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When Stop and Frisk Comes Home: Policing Public and Patrolled Housing

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WHEN STOP AND FRISK COMES HOME: POLICING PUBLIC AND PATROLLED HOUSING

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ABSTRACT

In response to programmatic stop-and-frisk, police killings, and other recent controversies in American policing, many have called for "smart policing"—the evidence-based deployment of police resources. An often-heralded example of smart policing is hot spots policing, which involves directing police attention to locations where crime and disorder fester. It is difficult to argue with the logic of hot spots policing, and this Article does not do so. Instead, it critically examines how the Fourth Amendment operates when hot spots policing and similar targeted strategies are used in a common setting: public housing developments and their private counterparts.

Largely because of mass criminalization, Fourth Amendment law allows police to lay siege to public housing and the people who live in it. Public housing developments and their private counterparts have historical reputations as problem places, and law enforcement has subjected these locations to specialized policing programs for decades. Given the low Fourth Amendment standards for stops, arrests, and searches in connection with minor misconduct, that outsized attention combines with the astounding array of conduct regulated in public and patrolled housing to permit police nearly unfettered authority. Fourth Amendment protections usually associated with the home are virtually unrecognizable in these places. Instead, the Fourth Amendment fuels the use of law enforcement as a tool of social control in public and patrolled housing. As such, the harms of programmatic stop-and-frisk are not remedied, but simply concentrated and localized. Policing in public and patrolled housing thus offers a cautionary tale of the limits of "smart policing" as an answer to abusive police practices.

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CONTENTS

INTRODUCTION 670
I. POLICING PROGRAMS IN PUBLIC AND PATROLLED HOUSING 676
A. Targeting Public and Patrolled Housing 680
B. Hot Spots Policing 686
II. THE FOURTH AMENDMENT IN PUBLIC AND PATROLLED HOUSING ... 691
A. Stop for Anything 695
1. Stops for Infractions, Regulations, and House Rules 696
2. High-Crime Areas 698
B. Arrest for Anything 702
C. Search for Anything: The Search Incident to Arrest Exception to the Warrant Requirement 707
D. Policing Public and Patrolled Housing in New York City: "Just Go to the Well" 714
III. MASS CRIMINALIZATION IN PUBLIC AND PATROLLED HOUSING AND FOURTH AMENDMENT VALUES 720
IV. PROVIDING PROTECTION AND RESTORING DIGNITY TO PUBLIC AND PATROLLED HOUSING RESIDENTS 724
A. Answering Open Questions of Fourth Amendment Law 724
B. State Law 726
C. Local Laws and Policies 728
CONCLUSION 728

INTRODUCTION

It is axiomatic that the home enjoys the greatest Fourth Amendment protection. Indeed, the "cult of the home" has led to Fourth Amendment jurisprudence that protects the home more than virtually any other location.[1] Although this concept has long been acknowledged to have greater resonance for those with more space rather than less, the notion that "the home is the castle" is widely accepted.[2] But closer examination reveals that this acceptance does not bear the weight of scrutiny. Fourth Amendment protection of the home

1. Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 912–16 (2010) (describing Fourth Amendment jurisprudence that provides extraordinary protection for the home).

2. *See generally* 1 WAYNE LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3 (5th ed. 2012) ("[O]ne's dwelling has generally been viewed as the area most resolutely protected by Fourth Amendment."). This maxim apparently pre-dates even English common law. *See* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 197 n.3 (1993).

is particularly circumscribed for some: residents of public housing and private housing developments subject to routine police patrol.[3] Residents of such developments and their visitors are subject to regular and intrusive police encounters—ranging from "voluntary" ones to stops, arrests, and searches—in and around their buildings based on little to no suspicion of criminal activity. These places, and the people who live in them, are subject to extensive scrutiny by law enforcement in the hallways, stairwells, courtyards, and other common spaces of their homes—encounters that are simply unimaginable in residences of the well-heeled and wealthy.

This Article examines the intersection of the policing strategies frequently used in such locations and Fourth Amendment doctrine to argue that Fourth Amendment law plays a critical role in fueling such intense police oversight and surveillance of public and patrolled housing that they are sometimes effectively rendered occupied territories. Police often label public and patrolled housing developments problem places and accordingly develop programs aimed squarely at them. In addition, they adopt "hot spots" strategies[4] and focus their use on public and patrolled housing. The primary way Fourth Amendment law encourages these practices is its permissiveness of seizures and searches in response to even the most minor misbehavior. The excessive regulation of conduct in and around such housing developments—achieved by statutes and ordinances that specifically govern conduct in those locations as well as "house rules" and similar restrictions enforced by police—combined with the freedom accorded police when they operate in these locales effectively provides police carte blanche to stop, arrest, and search everyone they encounter.

While hot spots policing strategies like those used in public and patrolled housing has become wildly popular among American police departments, legal scholarship examining the implications of their use has not kept pace. Legal scholars have long lamented the limited protection the Fourth Amendment offers to the urban poor[5] and racial

3. The term "public and patrolled housing" will be used throughout this Article to refer to these developments. As used here, "patrolled housing" refers to multi-unit dwellings subject to regular patrol by police or other law enforcement officers, typically as a result of agreement between the landlord and a local law enforcement agency. Some of these private developments receive government funding, but many are purely private. *See infra* notes 54–58 and accompanying text.

4. *See infra* Part I(B) for discussion of hot spots strategies.

5. *See, e.g.*, Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 401, 405 (2003) (observing that "Fourth Amendment protection varies depending on the extent to which one can afford accoutrements of wealth such as a freestanding home, fences, lawns, heavy curtains, and vision- and sound-proof doors and walls," and noting that people who live in "tenements or other crowded

minorities more generally.[6] In the realm of police programs, they have also examined and criticized "programmatic stop and frisk," through which police departments instruct their officers to aggressively stop and frisk civilians.[7] And, although there is extensive criminology literature about hot spots policing, which primarily addresses the impact of hot spots strategies on crime,[8] there is a lack of legal scholarship that offers

areas" are "much more likely to experience unregulated government intrusions"); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1270–73 (1999) (arguing that "[p]rivacy follows space, and people with money have more space than people without," leaving the urban poor, particularly African Americans, more subject to police scrutiny because "[p]rivacy, as Fourth Amendment law defines it, is something people tend to have a lot of only when they also have a lot of other things").

6. *See, e.g.*, I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1 (2011); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002) [hereinafter Carbado, *(E)racing the Fourth Amendment*]; Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994) [hereinafter Harris, *Factors for Reasonable Suspicion*]; Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243 (1991); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); *see also* Stuntz, *supra* note 5, at 1272–73 ("Poverty among certain population groups in certain parts of the country *is* almost exclusively an urban phenomenon . . . . Poor blacks are more likely to live in cities, surrounded by other poor blacks. If the law is tilted against the urban poor, it is bound have a racial tilt as well.") (footnotes omitted).

7. *See* Frank Rudy Cooper, *A Genealogy of Programmatic Stop and Frisk: The Discourse-to-Practice-Circuit*, 73 U. MIAMI L. REV. 1, 14–21 (2018) (describing programmatic stop and frisk and distilling scholarly treatment of the subject); *see also* Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 159 (2016) (describing programmatic stop and frisk as "a deliberate program of stopping and frisking individuals throughout [New York City], concentrated in certain areas, for the stated purpose of suppressing crime").

8. *See* Tammy Rinehart Kochel, *Constructing Hot Spots Policing: Unexamined Consequences for Disadvantaged Populations and for Police Legitimacy*, 22 CRIM. J. POL'Y REV. 350, 358 (2011) (noting that "few evaluation studies measure outcomes beyond crime rates" and that the usual definition of "hot spots" makes "[p]eople in hot spots . . . ancillary to the characteristics of the place itself"). As Tracey Meares has pointed out, criminologists seem to assume—erroneously—that police always act lawfully. Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—And Why It Matters*, 54 WM. & MARY L. REV. 1865, 1874 (2013).

a critical analysis of how hot spots policing and similar place-based policing strategies interplay with the Fourth Amendment.[9] This Article fills the gap and explores the meaning of the Fourth Amendment when police implement programs in public housing and private patrolled housing developments. It concludes that residents and visitors of such developments are uniquely vulnerable to police surveillance and control. Moreover, it reveals that the long-acknowledged anemic Fourth Amendment protections for the urban poor are especially weak in hot spots; in the context of public and patrolled housing, that weakness profoundly affects the everyday interactions between residents and the police. Actions deemed lawful under the Fourth Amendment can leave public and patrolled housing residents particularly vulnerable to surveillance, police encounters and stops, as well as searches and arrests.

By permitting such extensive dominion over the residents and visitors of public and patrolled housing, the Fourth Amendment facilitates social control of the largely impoverished residents of public and patrolled housing, who are, at least in public housing, largely black and brown.[10] Similar to the criminalization of welfare recipients, who

9. Rachel Harmon and Aziz Huq have touched upon hot spots policing in their analyses, respectively, of arrest and stop-and-frisk practices. *See* Rachel Harmon, *Why Arrest?*, 115 MICH. L. REV. 307 (2016) [hereinafter Harmon, *Why Arrest?*]; Rachel Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 794 & n.130 (2012) [hereinafter Harmon, *The Problem of Policing*]; Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2422–25 (2017). In addition, it is worth noting that Jeffrey Fagan has published two extensive empirical analyses of the New York City Police Department's enforcement practices in public housing. *See* Jeffrey Fagan et al., *Race and Selective Enforcement in Public Housing*, 9 J. EMPIRICAL LEGAL STUD. 697 (2012) [hereinafter Fagan et al., *Race and Selective Enforcement in Public Housing*] (evaluating the role of race in determining level of trespass enforcement in public housing); Jeffrey Fagan et al., *The Paradox of the Drug Elimination Program in New York City*, 13 GEO. J. ON POVERTY L. & POL'Y 415 (2006) [hereinafter Fagan et al., *The Paradox of the Drug Elimination Program*] (analyzing the impact of the U.S. Department of Housing and Urban Development's Drug Elimination Program on crime in New York City public housing).

