” need to worry about.\textsuperscript{123} Similar considerations lie behind the rule that officers cannot be sued for constitutional violations if they acted in reasonable good faith.\textsuperscript{124}

Police departments and local governments do not enjoy this kind of immunity. They can be sued for constitutional violations by the officers they employ, even when the officers acted in good faith, if the violations can be traced to an official policy or established custom.\textsuperscript{125} Likewise, the federal government can sue local police departments that have a “pattern or practice” of violating constitutional rights.\textsuperscript{126} That statutory authority—created by Congress in 1994—has been used against excessively violent departments, but only sparingly, and the Trump Administration has all but renounced it. And the pervasive understanding of unlawful police violence as “brutality” colors even efforts to hold departments and local governments liable for condoning excessive violence, and it has shaped the kinds of structural reform sought by private plaintiffs and, occasionally, by the federal Department of Justice. Those lawsuits have sometimes faulted how officers are trained regarding the use of force, but they have placed much greater emphasis on systems for identifying and tracking “problem officers.” The goal has been to get police departments to do a better job identifying their bad apples—and then either rehabilitating them or taking them off the streets.

Activists and scholars have often criticized this focus on bad apples. They problem, they have argued, is not isolated officers but the occupational culture of law enforcement—a culture of paranoia, intolerance, and above all toughness. Police brutality, these critics have suggested, is not the product of violent officers but of a violent system, a violent mentality.\textsuperscript{127} Sometimes that mentality is blamed on what working as a police officer does to a person, sometimes it is blamed on the kinds of people who become police officers.\textsuperscript{128} Either way, blaming the mentality or culture of law enforcement for police brutality is itself a kind of characterological explanation. It replaces rogue officers with rogue forces, or a rogue profession, but it still finds the root of police violence in the police themselves, in their dispositions and proclivities, not in the circumstances in which they find themselves.

Police departments and their defenders, on the other hand, focus very much on circumstances in their discussions of police violence. They see the origins of police

\textsuperscript{123} Davis v. United States, 564 U.S. 229, 241 (2011); see also, e.g., Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).
\textsuperscript{125} See Monell v. Department of Social Services, 436 U.S. 658 (1978).
\textsuperscript{126} 34 U.S.C. § 12601.
\textsuperscript{127} See, e.g., Barbara E. Armacost, Organizational Culture and Police Misconduct, 72 GEO. WASH. L. REV. 453 (2004). For a critique of the emphasis of police occupational culture, see David Alan Sklansky, Seeing Blue: Police Reform, Occupational Culture, and Cognitive Burn-In, in POLICE OCCUPATIONAL CULTURE: NEW DEBATES AND DIRECTIONS 19 (Megan O’Neill, Monique Marks & Anne-Marie Singh eds., 2007).
\textsuperscript{128} Both variants were prominent in the 1960s and 1970s. See SKLANSKY, supra note 96, at 39-41.
violence in the dangers and difficulties that officers face. Much of an officer’s day may be filled with tedium, but the stresses of the job are undeniable. And those stresses are greater in the United States than in Europe, or in Britain or Canada or Australia, if only because there are so many more guns in the United States. Officers here are much more likely to get shot at. And even when suspects do not fire at the police, even when they are unarmed and do not appear threatening, the danger of gunplay lurks in the background of every encounter they have when patrolling or responding to a call.

Policing in the United States is less dangerous than it used to be. The death rate of officers on the job fell by roughly two-thirds in the last quarter of the twentieth century, partly because of the widespread adoption of Kevlar. But the odds of suffering a lethal assault on the job still are more than ten times higher for police officers in this country than in, for example, England or Germany.

Here, as elsewhere, rival theories of violence capture separate, partial truths. It is a question of what you want to emphasize, and for what purpose. Some officers are more violent than others. Some departments are more violent than others. Programs targeting problem officers, and problem departments, are sometimes effective in reducing violence. So there is in fact a characterological side to police violence. But there is a situational side, too. That is why even officers caught on video beating up or shooting a suspect can often defend themselves successfully against charges of brutality: the circumstances in which the police operate do in fact help to explain at least some police violence, regardless whether they excuse it.