10. Over two million people reside in public housing, of whom approximately 67 percent were minorities in 2017. *See* U.S. DEP'T OF HOUSING & DEV., *Assisted Housing: National and Local Datasets*, https://www.huduser.gov/portal/datasets/assthsg.html [https://perma.cc/3E7U-WJ8Y] (last visited Mar. 3, 2019) (follow "Data"; then follow "2017—Based on Census 2010 geographies" and select "U.S. Total"). Because policing programs in patrolled housing (as defined in this Article) are not regulated or subject to routine data collection, it would be impossible to determine the racial makeup of patrolled housing. That said, there is reason to believe its residents are also largely black and brown.

are subject to substantial regulation of their conduct,[11] the residents and visitors of public and patrolled housing do not enjoy the same freedom to move about their daily lives that most Americans expect. Instead, they may find that even the most mundane rule violations subject them to police encounters, which sometimes end with detentions, jail time, and criminal prosecutions. The treatment of these problem places in Fourth Amendment jurisprudence is yet another mechanism by which the Fourth Amendment permits profiling, with place effectively allowed to become a proxy for race and class. This dynamic undermines core Fourth Amendment interests and values, including autonomy, the right to locomotion, and dignity interests. It also demonstrates the limits of "smart policing," which reformers frequently call for in response to abuses like programmatic stop-and-frisk, and is supposed to use evidence to direct police resources where they are needed most.

This Article proceeds in four parts. Part I examines the rise of two categories of policing programs that have been used to target public and patrolled housing: those that are focused on housing developments, sometimes funded by the U.S. Department of Housing & Urban Development, and hot spots policing more generally. Resting largely on criminology scholarship, this examination is useful because it demonstrates that the police focus on public and patrolled housing has not occurred randomly or by happenstance; instead, it is the result of a conscious effort to exploit the uniquely expansive authority police have in public and patrolled housing.

Part II addresses the Fourth Amendment doctrines that work together to limit protection against searches and seizures in and around public and patrolled housing. Fourth Amendment law permits police to subject residents and others who frequent public and patrolled housing to routine and virtually suspicionless stops, arrests, and searches largely because of "mass criminalization"[12] in public and patrolled housing, i.e., the hyper regulation of behavior through the use of house rules and similar standards. *First*, the standards for stops and high-crime area doctrine function together to permit stops for virtually any infraction. Courts have utterly failed to attach any meaning to the term high-

11. *See* KAARYN GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF WELFARE 60–70 (2012) (describing administrative rules and punishments utilized in welfare system); Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540 (2012) (exploring racially exclusionary practices that effectively restrict access of poor black women to publicly subsidized housing in white communities).

12. As described more fully in Part II, Devon Carbado coined this term. *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1487 (2016).

crime area, giving police officers extraordinary latitude to conduct stops in any locations they define as such. This broad authority operates with mass criminalization to provide police with especially expansive power to conduct stops of people in and around public and patrolled housing. *Second*, there is the *Atwater* rule, which permits arrest for "very minor crimes," i.e., effectively anything—including behavior regulated by housing rules rather than criminal law.[13] This rule grants police expansive power to arrest, no matter how trivial the charge. *Third*, the search incident to arrest doctrine leads to exploratory searches in public and patrolled housing. The permission provided in *Atwater* to arrest for virtually any offense can be exploited to facilitate widespread searches, and some police departments invoke the exception to justify searches of people in and around public and patrolled housing without even making arrests. Several appellate courts have refused to suppress evidence in this context, thus implicitly encouraging its use. Together, these three doctrines legalize routine stops, arrests, and searches in public and patrolled housing. They reveal that when police label places as problems, police can exercise virtually limitless authority to seize and search the people within them. Part II ends with a case study of New York City Police Department programs that involve frequent patrols—both inside and out—of public housing and private apartment complexes. It illustrates how targeted policing programs operate with the Fourth Amendment powers described in Part II to leave residents defenseless against police surveillance and intrusions anywhere but in the inner sanctums of their apartments.

Part III describes the costs associated with the aggressive stop, arrest, and search practices frequently used in public and patrolled housing, including the substantial disconnect between the traditional articulation of Fourth Amendment values and the lived experiences of people in public and patrolled housing. In addition, it details the unique harms that flow from the use of such order maintenance tactics in homes.

Part IV describes remedies for the severe limits on Fourth Amendment protection for people who inhabit or frequent public and patrolled housing. Some lie in the courts, while others in political bodies at the state and local level. To the extent that some of the identified Fourth Amendment issues remain open questions, particularly those regarding the propriety of searches, courts should answer them in ways that cabin the authority of police to seize and to search. State courts and legislatures can also address these issues. State courts can interpret state laws and constitutional provisions with an eye toward the harms that unfold when police are given unreasonably broad authority to stop, arrest, and search. In particular, state courts should be attentive to whether their state constitutions even permit arrests for civil

13. Atwater v. City of Lago Vista, 532 U.S. 318, 322 (2001); *infra* notes 161–172 and accompanying text.

infractions. Legislative bodies should refrain from enacting laws that unnecessarily criminalize conduct in public and patrolled housing and enact affirmative bans on stops and arrests for minor misconduct. Finally, local governments can both regulate police departments directly and decriminalize housing-related infractions.

I. POLICING PROGRAMS IN PUBLIC AND PATROLLED HOUSING

Residents of public and patrolled housing have been in the crosshairs of American police departments for over forty years. During a period of tremendous change in policing and coinciding with a newfound emphasis on place-based programs, law enforcement agencies have developed both programs specifically targeted at public and patrolled housing and hot spots strategies that have been frequently used in such locales.

Over the course of the early twentieth century, policing was successfully transformed from a purely political and often corrupt exercise to a professional one that focused almost entirely on fighting crime.[14] Police officers, who had previously been driven by parochial political concerns, came to be "portrayed as semi-automatic; officers were described as loyally following rules and as largely under administrative control."[15] The reform era did not, however, end all problems with policing. Instead, significant critiques of American policing practices emerged in mainstream discourse in the 1960s and 1970s. In direct contravention to the notion of police officers as neutral, semi-automatic arbiters of justice, an American Bar Association study

14. *See* SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM 53–56 (1977) (describing the professionalization movement in policing and its focus on "administrative efficiency," resulting in greater control of officers by police executives); Anthony A. Braga, *Crime and Policing Revisited*, NEW PERSP. IN POLICING, Sept. 2015, at 3–4 (describing "pre-1930s 'political era' of policing" and emergence of the professional model of policing); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 565–67 (1997) (describing the pre-reform era connection between local politics and policing and the later reforms that created "greater autonomy" of police); Sarah Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253, 1261 (2000) ("Reformers severed the close ties between police and local political leaders, as well as between the police and neighborhoods they patrolled . . . . Criminal law became the primary source of police legitimacy, and reformers posited crime control and apprehension of criminals as the core police function.").

15. Waldeck, *supra* note 14, at 1261–62.

highlighted the enormous role of discretion in policing.[16] Around the same time, longstanding complaints about police abuse by communities of color gained new audiences following rebellions in numerous cities.[17]

In response, three major approaches have come to dominate the public debate about American policing since the 1970s: order maintenance policing, community policing, and problem-oriented policing.[18] All three can and have been used to implement policing programs that target public and other patrolled housing.

Order maintenance policing, also sometimes referred to as zero tolerance policing, is an heir of "Broken Windows" theory.[19] According to Broken Windows theory, "police should address minor disorders to strengthen police-citizen interactions, and consequently, informal social control . . . . [S]igns of physical and social disorder invite criminal activity. Disorder indicates to law-abiding citizens that their neighborhoods are dangerous places, leading to their withdrawal from informal social control and regulation."[20] By implementing this theory through order maintenance policing, "police aggressively enforce laws against social disorder with 'zero tolerance' that requires arrest for any law infraction."[21] Accordingly, Broken Windows supporters promote using maximum legal authority to stop, arrest, and search people who live in areas with high levels of disorder.[22] Of particular relevance to an analysis of policing programs that target particular locales, it is worth noting that identifying disorder may turn on the racial and class

16. *Id.* at 1262–63 (citing AMERICAN BAR ASSOCIATION, THE URBAN POLICE FUNCTION (1973)).

17. *Id.* at 1262 (citing REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968)).

18. *See, e.g.*, Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 423 (2000); Livingston, *supra* note 14, at 562–63.

19. Jeffrey Fagan et al., *Street Stops and Broken Windows:* Terry*, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 464 (2000).

20. *Id.* (footnotes omitted); *see also* George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC (Mar. 1982), https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/ [https://perma.cc/ZL8A-7MG6] ("[A]t the community level, disorder and crime are usually inextricably linked, in a kind of developmental sequence. Social psychologists and police officers tend to agree that if a window in a building is broken and is left unrepaired, all of the rest of the windows will soon be broken.").

21. Fagan et al., *supra* note 19, at 467.

22. *See* George L. KELLING & WILLIAM H. SOUSA, DO POLICE MATTER? AN ANALYSIS OF THE IMPACT OF NEW YORK CITY'S POLICE REFORM (2001).

characteristics of a location's residents.[23] The Broken Windows approach has been subject to criticism from a variety of quarters.[24]

In contrast, community policing focuses on the notion of partnerships between police and community. Under this theory, the community should play a leading role in identifying policing priorities and defining the problems that require police attention.[25] As a National Institute of Justice study explained, the four principles of community policing are "community-based crime prevention, reorientation of patrol, increased police accountability, and decentralization of command."[26] The definition of community policing is murky and susceptible to wildly different, even conflicting, interpretations.[27] Accordingly, police departments may deem themselves to be practicing community policing even when they adopt Broken Windows practices

23. *See* Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of "Broken Windows,"* 67 SOC. PSYCHOL. Q. 319, 336 (2004) (evaluating perceptions of disorder and concluding that "social structure [*i.e.*, race and class] proved a more powerful predictor of perceived disorder than did carefully observed disorder").

24. *See, e.g.*, Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men's Perceptions of Police Legitimacy*, 27 JUST. Q. 255, 273 (2010) (studying impact of order maintenance tactics on young men in St. Louis and concluding that "aggressive order maintenance manifesting in the form of widespread stop-and-frisks can compromise procedural justice and, therefore, undermine police legitimacy"); Bernard Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 277 (2006) (reviewing crime data in cities that utilized Broken Windows approach and finding that order maintenance policing cannot be deemed "the optimal use of scarce government resources"); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); Tom R. Tyler et al., *The Consequences of Being an Object of Suspicion: Potential Pitfalls of Proactive Police Contact*, 12 J. EMPIRICAL LEGAL STUD. 602, 605 (2015) (using national survey data to find that aggressive order maintenance practices lowered police legitimacy among those who had the experience of "being stopped and 'feeling like a suspect'").

25. Livingston, *supra* note 14, at 576.

26. Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. 834, 872 n.160 (2016) (quoting WILLIAM LYONS, THE POLITICS OF COMMUNITY POLICING: REARRANGING THE POWER TO PUNISH 35 (1999)).

27. *Id.* at 872–73 ("[T]he theory and practices of community policing are muddled . . . . Often [the underlying] concepts fill in the vagaries of or complement one on [sic] another, but they also clash and confuse; where one set of practices ends and the other begins is often unclear and subject to debate."); *see also* Livingston, *supra* note 14 and accompanying text.

that criminalize substantial portions of the community from which they are supposed to take direction.[28]

Finally, problem-oriented policing embraces the notion "that the 'police job requires that they deal with a wide range of behavioral problems that arise in the community.'"[29] Specifically, it "seeks to identify the underlying causes of crime problems and to frame appropriate responses tailored to problems based on the results of analysis."[30] It is an approach that focuses on the underlying conditions in areas where disorder and crime unfold rather than the possible perpetrators. Along with community policing,[31] reformers sometimes call for the use of problem-oriented policing in response to concerns about over-policing and criminalization.[32]

The following sections summarize the historical development of the special attention police agencies have paid to public and patrolled housing and the contemporaneous rise of hot spots policing. The aim is to provide useful background on some of the common approaches to policing public and patrolled housing, so that the limits of Fourth Amendment protection in those locales can be more fully understood.

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28. *See* Akbar, *supra* note 26, at 873–75 (describing the push for community policing "inflected by broken windows theory" and troubling results).

29. ANTHONY A. BRAGA & DAVID L. WEISBURD, POLICING PROBLEM PLACES: CRIME HOT SPOTS AND EFFECTIVE PREVENTION 50 (2010).

30. Braga, *supra* note 14, at 12.

31. Community policing resembles problem-oriented policing and sometimes incorporates problem-oriented policing processes. "The three core, and densely interrelated, elements of community policing are citizen involvement in identifying and addressing public safety concerns, the decentralization of decision-making down the police organizational hierarchy to encourage development of local responses to locally defined problems, and *problem solving* to respond to community crime and disorder concerns." *Id.* at 11–12 (emphasis in original) (citations omitted).

32. *See, e.g.*, Michael T. McPhearson, Denise Lieberman & John Chasnoff, *New Model of Policing Needed*, ST. LOUIS POST-DISPATCH (Apr. 8, 2015), https://www.stltoday.com/opinion/columnists/new-model-of-policing-needed/article_83e6937b-bd23-5918-ad8a-7852f4916349.html [https://perma.cc/STH6-Y2DL] (steering committee members of Don't Shoot Coalition, composed of fifty St. Louis-area organizations formed after the killing of Michael Brown, calling for community policing and critiquing "[g]eographical hot-spot policing" that "disrupts whole neighborhoods"). *But see* Brendan McQuade, *Against Community Policing*, JACOBIN (Nov. 2015), https://www.jacobinmag.com/2015/11/obama-chicago-black-lives-matter-police-brutality/ [https://perma.cc/3WXV-GLZC] (arguing that "while . . . community policing programs purport to build stronger communities, they train small, self-selecting groups to amplify police power," and "there is no evidence that it will bring meaningful accountability or otherwise curtail state violence").

A. Targeting Public and Patrolled Housing

Public housing looms large in the public imagination as a major site of urban disorder and criminality. Although crime problems are not, in fact, universal, stereotypes about the dangers of public housing are taken as an article of faith.[33] There is reason to believe that this is true even among criminologists and police officials.[34] Likely as a result of this widespread belief, police departments, and other law enforcement agencies have trained their attention on public housing for at least forty years, using a variety of approaches to address crime and disorder that result in substantial police surveillance and control.[35]

In 1978, the U.S. Department of Housing and Urban Development ("HUD") instituted federal efforts to address crime conditions in public housing. It provided funding to thirty-nine local public housing authorities with the aim of developing community-based anti-crime programs.[36] Using what would now be described as problem-oriented

33. GARTH DAVIES, CRIME, NEIGHBORHOOD, AND PUBLIC HOUSING 9 (2006) ("[W]hile there may, in fact, be some truth to the concept of 'problem projects,' it is inaccurate and unfair to paint the entire public housing universe with the same broad strokes."); Fagan et al., *Race and Selective Enforcement in Public Housing*, *supra* note 9, at 699 (explaining that links between public housing and crime "are routinely revisited in the press, which has provided near constant reminders of the drug problems in public housing," and are "reinforced by academic and media portrayals and lead[] to a situation where outsiders . . . perceive public housing as more dangerous than the facts can substantiate"); Harold R. Holzman, *Criminological Research on Public Housing: Toward a Better Understanding of People, Places, and Spaces*, 42 CRIME & DELINQ. 361, 361 (1996) (describing public housing's "image problem"); LANGLEY G. KEYES, STRATEGIES AND SAINTS: FIGHTING DRUGS IN SUBSIDIZED HOUSING 34–35 (1992); Fritz Umbach & Alexander Gerould, *Myth #3: Public Housing Breeds Crimes*, *in* PUBLIC HOUSING MYTHS: PERCEPTION, REALITY, AND SOCIAL POLICY 66 (Nicholas Dagen Bloom et al. eds., 2015) ("Portrayals of public housing complexes as 'criminal paradises' stretch back to the late 1950s, when it became obvious that reformers' utopian visions of redeeming blighted urban tenements through modern architecture and state management had failed to deliver.").

34. *See* DAVIES, *supra* note 33, at 7; Holzman, *supra note* 33, at 362–63 (describing the "information gap" in criminological research on public housing because of small number of studies focused on public housing).

35. *See* Fagan et al., *Race and Selective Enforcement in Public Housing*, *supra* note 9, at 697 ("The resulting labeling of public housing has led to a set of law enforcement tactics that place residents under a very close police gaze, justifies efforts to 'contain' residents within the boundaries of public housing sites, and legitimizes the close surveillance of visitors and neighbors from the surrounding communities who venture into public housing's perimeter.").

36. SAMPSON O. ANNAN & WESLEY G. SKOGAN, THE POLICE FOUNDATION, DRUG ENFORCEMENT IN PUBLIC HOUSING: SIGNS OF SUCCESS IN DENVER 9 (1993); I W. VICTOR ROUSE & HERB RUBINSTEIN, U.S. DEP'T

policing strategies, the focus of these efforts was initially physical design and environmental issues thought to contribute to crime, such as lack of surveillance and lack of door and window locks.[37] It did, however, begin a coordinated effort to increase the use of specialized police in public housing around the same time.[38] The problem-oriented approach was ultimately deemed a failed effort, and attention shifted to enforcement-heavy approaches that were part of the larger War on Drugs.[39]

In the 1990s, numerous local public housing authorities and cities began to utilize more aggressive order maintenance strategies. In 1990, the Police Executive Research Forum, the nation's leading research institute on policing practices, published a book on policing strategies to address drug crimes in public housing.[40] It described "occupying the community," accomplished by increasing police assigned to public housing developments, opening "mini-police stations within the complexes," and "beefing up enforcement efforts," as a common approach.[41] "Round-em up" tactics focused on public nuisances, and undercover buy-and-bust operations also became popular.[42] HUD's Drug Elimination Program ("DEP"), which provided financial support to public housing authorities in their efforts to combat drug problems,

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of Hous. And Urban Dev., Crime in Public Housing: A Review of Major Issues and Selected Crime Reduction Strategies iv–v (1978).

37. *See* Rouse & Rubinstein, *supra* note 36, at 9–22. This focus on non-law enforcement strategies may have developed because previous research did not demonstrate that an increased police presence reduced crime. *See* Oscar Newman & Susan A. Franck, Nat'l Inst. of Justice, Factors Influencing Crime and Instability in Urban Housing Developments 140 (1980).

38. U.S. Dep't of Hous. & Urban Dev., Urban Initiatives Anti-Crime Program First Annual Report to Congress 16–17 (Mar. 31, 1980), *microformed on* Nat'l Criminal Justice Reference Serv. (Nat'l Inst. of Justice) (describing federal efforts to provide funding for police in public housing).

39. Terence Dunworth & Aaron Saiger, Nat'l Inst. of Justice, Drugs and Crime in Public Housing: A Three-City Analysis 6 (1994); Susan J. Popkin et al., The Hidden War: Crime and the Tragedy of Public Housing in Chicago 29 (2000).