There is a missing piece in many discussions of police violence. Critics of police brutality emphasize the characterological explanations of violence; the police and their defenders trace police violence to the circumstances that officers encounter. The missing piece has to do with the responsibility of the police for the situations in which they find themselves: the tactics that place officers in positions where they feel called upon to use force. Good police tactics help officers avoid those positions and give them time to reflect. Good police departments train their personnel in those tactics and require their use. But many departments don’t train their officers in these tactics, and even more departments lack policies requiring their use.

A good deal of police violence can be attributed in part to the training that officers receive, and the tactics they employ in the hours, minutes, and seconds leading up to the use of force. But courts—including the Supreme Court—generally do not hold officers or their departments accountable for the tactics that put officers in situations where they are called upon to use force. Fourth Amendment law, as interpreted by the Supreme Court

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129 See ZIMRING, supra note 19, at 99-100, 107-08.
130 See id. at 86. Most uses of force by the police are proactive, not defensive, see Seth W. Stoughton, Policing Facts, 88 TUL. L. REV. 847, 868 (2014), but that may not be true of deadly force, see ZIMRING, supra note 19, at 61-63.
131 See Garrett & Stoughton, supra note 16.
132 See id.
and as applied by lower courts, focuses instead almost exclusively on the moment in which an individual officer employs violence, and courts routinely declare their reluctance to second-guess the “split-second” decisions that officers make “in circumstances that are tense, uncertain, and rapidly evolving.”

When courts assess the “reasonableness” of police violence, why do they place so little weight on the training that officers receive, or the tactics an officer employs early in an encounter? Part of the reason is a series of procedural rules the Supreme Court has established for civil rights lawsuits, which make it easier for plaintiffs to focus their cases on the actions of individual officers, rather than on a department’s polices or general practices—not just in cases alleging brutality, but in all cases challenging the constitutionality of police conduct. Liability can be based on poor training, for example, only if the defendant can be shown to have been “deliberately indifferent” to constitutional rights and courts typically won’t even take up the issue of departmental or municipal liability until an underlying constitutional violation by an individual officer has been shown. Another part of the reason, though, is the ingrained habit of looking only at the moment in which force is used: what law professors Brandon Garrett and Seth Stoughton call the “‘split second’ theory of policing.” And that theory, in turn, can be traced in part to the nature of the debate over the causes of police violence. One camp has emphasized characterological explanations, focusing either on problem officers or occupational culture; the other camp has emphasized the circumstances that lead to officers using force. Too often what has been crowded out is attention to how police get themselves into those circumstances, and the training and tactics that could help officers avoid them—or, as a last resort, navigate them with less risk to life or limb.

Here is an example of the kind of issue that gets crowded out. Most of the roughly one thousand people shot to death by the police in the United States each year are carrying guns, but roughly 15%—about 150 a year—are armed only with knives. Police officers are almost never killed with knives. Moreover, police in England or Europe almost never shoot anyone armed only with a knife. The reason that so many people armed only with knives are killed by the police in the United States comes down to training and tactics. Police overseas are trained to “contain and negotiate” when facing suspects armed with

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133 Graham v. Connor, 490 U.S. 386, 397 (1989). Lower courts quoted this language more than 2300 times in the 25 years following the Supreme Court’s decision in Graham. See Stoughton, supra note 130, at 865.
137 Garrett & Stoughton, supra note 16, at 216. Some lower courts do better; they consider whether the officer’s conduct was reasonable during each part of the encounter. See id. at 291-93.
138 See Zimring, supra note 19, at 57-63.
knives. In the United States, in contrast, police officers have been told for years about a “21-foot rule”: once a suspect with a knife is within 21 feet of you, you won’t have time to draw and fire your gun before you are stabbed.