40. Deborah Lamm Weisel, Police Exec. Research Forum, Tackling Drug Problems in Public Housing: A Guide for Police (1990).

41. *Id.* at 101–02 (describing efforts in this category in Philadelphia, Pa.; New Orleans, La.; Baltimore, Md.; Orlando, Fla.; Tampa, Fla.; Atlanta, Ga; Newport News, Va.; New Brunswick, N.J.; Alexandria, Va.; and Monette, Ariz.).

42. Popkin et al., *supra* note 39, at 29.

helped fund some of these efforts.[43] In stark contrast to prior HUD programs, the overwhelming focus of DEP was an increased law enforcement presence in public housing.[44]

Perhaps the most notorious example of 1990s-era aggressive practices occurred in Chicago. There, the Chicago Housing Authority and Chicago Police Department implemented Operation Clean Sweep, which involved "surprise searches of apartments, typically conducted before dawn, in which a team of law enforcement officers would furtively enter a single high-rise without search warrants to locate gangs, criminals, unreported household boarders, and illicit paraphernalia."[45] After legal challenges brought by the ACLU, the sweeps were severely limited and replaced with building-specific patrols.[46] Ultimately, after spending hundreds of millions of dollars, the program was regarded as a failure.[47] That said, it did inspire the exploration and in some cases implementation of similar programs in other major cities.[48] It also spurred a national conversation about crime control tactics in public housing. President Clinton ordered HUD and the Justice Department to develop a plan to combat crime in public housing.[49] Six of the seven points involved expanded authority to search

43. Fagan et al., *The Paradox of the Drug Elimination Program*, *supra* note 9, at 416–17.

44. THEODORE M. HAMMETT ET AL., U.S. DEP'T OF HOUS. AND URBAN DEV., PUBLIC HOUSING DRUG ELIMINATION PROGRAM RESOURCE DOCUMENT FINAL REPORT ii, 33 (1994) (reporting that 47 percent of DEP funds were dedicated to law enforcement activities, compared to 6 percent each for physical improvements and drug treatment, and 4 percent for resident initiatives); *id.* at 38 (identifying "police patrol" as among the top five most commonly cited activities funded through DEP).

45. SUDHIR ALLADI VENKATESH, THE RISE AND FALL OF A MODERN GHETTO 130 (2000).

46. POPKIN ET AL., *supra* note 39, at 33.

47. *Id.* at 175–76.

48. David E.B. Smith, Note, *Clean Sweep or Witch Hunt?: Constitutional Issues in Chicago's Public Housing Sweeps*, 65 CHI.-KENT L. REV. 505, 506–07 & nn.9–13 (1993) (noting that "sweep programs were considered or instituted in Atlanta, Baltimore, Boston, Newark, Philadelphia, Nashville, Detroit, Seattle, Des Moines, Annapolis, and Marquette, Michigan").

49. William J. Clinton, *The President's Radio Address* (Apr. 16, 1994), (transcript available at https://www.presidency.ucsb.edu/node/219057 [https://perma.cc/G37E-UAR5]); *see also* Ronald Brownstein, *Frisk for Guns at Housing Projects, Panel Urges*, L.A. TIMES (Apr. 13, 1994), http://articles.latimes.com/1994-04-13/news/mn-45548_1_housing-projects [https://perma.cc/3ZCF-S4LN] (discussing the proposed plan); Lynn Sweet, *Clinton Unveils Tailored 7-Point Sweeps Policy*, CHI. SUN TIMES, Apr. 17, 1994, at 3 (describing the president's new policy).

apartments and people in public housing, such as an increased use of stop-and-frisk and warrantless "consent searches" of apartments.[50]

Less high profile were the efforts like those of the Metropolitan Police Department's new Public Housing Division in Washington D.C. There, the police department instituted several problem-oriented strategies to address issues that it deemed to be particular to public housing.[51] For example, Operation Bark & Bite focused on public housing residents' ownership of dogs, particularly pit bulls, which intimidated residents and were used in fights for gambling.[52] In part because public housing tenants' leases barred dog ownership, the Public Housing Division was able to issue citations to residents and impound animals, as well as patrol buildings with housing authority staff members who had access to apartments.[53] Although this example does not involve the typical crime conditions associated with public housing in the popular imagination, it provides a good example of the expansive tools and authority that police can put to use when they target public housing.

And, although public housing usually receives outsized attention regarding crime, private buildings also became a focus of policing efforts. For example, in New York City, the Manhattan District Attorney launched the Trespass Affidavit Program ("TAP") in 1990.[54] Later expanded to the entire city under the title "Operation Clean Halls," the NYPD receives permission from private landlords to patrol the common areas of apartment buildings.[55] The original focus of the program was "narcotics sales taking place in the common areas of private buildings, such as lobbies, stairwells, and rooftops."[56] It later expanded to include other criminal activity and quality of life offenses in the buildings.[57] Such programs are effectively unregulated and no comprehensive listing of them exists. Cases alleging improper arrests or

50. Sweet, *supra* note 49.

51. Joshua Ederheimer, *Complex Crime: Contending with Crime in Public Housing*, *in* 3 Problem Oriented Policing: Crime-Specific Problems, Critical Issues, and Making POP Work, at x (Corina Sole & Eugenia E. Gratto eds., 2000).

52. *Id.* at 9.

53. *Id.* at 10–11.

54. Ligon v. City of New York, 925 F. Supp. 2d 478, 484–85, 517 (S.D.N.Y. 2013).

55. *Id.*

56. *Id.* at 517.

57. *Id.* at 517–19.

other encounters between residents or their guests suggest that this practice extends beyond New York City.[58]

Aside from these policing strategies heralded by police departments, HUD, and local governments, police programs and practices targeted at public and patrolled housing have also come to light through investigations and lawsuits challenging them. For example, the U.S. Department of Justice Civil Rights Division found in recent investigations that the Baltimore and Newark police departments singled out public housing residents for arrest and citation. The Baltimore Police Department ("BPD") concentrated on public housing for trespassing enforcement, resulting in unconstitutional arrests.[59] At least one BPD district even used a template for processing trespassing arrests in public housing,[60] presumably to make them easier. Astonishingly, the template's section for an arrestee's demographic information was pre-filled with the words "black male," thus "presum[ing] that individuals arrested for trespassing will be African American."[61] In Newark, the Justice Department identified complaints that the police department focused on public housing projects as "convenient targets" for citations for quality of life infractions.[62]

Numerous courts have also weighed in on these targeted practices as a result of constitutional challenges brought by residents and their guests. Public housing residents in Frederick, Maryland brought a lawsuit charging that the local police department, which had entered an agreement with the public housing authority, was illegally arresting people for trespassing.[63] After advising residents to "carry their photo identification with them at all times to display to police," the housing authority maintained a "trespass log" to document those who had been issued trespassing citations, i.e., "[p]ersons believed to be at one of the Apartments with 'no apparent legitimate reason.'"[64] If persons listed on the log were encountered again on the grounds of the public housing

58. *See, e.g.*, Franklin v. Montgomery Cty., Md., No. DKC 2005–0489, 2006 WL 2632298, at *7–8 (D. Md. Sept. 13, 2006) (describing police department's authority to patrol private housing complex); L.D.L. v. State, 569 So. 2d 1310, 1311 (Fla. Dist. Ct. App. 1990) (same); Holland v. Commonwealth, 502 S.E.2d 145, 145–46 (Va. Ct. App. 1998) (same).

59. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEP'T 37–38 (2016).

60. *Id.*

61. *Id.* at 37.

62. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 21 (2014).

63. Diggs v. Hous. Auth. of Frederick, 67 F. Supp. 2d 522, 524–25 (D. Md. 1999).

64. *Id.* at 525–26.

apartments, they were arrested solely because their name appeared on the trespass log.[65] Residents and visitors have challenged similar trespass enforcement practices used in public and patrolled housing complexes in Ohio, Maryland, Massachusetts, New Jersey, Virginia, and Washington.[66] In East Chicago, Indiana, a public housing resident sued because, pursuant to a relationship between the public housing authority and police department, the police routinely entered apartments with drug-sniffing dogs to conduct searches.[67]

Pending cases in Buffalo and Oakland raise constitutional questions about policing practices in public housing as well. A public housing resident in Oakland, along with his frequent guest, have challenged the Oakland Housing Authority Police Department's ("OHAPD") practice of stopping, questioning, and searching public housing residents and their guests without suspicion under the guise of enforcing an unconstitutionally vague loitering ordinance.[68] The lead plaintiff was named in at least sixty-three incident reports reflecting stops or interactions with OHAPD officers between 2011 and 2017.[69] OHAPD incident reports indicate that officers routinely conduct warrant and records checks of people they accuse of loitering, and officers often handcuff them as well.[70] Officers also frequently request that the housing authority's legal counsel review residents' leases for possible

65. *Id.* at 526.

66. *See* Brown v. Dayton Metro. Hous. Auth., No. C-3-93-037, 1993 WL 1367433 (S.D. Ohio Aug. 26, 1993); State *ex rel.* X.B., 952 A.2d 521 (N.J. Super. Ct. App. Div. 2008); Holland v. Commonwealth, 502 S.E.2d 145, 145–46 (Va. Ct. App. 1998) (describing the Leesburg, Virginia police department's agreement with a federally-subsidized apartment complex so that it would have power to "issue barment notices to unauthorized individuals present on the . . . property"); City of Bremerton v. Widell, 51 P.3d 733 (Wash. 2002) (en banc) (describing fiancés of two public housing tenants in Bremerton, Washington suit against the police department because they were ticketed or arrested for trespassing multiple times as a result of the public housing authority's trespassing policy, which gave the police department authority to issue barment notices to nonresidents); Kimberly E. O'Leary, *Dialogue, Perspective and Point of View as Lawyering Method: A New Approach to Evaluating Anti-Crime Measures in Subsidized Housing*, 49 WASH. U.J. URB. & CONTEMP. L. 133, 134 n.4 (1996) (describing aggressive arrest practices in public housing in Plymouth, Massachusetts, and St. Michaels, Maryland).

67. Gutierrez v. City of East Chicago, No. 2:16-CV-111-JVB-PRC, 2016 WL 5819818 (N.D. Ind. Sept. 6, 2016).

68. Complaint at 10–12, Mathieu v. City of Oakland, No. 18-cv-5742 (N.D. Cal. Sept. 19, 2018).

69. *Id.* at 13.

70. *See id.* at Exhibits. B, F, H, N, T, X.

eviction.[71] Groups of all sizes have drawn OHAPD attention, including a gathering following a funeral.[72]

In Buffalo, a local Black Lives Matter group filed a complaint with the New York Attorney General that accused the Buffalo Police Department's housing unit of engaging in unconstitutional trespass enforcement policies, including trespass "sweeps" and checkpoints that resulted in unconstitutional arrests in and around public housing complexes.[73] A federal lawsuit filed in 2018 further alleges that the housing unit has played an outsized role in the Buffalo Police Department's policy and practice of utilizing unconstitutional checkpoints for crime control purposes.[74] That unit writes approximately one third of the traffic tickets issued by the entire police department.[75]

In sum, public and patrolled housing have received special attention from police departments for decades. For public housing in particular, federal funding has driven some of this attention, which has taken varying forms, but appears to have focused in more recent years on aggressive order maintenance strategies. These targeted programs have persisted even as traditional public housing has been on the decline in recent years.

B. Hot Spots Policing

The rise of policing targeted at public and patrolled housing in recent decades has coincided with a newfound emphasis on hot spots policing. Indeed, hot spots policing has become wildly popular across the United States[76] and is often called for as an element of "smart

71. *See id.* at Exhibits. H & X.

72. *Id.* at Exhibit. J.

73. ANJANA MALHOTRA, UNCHECKED AUTHORITY WITHOUT ACCOUNTABILITY IN BUFFALO, NEW YORK: THE BUFFALO POLICE DEPARTMENT'S WIDESPREAD PATTERN AND PRACTICE OF UNCONSTITUTIONAL DISCRIMINATORY POLICING, AND THE HUMAN, SOCIAL AND ECONOMIC COSTS 15–16 (2017).

74. Complaint at 10–15, Black Love Resists in the Rust v. City of Buffalo, No. 18-cv-00719-CCR (W.D.N.Y. June 28, 2018) (describing checkpoint practices).

75. *Id.* at 17.

76. *See* Anthony A. Braga et al., *The Effects of Hot Spots Policing on Crime; An Updated Systematic Review and Meta-Analysis*, 31 JUST. Q. 633, 634, 636-37 (2014) [hereinafter Braga et al., *The Effects of Hot Spots Policing on Crime*] (noting that a majority of American police departments use hot spots policing strategies and that of 192 police agencies surveyed in 2008 by the Police Executive Research Forum, nine out of ten used hot spots strategies). As local news reports demonstrate, police departments both large and small have embraced its use. *See* Kochel, *supra* note 8, at 359–62 (finding "almost exclusively positive press" about hot spots

policing."[77] Law enforcement's eager adoption of hot spots policing has likely contributed to the targeting of public and patrolled housing for police programs. While police departments do not always utilize the term "hot spots policing" when identifying the place-based strategies they employ, it is fair to describe their enforcement strategies that zero in on particular locations as versions of hot spots policing.[78] It is therefore useful to understand the concepts underlying hot spots policing in an examination of policing programs targeted at public and patrolled housing.

Police agencies and criminologists have embraced the concept that problem places require special police attention for decades,[79] but in the last thirty years, hot spots policing strategies have emerged as a favorite

policing in review of Midwest media coverage between 1990 and 2005); *see also, e.g.*, Phil Fairbanks, *Erie County Gets $1.7 Million Grant to Fight Gun Violence*, BUFFALO NEWS (July 7, 2016), https://buffalonews.com/2016/07/07/erie-county-gets-1-7-million-grant-to-fight-gun-violence/ [https://perma.cc/9YNQ-EKEZ] (describing hot spots policing to be one of two strategies funded by large grant); Tristan Hallman, *More Dallas Police Officers Put on 911 Response Patrols*, DALL. MORNING NEWS (Oct. 6, 2015), https://www.dallasnews.com/news/crime/2015/10/05/more-dallas-police-officers-put-on-911-response-patrols [https://perma.cc/5SQD-KJND] (noting that hot spot policing was a "major initiative" of Dallas police chief); Kim Bell, *St. Louis Takes Another Shot at Hot-Spot Policing*, ST. LOUIS POST DISPATCH (Jan. 26, 2015), https://www.stltoday.com/news/local/crime-and-courts/st-louis-takes-another-shot-at-hot-spot-policing/article_b71de858-3780-5498-99ba-5939e85777c4.html [https://perma.cc/632Z-4JZ2] (describing "new rounds" of hot-spot policing, described by the St. Louis police chief as one of his department's "core principles"); Maxine Bernstein, *Portland City Council Accepts Federal Grant to Help Police Study 15-Minute Hot Spot Policing*, OREGONIAN (Nov. 5, 2014), https://www.oregonlive.com/portland/2014/11/portland_city_council_accepts.html [https://perma.cc/W8BC-GB25] (describing a federal grant to Portland police department to study new hot spots policing program).

77. James R. Coldren, Jr. et al., *Introducing Smart Policing: Foundations, Principles, and Practice*, 16 POLICE Q. 275 (2013) (describing the development of smart policing).

78. The NYPD is a good example of a police department that has used hot spots strategies without labeling them as such. *See generally* David Weisburd et al., *Could Innovations in Policing Have Contributed to the New York City Crime Drop Even in a Period of Declining Police Strength?: The Case of Stop, Question and Frisk as a Hot Spots Policing Strategy*, 31 JUST. Q. 129 (2014) (concluding that the NYPD's Operation Impact, which involved the focused use of stop and frisk in "Impact Zones," was a hot spots strategy).

79. Fagan et al., *supra* note 19, at 472–73 (describing criminological emphasis on place dating to the 1920s).

tool to combat crime and disorder.[80] The basic concept underlying hot spots policing is "the application of police interventions at very small geographic units of analysis,"[81] such as "buildings or addresses, block faces or street segments, or clusters of addresses, block faces and street segments."[82]

But hot spots policing is not one-size-fits-all. Instead, police departments may use any policing strategy—order maintenance, community policing, or problem-oriented policing—to implement hot spots policing. David Weisburd, a criminologist who pioneered the concept of hot spots policing, describes the variety of approaches as follows:

> There is no single way to implement hot spots policing. Approaches can range rather dramatically across interventions. For example, strategies of hot spots policing are often based simply on drastically increasing officer time spent at hot spots, as was the case in the Minneapolis, Minnesota, Hot Spots Patrol Experiment. But hot spots policing can also employ much more complex interventions to do something about crime problems. In the Jersey City, New Jersey, Drug Market Analysis Program Experiment, for example, a three-step program (including identifying and analyzing problems, developing tailored responses, and maintaining crime control gains) was used to reduce problems at drug hot spots. Also in Jersey City, in the Jersey City POP Experiment, a problem-oriented policing approach was taken in developing a specific strategy for each of the violent crime hot spots.[83]

Thus, some police agencies have consciously employed an order maintenance approach and increased enforcement actions, e.g., stops, arrests, and tickets, as part of their hot spots strategies, while others have focused on community policing and problem-oriented policing strategies.[84]

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80. Braga, *supra* note 14, at 13 ("[C]rime is not evenly distributed across urban areas; rather, it is concentrated in very small places, or hot spots, that generate half of all criminal events.").

81. BRAGA & WEISBURD, *supra* note 29, at 9.

82. Braga, *supra* note 14, at 13.

83. David Weisburd, *Does Hot Spots Policing Inevitably Lead to Unfair and Abusive Police Practices, or Can We Maximize Both Fairness and Effectiveness in the New Proactive Policing?*, 2016 U. CHI. LEGAL F. 661, 667 (2016) (footnotes omitted).

84. *See* Braga et al., *The Effects of Hot Spots Policing on Crime*, *supra* note 76, at 642–43, 644–51 tbl.2 (describing interventions used in nineteen hot spots policing programs).

For example, the Houston Police Department utilized a combination of approaches in its "Targeted Beat Program."[85] All of the department's participating substations initially used order maintenance strategies and some altered their strategies over time.[86] In one where public housing was concentrated officers began by saturating particular beats with officers, and ultimately settled on "targeting apartment complexes and the disproportionate amount of calls being generated by a small number of complexes."[87] Officers spent the majority of their time "in high crime areas or doing apartment checks."[88] In one beat where public housing comprised 25 percent of the apartment units, the police department implemented a program to "take back the beat," which involved "[c]rime sweeps through government housing and problem apartment complexes."[89] Consequently, officers in that beat spent close to 80 percent of their time patrolling public housing and private apartment buildings.[90] In other beats, the use of stops, categorized separately from sweeps, was more prevalent.[91] In one, over 70 percent of stops led to arrests or the issuance of summonses, including for "walking on the wrong side of the street" or similarly minor offenses.[92] Other departments have also utilized order maintenance strategies in their pursuit of driving down crime in hot spots.[93]

85. Tory J. Caeti, Houston's Targeted Beat Program: A Quasi-Experimental Test of Police Patrol Strategies (May 1999) (unpublished Ph.D. dissertation, Sam Houston State University) (on file with author).

86. *Id.* at 188.

87. *Id.* at 115, 189.

88. *Id.* at 213. The study did not define "apartment checks."