There is zero science behind this “rule.” It was devised by a police trainer who timed how long it took officers to unholster and shoot their weapons (one and half seconds, he concluded), and how fast a typical man can run in that time (21 feet, he found). He published his results in a trade magazine, and they quickly became part of the lore of American policing. Criminologists and police executives have repeatedly dismissed the 21-foot rule as a poor guide for officers in the field; even the trainer who came up with rule has disavowed it as anything more than a rough heuristic. Nonetheless, belief in the rule remains pervasive among officers, and the rule is still often taught in police academies.

Moreover no police department has been found liable for failing to disabuse its officers of the rule, in part because of the high bar set by the “deliberate indifference” standard, in part because of the requirement that plaintiffs first prove a constitutional violation by an individual officer, and in part because the very fact that the rule is so widely relied upon makes it seem “reasonable” to many courts.

Comparing Ideas About Violence in Criminal Law and Criminal Procedure

Substantive criminal law and criminal procedure law have both been shaped by ideas about what causes violence. As we saw in chapter 2, modern criminal law takes a strongly characterological view of violence: it reflects the assumption that violence is driven more by individual proclivities than by circumstances, that violent offenses are committed, by and large, by violent people. That is why a person needs to commit so few violent offenses—often one will suffice, and two or three almost always suffices—to be branded as violent offender for purposes of sentencing enhancements, restrictions on parole eligibility, and exclusion from drug courts, veterans courts, and similar diversion programs. The strongly characterological focus of modern criminal statutes is something of a break with tradition. Two signal features of Anglo-American criminal law—the actus reus requirement, and the rule against character evidence—reflect a longstanding wariness about characterological explanations of criminality. There are few traces of that wariness in modern criminal statutes targeting violent crime.

Modern criminal procedure law is also shaped by ideas about the nature of violence, but the commitment to characterological explanations here is far less complete—partly,

141 See Zimring, supra note 19, at 100-02; Martinelli, supra note 140.
perhaps, because the image of police brutality is less racialized than the image of violent crime. In the public mind, the face of violent crime is the face of a young man of color, and offending by members of racial minorities is more readily understood as arising from character rather than circumstances: "whites commit crimes, but black males are criminals." Class prejudice shapes the public perception of police officers—and, even more so, of violent police officers. That kind of prejudice also lends credence to characterological explanations of violence, but it doesn’t operate as strongly as racial bias.

That may be one reason why there is a powerful counter narrative to accounts that tie police brutality to the character of individual officers, to the culture of particular departments, or to the occupational mindset of law enforcement. The counter narrative traces police violence to the circumstances in which officers find themselves. Because this counter narrative is generally advanced by the police themselves or by their defenders, it tends to gloss over the responsibility of the police themselves for the circumstances in which they find themselves—which is to say, it downplays the importance of police training and tactics. For their part, campaigners against police brutality often slight those factors, as well, because their attention is focused on matters of individual character, departmental culture, and occupational mindset.

That is not the sharpest contrast, however, between how ideas about violence operate today in criminal law and in criminal procedure. The sharpest contrast has to do with the salience of violence. Until the early 1960s, criminal statutes placed little weight on the distinction between violent and nonviolent offenses. Since then, though, that distinction has become criminal law’s master divide, the most common proxy for identifying the worst offenses and the defendants least deserving of mercy. Nothing like that has happened in criminal procedure, or in our thinking more generally about the police. If anything, violence matters less in criminal procedure today than it used to. Some of that can be traced to the way in which privacy has crowded out other values in criminal procedure, some of it to the idea that the police need to be violent to combat violent crime, and some of it, perhaps, to the habit of referring to police violence simply as “force” or “response to resistance.” It is a mistake to make too much of violence, but it may be worse to fail to even name it.

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143 David Levering Lewis, [*]; see chapter 2.