89. *Id.* at 116, 190–91. The published study of the Houston Police Department's program did not provide details describing the tactics used during the sweeps.

90. *Id.* at 211.

91. It is hard to imagine that the sweeps of apartment buildings did not involve frequent stops of people encountered in and around them, but the study categorized stops as a different tactic. *See id.* at 210–18.

92. *Id.* at 218.

93. *See, e.g.*, Anthony A. Braga et al., *Problem-Oriented Policing in Violent Crime Places: A Randomized Controlled Experiment*, 37 CRIMINOLOGY 541, 554–55 (1999) (describing Jersey City hot spots experiments in which "aggressive order maintenance" tactics, including "dispersing groups of loiterers, issuing a summons for public drinking, and 'stop and frisks' of suspicious persons"); Lawrence W. Sherman & Dennis P. Rogan, *Effects of Gun Seizures on Gun Violence: "Hot Spots" Patrol in Kansas City*, 12 JUST. Q. 673, 677 (1995) (describing that hot spots strategies included conducting "field interrogations in gun crime hot spots").

In contrast, hot spots policing can also utilize a problem-oriented policing model. Examples in Jacksonville and Boston demonstrate that police departments can make environmental changes to reduce the prevalence of crime in hot spots. Rather than focusing on code enforcement, the Jacksonville Sheriff's Department made lighting improvements and fencing repairs, and consulted with business owners and rental property managers about security measures.[94] The Boston Police Department made similar environmental changes in a hot spot and also worked with a local high school whose students were targeted for robberies to bring attention to the crime problem.[95]

Leading criminologists who study hot spots policing tend to be strong advocates for the problem-oriented policing approach.[96] Yet, the order maintenance methodology appears to be ubiquitous among the police departments that utilize hot spots strategies.[97] And, as the Houston example demonstrates, hot spots practices are sometimes directed towards public and patrolled housing as part of larger programs.

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94. Bruce Taylor et al., *A Randomized Controlled Trial of Different Policing Strategies at Hot Spots of Violent Crime*, 7 J. EXPERIMENTAL CRIMINOLOGY 149, 158 (2011).

95. Anthony A. Braga & Cory Schnell, *Evaluating Place-Based Policing Strategies: Lessons Learned from the Smart Policing Initiative in Boston*, 16 POLICE Q. 339, 348–50 (2013).

96. For example, in their recent book on hot spots policing, Anthony Braga and David Weisburd made clear that they think problem-oriented policing is a better approach for hot spots policing, particularly in light of the costs that zero tolerance strategies can impose:

> We believe that how police address crime hot spots matters. Police officers should strive to use problem-oriented policing and situational crime prevention techniques to address the place dynamics, situations, and characteristics that cause a "spot" to be "hot." We also make the point that the strategies used to police problem places can have more or less desirable effects on police-community relations. Particularly in minority neighborhoods where residents have long suffered from elevated crime problems and historically poor police service, police officers should make an effort to develop positive and collaborative relationships with residents and not engage in strategies that will undermine the legitimacy of police agencies, such as indiscriminant enforcement tactics.

BRAGA & WEISBURD, *supra* note 29, at 4–5.

97. Kochel, *supra* note 8, at 365 (finding that review of criminological scholarship on hot spots and review of Midwest media on hot spots programs found "little or no mention" of problem-oriented strategies, but instead "most hot spots approaches appeared to be enforcement-oriented, including directed patrol, saturation of an area with police presence, or zero tolerance of order maintenance violations").

In sum, public and patrolled housing are often subject to significant scrutiny from law enforcement agencies, both because police departments develop programs that explicitly target them and because they sometimes deploy hot spots strategies in those locales. Some of the attention public and patrolled housing receive from police is rooted in genuine concern about crime conditions, but in some cases it results from presumptions and prejudice against those places and the people who live in and frequent them. Consequently, the residents and visitors of public and patrolled housing are often subject to outsized police attention. Moreover, police departments have consciously decided to use their unique access to public and patrolled housing to execute targeted and hot spots strategies.

In light of limited Fourth Amendment protections, which are described in detail in Part II, programs that target public and patrolled housing can result in police surveillance and control of law-abiding people who live in or frequent public and patrolled housing. Under the auspices of programs that are ostensibly designed to protect and serve the residents of public and patrolled housing, the Fourth Amendment operates to permit widespread stops, arrests, and searches of people who engage in behavior, often innocuous, that is either not criminalized in other places or simply never subject to police oversight.

II. The Fourth Amendment in Public and Patrolled Housing

The Fourth Amendment's usual protection for the home is unrecognizable in public and patrolled housing. Although scholars have long acknowledged that the Fourth Amendment offers limited protection for those who live in urban areas where their daily lives are more exposed to public view than their wealthy counterparts', the Fourth Amendment rights of residents of public and patrolled housing are uniquely circumscribed. What powers do police have when they execute targeted and hot spots strategies in public and patrolled housing? Just about any they can dream up outside the doors of individual apartments.

As noted above, the home has such an exalted status that one scholar has described a "cult of the home" in Fourth Amendment jurisprudence.[98] This cult, however, is much more welcoming to private homes than to apartments. With regard to searches, government agents are typically required to procure warrants before searching private homes,[99] including the curtilage—the "area around the home to which

98. *See* Stern, *supra* note 1, at 912–18 (describing Fourth Amendment protection for the home).

99. *See* Welsh v. Wisconsin, 466 U.S. 740, 752–54 (1984). A major exception to this rule is the authority to search welfare recipients' homes. *See* Jordan

the activity of home life extends."[100] An enclosed backyard of a house is the paradigmatic example of curtilage.[101] In the same vein, police may not enter homes to make arrests absent exigent circumstances.[102] There are many fewer restrictions on searches and seizures in "public" places, where arrests may generally take place without warrants,[103] and searches may be permissible if there is no reasonable expectation of privacy.[104] In the context of apartment buildings and other multi-unit dwellings, the warrant requirement extends to the interiors of apartments, but typically not to the common areas of such buildings.

C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolate Home*, 85 IND. L.J. 355, 359–73 (2010) (describing supposed "special status of the home" in the Fourth Amendment jurisprudence and the "competing narrative" of treatment of homes of the poor); Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 697–708 (2009) (describing decades-long judicial approval of home searches of public assistance recipients).

100. Oliver v. United States, 466 U.S. 170, 182 n.12 (1984). The Court has developed a four-factor test for identifying curtilage: (1) "the proximity of the area . . . to the home"; (2) "whether the area is included [in] an enclosure surrounding the home"; (3) "the nature of the uses to which the area is put"; and (4) "the steps taken by the resident to protect the area from observation by people passing by." United States v. Dunn, 480 U.S. 294, 301 (1987). Because curtilage "has been considered part of the home itself for Fourth Amendment purposes," the Fourth Amendment's warrant requirement applies to searches of curtilage in the same way it applies to the home. *Oliver*, 466 U.S. at 180.

101. *See* California v. Ciraolo, 476 U.S. 207, 211–13 (1986) (noting that enclosed backyard "immediately adjacent to a suburban home, surrounded by high double fences," with "close nexus to the home" was part of home's curtilage). Determining whether a particular area constitutes curtilage is a fact-intensive inquiry, which has led to disparate results. *See* LAFAVE, *supra* note 2, § 2.3(d) (collecting examples of structures and areas found to be curtilage (or not)).

102. Steagald v. United States, 451 U.S. 204, 213–14 (1981) (holding that, absent exigent circumstances or consent, a search warrant is required to search a third party's home for the subject of an arrest warrant); Payton v. New York, 445 U.S. 573, 590 (1980) ("In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.").

103. United States v. Santana, 427 U.S. 38, 42 (1976) (upholding the warrantless arrest of a defendant who stood at the threshold of her house because she was in a "'public' place"); United States v. Watson, 423 U.S. 411, 423–24 (1976) (upholding a warrantless arrest in a public place).

104. Katz v. United States, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

Those spaces are deemed public, and courts largely have held that apartment dwellers cannot claim a reasonable expectation of privacy in them.[105] This comparatively restrictive definition of the home applies to rich and poor alike; the hallways of buildings where apartments cost millions are likely not curtilage, just as they are not in public housing. But other unique characteristics of the way Fourth Amendment law operates in public and patrolled housing leads to the differential treatment of its residents. Thus, despite the special status of the home, the Fourth Amendment does not provide the freedom of movement, privacy, autonomy, or dignity to residents of public and patrolled housing that most Americans expect.

The primary source of the extraordinary police power in and around public and patrolled housing is the astounding breadth of state and local laws and rules that regulate and often criminalize conduct in those locations. Devon Carbado has described this phenomenon more generally as "mass criminalization": "the criminalization of relatively nonserious behavior or activities and the multiple ways in which criminal justice actors, norms, and strategies shape welfare state processes and policies."[106]

There are several methods by which mass criminalization in public and patrolled housing is achieved. Some states and localities enact restrictions by statute or ordinance that are specific to public housing. The paradigmatic examples are statutes that specifically bar drug possession or sale in public housing.[107] In addition, some local housing authorities and private landlords require compliance with specific terms of conduct in leases signed by tenants or in house rules incorporated into leases by reference, which law enforcement officers are empowered to enforce.[108] Further, quality of life laws of general application

105. *See* Carol A. Chase, *Cops, Canines, and Curtilage: What* Jardines *Teaches and What It Leaves Unanswered*, 52 HOUS. L. REV. 1289, 1303–05 (2015) (reviewing post-2000 cases on whether common areas of multi-unit apartment buildings constitute curtilage and concluding that "the overwhelming weight of authority rejects the proposition that a resident of a multi-dwelling residential building can claim curtilage protection in common areas—or even anywhere outside an individual unit").

106. Carbado, *supra* note 12, at 1487.

107. *See, e.g.*, CONN. GEN. STAT. ANN. § 21a-278a(b) (West 2019); FLA. STAT. ANN. § 893.13(1)(f) (West 2018); N.J. STAT. ANN. 2C:35-7.1(a) (West 2019).

108. *See, e.g.*, United States v. Martin, 399 F.3d 750, 751–52 (6th Cir. 2005) (describing an agreement between the public housing authority of Inskter, Michigan and the local police department); City of Bremerton v. Widell, 51 P.3d 733, 735 n.1 (Wash. 2002) (describing Bremerton Housing Authority's exclusion policy); L.D.L. v. State, 569 So. 2d 1310, 1311 (Fla. Dist. Ct. App. 1990) (citing policy of a "low-rent federally subsidized housing project" that provided authority to Tallahassee Police

addressing a wide range of subjects—noise ordinances, jaywalking, smoking, open container, riding bicycles on sidewalks—are all enforceable in and around public and patrolled housing. The U.S. Department of Justice Civil Rights Division's description of the Ferguson, Missouri municipal code aptly captures the incredible breadth of conduct that is often regulated by local authorities—ranging from "Manner of Walking in Roadway" to the height of grass and weeds.[109] As a result, police officers have a plethora of tools at their disposal when they determine that they want to conduct a stop, arrest, or "voluntary" encounter on the grounds of public or patrolled housing.

Two examples from New York illustrate how both laws specific to housing and laws of general application create mass criminalization in public and patrolled housing. The New York Penal Law specifically criminalizes trespassing in public housing developments.[110] When a person enters or remains on the premises of a public housing development despite a "housing officer or other person in charge" having "personally communicated" a request to leave, they have committed criminal trespass.[111] A person also commits criminal trespass when they enter or remain on the premises of a public housing development in violation of "conspicuously posted rules or regulations governing entry and use thereof."[112] Thus, law enforcement officers have unique powers in public housing to expel people at will, followed by the pain of arrest for failure to comply. Remarkably, even public housing *residents* become criminals when they are present in spaces of their own buildings that are deemed off limits.[113] Laws of general application that are only enforced in certain locations also play a role. For example,

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Department to "issue no trespass warnings and/or to arrest any persons loitering on the property who are not residents").

109. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 7 (2015) ("[T]he code establishes housing violations, such as High Grass and Weeds; requirements for permits to rent an apartment or use the City's trash service; animal control ordinances, such as Barking Dog and Dog Running at Large; and a number of other violations, such as Manner of Walking in Roadway.") (citing FERGUSON, MO. CODE OF ORDINANCES §§ 29-16, 37-1, 46-27, 6-5, 6-11, 44-344 (2018)); *see also* Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2001) (describing the authority of municipal governments to enact criminal laws and the breadth of such laws).

110. N.Y. PENAL LAW § 140.10(e), (f) (McKinney 2019).

111. § 140.10(f).

112. § 140.10(e).

113. *See infra* notes 249–251 and accompanying text (recounting the arrest of a public housing resident and his guest because of their presence on his building's roof landing).

smoking is banned in the common areas of apartment buildings in New York City with three or more units and failure to comply with this law can result in citation.[114] But this offense is likely to result in a police encounter only in buildings where police officers have a regular presence. Thus, mass criminalization operates uniquely in public and patrolled housing to expose residents and others in and around those locations to the criminal justice system.

In combination with the intensity of police attention to public and patrolled housing through targeted and hot spots strategies, mass criminalization results in the Fourth Amendment offering extraordinarily limited protection to those who live in and frequent public and patrolled housing. Three doctrines are particularly important in understanding this dynamic. *First*, police officers have virtually limitless authority to stop people in and around public and patrolled housing because of the breadth of conduct regulated in those places, the very low standard for conducting stops on suspicion of noncriminal infractions, and the frequent labeling of public and patrolled housing as high-crime areas. *Second*, the Supreme Court created extraordinarily broad arrest authority when it determined that the Fourth Amendment did not bar arrests for very minor crimes—even ones for which arrest is not permitted under state law. This makes violators of the uniquely broad sets of regulations in public and patrolled housing subject to arrest for astonishingly minor misbehavior. *Third*, the search incident to arrest doctrine leaves those who frequent locations targeted by place-based policing programs especially vulnerable to invasive searches. Numerous courts have interpreted this exception to permit searches whenever there is probable cause to arrest—even when an arrest has not taken place.

Taken together, these doctrines leave residents of public and patrolled housing uniquely vulnerable to police surveillance and control. They may be stopped, arrested, and searched for almost anything. As a result, when police utilize targeted and hot spots policing strategies, particularly the order maintenance variety, only the interiors of their apartments provide sanctuary. In short, the substantial privacy and dignitary interests protected by the Fourth Amendment are effectively dead letters in public and patrolled housing.

A. Stop for Anything

The power to stop people on the basis of a relatively low level of suspicion for even minor infractions is the cornerstone of the targeted policing practices utilized in public and patrolled housing. As explained in Part I, all manner of law enforcement personnel patrol public and patrolled housing, e.g., special departments, units, and regular patrols, including those tasked with enforcing hot spots strategies. When they

114. N.Y.C. ADMIN. CODE §§ 17-503(a)(13), 17-508(d), 17-508(e) (2018).

do, there is little they must see to justify approaching a person, questioning them about their conduct, and temporarily detaining them.[115] The standard for stops announced by the Supreme Court in *Terry v. Ohio*[116] is by now familiar: reasonable suspicion, based on articulable facts, that an individual is involved in criminal activity.[117] Numerous problems with this standard are widely recognized, ranging from the derogation of the probable cause standard[118] to its failure to acknowledge the role of race in identifying suspicious behavior.[119] But when police focus their attention on public and patrolled housing, *Terry* operates to expose residents to almost unbridled power to detain and question residents, their guests, and others who are legitimately present. Two doctrinal areas are particularly important for understanding how and why police officers have such extraordinary power: the permission to stop for noncriminal infractions and the notion that presence in a high-crime area contribute to reasonable suspicion.

1. Stops for Infractions, Regulations, and House Rules

When enforcing the wide variety of laws, rules, and regulations that govern conduct in and around public and patrolled housing, the Fourth Amendment requires a very low level of suspicion to initiate a stop. As with stops made on suspicion of criminal activity, courts typically require only reasonable suspicion to temporarily detain people on suspicion of noncriminal infractions.[120] Although some states have

115. Of course, "voluntary" and "consensual" encounters in which a reasonable person would feel free to leave are not stops and therefore not subject to Fourth Amendment regulation at all. *See* Michigan v. Chesternut, 486 U.S. 567, 573 (1988) ("[T]he police can be said to have seized an individual 'only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" (citation omitted)).

116. 392 U.S. 1 (1968).

117. *Id.* at 30.

118. *See* Jeffrey Fagan, Terry*'s Original Sin*, 2016 U. CHI. LEGAL F. 43, 50–56 (2016).

119. *See, e.g.*, Capers, *supra* note 6; Carbado, *(E)racing the Fourth Amendment*, *supra* note 6; Maclin, *supra* note 6; Thompson, *supra* note 6.

120. *See, e.g.*, *In re* A.J., 63 A.3d 562 (D.C. Cir. 2013) (upholding a stop for truancy); State v. Stevens, 394 N.W.2d 388 (Iowa 1986) (same for public intoxication); State v. Dumas, 786 So. 2d 80 (La. 2001) (same for a city ordinance prohibiting walking in a roadway); People v. McNutt, No. 313621, 2014 WL 1510118, at *2 (Mich. Ct. App. 2014) (same for a suspected noise ordinance violation); City of Devil's Lake v. Lawrence, 639 N.W.2d 466 (N.D. 2002) (same for disorderly conduct); State v. Morris, 641 P.2d 77 (Or. Ct. App. 1982) (same for curfew law); State v. Iverson, 871 N.W.2d 661 (Wis. 2015) (same for littering). Similarly, it has long been clear that law enforcement officers need only have reasonable suspicion to make noncriminal traffic stops. *See* Jordan Blair Woods,

specifically cabined stop authority so that officers may conduct stops only when they suspect misdemeanors or felonies, this appears to be a minority position.[121] Accordingly, an encounter with a police officer that the subject cannot end may lead to an arrest, a search, or other significant disruption.

Law enforcement officers' use of the broad range of regulated conduct in public and patrolled housing is analogous to the utilization of America's many traffic laws to initiate car stops on roads and highways. As David Harris has observed in that context, "the comprehensive scope of state traffic codes makes them extremely powerful tools . . . . These codes regulate the details of driving in ways both big and small, obvious and arcane . . . . [N]o driver can avoid violating *some* traffic law during a short drive, even with the most careful attention."[122] The same is true in public and patrolled housing, where the banalities of daily life—ball playing, the placement of BBQ grills, the size of pets, and rollerblading—are subject to rules and regulations and provide opportunities for stops.[123]

In light of this wide breadth of regulated conduct and the low quantum of suspicion required to initiate them, the risk that police will

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Decriminalization, Police Authority, and Routine Traffic Stops, 62 UCLA L. REV. 672, 711–13, 713 & n.181 (2015) (collecting cases and concluding that "most courts now use a reasonable suspicion standard to evaluate the state and federal constitutionality of police initiations of routine traffic stops," although the Supreme Court has not expressly decided the appropriate standard for traffic stops).

121. *See, e.g.*, N.Y. CRIM. PROC. LAW § 140.50(1) (McKinney 2016) (allowing stops for only felonies or misdemeanors identified in the New York Penal Law); Brazwell v. State, 119 S.W.3d 499 (Ark. 2003) (holding that a stop made on suspicion of loitering unlawful); Commonwealth v. Cruz, 945 N.E.2d 899 (Mass. 2011) (holding that a suspected violation of a nontraffic civil infraction does not justify an investigatory stop); State v. Duncan, 43 P.3d 513, 517 (Wash. 2015) (same).

122. David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 545 (1997).

123. The wide array of regulations governing conduct is arguably even broader than written because mistakes of law by police officers will typically be forgiven. *See* Heien v. North Carolina, 135 S. Ct. 530 (2014) (holding that stop was supported by reasonable suspicion even though the officer made a "reasonable" mistake of law underlying suspicion); Kit Kinports, Heien*'s Mistake of Law*, 68 ALA. L. REV. 121, 168–74 (2016) (describing risk that *Heien* would be read to permit police officers to make mistakes of law, resulting in the upholding of searches and seizures in a variety of circumstances); *cf.* United States v. Davis, 692 F. Supp. 2d 594 (E.D. Va. 2010) (pre-*Heien*, suppressing evidence revealed following a stop for walking in the roadway between two housing projects "known to be high crime areas" because officer was mistaken that law barred walking in roadways without sidewalks).

use minor misbehavior as pretext to stop is uniquely high in public and patrolled housing. Following the Supreme Court's decision in *Whren v. United States*,[124] pretextual stops pose no Fourth Amendment problem. There, the Court sanctioned the car stop of two African American men in a "high drug area" for turning and failing to signal.[125] The fact that the officers were in plainclothes and members of the Washington D.C. police department's vice squad provided strong evidence that cracking down on traffic infractions was not the officers' actual interest.[126] The stopped men argued that the stop had been based on race and therefore violated the Fourth Amendment.[127] The Court rejected this claim, holding that intentional race discrimination is irrelevant to Fourth Amendment inquiries and that as long as an officer can identify any legal violation as the basis for a stop, the Fourth Amendment's demands have been met.[128] Despite the legion of criticism that followed this decision,[129] *Whren* stands, thus cementing the ability of police officers to conduct stops on virtually any basis—even if the underlying motivation is rooted in animus, stereotypes, or unproven order-maintenance policing strategies.

2. High-Crime Areas

The second area of law that fuels stops in public and patrolled housing is the standardless high-crime area doctrine. In *Brown v. Texas*,[130] the Supreme Court appeared to establish that one's mere presence in a high-crime area could not be sufficient to articulate reasonable suspicion.[131] There, police stopped, frisked, and arrested a man encountered in an alley in a "high drug problem area."[132] The initial encounter rested on only the supposition that the man's presence

124. 517 U.S. 806 (1996).

125. *Id.* at 808.

126. *Id.*

127. *Id.* at 810–14.

128. *Id.* at 813.

129. *See, e.g.*, Carbado, *(E)racing the Fourth Amendment*, *supra* note 6 (arguing that *Whren* permits race to be part of officer's rationale as long as he does not say so); Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 884 & n.2 (2015) (collecting literature linking Fourth Amendment jurisprudence to racial profiling).

130. 443 U.S. 47 (1979).

131. *Id.* at 52.

132. *Id.* at 49.

in an alley "'looked suspicious.'"[133] The Court unanimously rejected the proposition that such mere presence constituted reasonable suspicion, emphasizing the need for individualized suspicion that the targeted individual has engaged in criminal activity.[134] Standing alone, this decision suggests that people who live in or frequent areas with reputations as problem places would be free from police interactions merely because of their presence in them. But later decisions rendered this decision, which de-linked problem places and the people who happen to be in them, a fallacy.

The Court fatally undermined *Brown* in *Illinois v. Wardlow*.[135] There, the Court held that the "relevant characteristics of a location" may be used to determine whether reasonable suspicion exists.[136] Thus, one's presence in a high-crime area is "among the relevant contextual considerations in a *Terry* analysis."[137] The stop at issue in *Wardlow* itself rested on two simple facts: the defendant's presence in "an area known for heavy narcotics trafficking, [where] officers anticipated encountering a large number of people in the area, including drug customers and individuals serving as lookouts,"[138] and the defendant's "unprovoked flight upon noticing the police."[139] For the Supreme Court, these meager "facts" were sufficient to establish reasonable suspicion.[140]

Scholars have rightly critiqued Fourth Amendment jurisprudence about high-crime areas as effectively meaningless.[141] There is no common definition of high-crime area, and courts use a variety of metrics to define them. Andrew Guthrie Ferguson and Damien Bernache aptly summarized the confusion as follows:

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133. *Id.* at 52.

134. *Id.* ("The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct . . . . [T]he appellant's activity was no different from the activity of other pedestrians in that neighborhood.").

135. 528 U.S. 119 (2000).

136. *Id.* at 124.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 24–25.

141. *See, e.g.*, Andrew Guthrie Ferguson & Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587 (2008); Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99 (1999).

> [S]ome courts have defined a high-crime area as an area of "expected criminal activity," which fits within the language of *Wardlow*. Other courts have described it as an area known for drug activity, or one under surveillance. Still other courts have held that a high-crime area is one that is "riddled with narcotics dealings and drug-related shootings." Some courts have found that a "crime wave" can create a high-crime area. Being an area which is "notorious" or has a reputation for illegal conduct can also qualify an area as high-crime. Areas "plagued by gang-related shootings, drug dealing, assaults, and robberies" may also be termed high-crime areas. . . . . How does one know one is in a high-crime area? How is the determination that a location is a high-crime area made? These questions are still unanswered.[142]

The NYPD provides a good example of the meaninglessness of this term. It trains its officers that high-crime area could refer to a building, a block, a sector within a precinct, or an entire county.[143]

This definitional morass, in combination with a heavy reliance on officer testimony to identify high-crime areas,[144] means, in practical terms, that whenever a police department identifies a hot spot or other problem location and subjects it to specialized policing strategies, a court will accept that it is a high-crime area. Unsurprisingly, the case law is littered with examples of courts identifying public and other patrolled housing as high-crime areas.[145] This designation may be

142. Ferguson & Bernache, *supra* note 141, at 1605–06 (footnotes omitted).

143. *See* Transcript of Motion Hearing at 862–64, Ligon v. City of New York, No. 12-cv-2274 (S.D.N.Y. Oct. 15, 2012).

144. Ferguson & Bernache, *supra* note 141, at 1607–08 (explaining that the majority of jurisdictions determine that a location is a high-crime area in reliance on officer testimony, although some require additional documentation or testimony to make the determination).

145. *See, e.g.*, United States v. Horne, 386 F. App'x 313 (3d Cir. 2010) (finding a defendant's presence in a housing project in a high-crime area of Newark relevant to reasonable suspicion analysis); United States v. See, 574 F.3d 309, 312 (6th Cir. 2009) (reiterating the district court findings that a Cuyahoga County public housing complex "has a reputation for illicit drug activity, domestic disturbances, robberies and assaults"); United States v. Black, 525 F.3d 359, 361 (4th Cir. 2008) (describing a Richmond, Virginia public housing project as a high-crime area); United States v. Martin, 399 F.3d 750 (6th Cir. 2005) (same in Inkster, Michigan); United States v. Matthews, 278 F.3d 560 (6th Cir. 2002) (same in Nashville); United States v. Wadley, 59 F.3d 510, 512 (5th Cir. 1995) (describing Dallas public housing complex as one with "a high incidence of drug transactions," in part because of FBI intelligence reports "revealing . . . a high incidence of drug transactions"); United States v. Anderson, No. CR 11-0938 SBA, 2012 WL 3309696 (N.D. Cal. Aug. 13, 2012) (same in Richmond, California); United States v. Williams, No. CR410-224, 2011 WL 765728, at *3 n.5 (S.D. Ga. Jan. 12, 2011) (noting that numerous

especially likely for public and patrolled housing because of bias against such locales and the people that live there. As noted above, perceptions of disorder—and not necessarily actual levels of disorder—are strongly correlated with race and class.[146]

Consequently, there is an automatic strike in favor of stopping people who find themselves in public or patrolled housing, including residents,[147] that makes public and patrolled housing particularly attractive locations to police for stop activity.[148] The Supreme Court's decision in *Utah v. Strieff*[149] has amplified this dynamic. There, the Court refused to suppress the evidence gathered following an arrest made pursuant to a warrant check that resulted from a stop made without reasonable suspicion.[150] It reasoned that the officer was merely "negligent" when he stopped a person without reasonable suspicion and conducted a warrant check, which revealed an outstanding arrest warrant for a traffic violation.[151] This decision plainly incentivizes police to make suspicionless stops in places where they think they are likely to encounter people with outstanding warrants.[152] Although the majority rejected the contention that its decision would result in "dragnet searches" by police because of the availability of civil liability

federal cases established that public housing facilities in downtown Savannah, Georgia were "high crime area[s] where drug activity and the unlawful possession and use of firearms is commonplace").

146. Sampson & Raudenbush, *supra* note 23, at 336.

147. Notably, the Supreme Judicial Court of Massachusetts has not followed suit under its state criminal procedure law. *See* Commonwealth v. Cruz, 945 N.E.2d 899, 907 (Mass. 2011) (holding a defendant's presence on his own street could not be found suspicious even though police officers claimed that it was a high-crime area).

148. Aziz Huq has made a similar observation with regard to areas of concentrated poverty generally. *See* Huq, *supra* note 9, at 2447–48, 2447 & nn.235–36 (expounding on Stuntz's observation that criminal procedure law creates "subsidies" for certain kinds of policing) (citing William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 782 (2006); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1821 (1998)).

149. 136 S. Ct. 2056 (2016).

150. *Id.* at 2064.

151. *Id.* at 2060, 2063.

152. In her dissent, Justice Sotomayor described the prevalence of outstanding warrants. *Id.* at 2068 (Sotomayor, J., dissenting) ("Outstanding warrants are surprisingly common . . . . The States and Federal Government maintain databases with over 7.8 million outstanding warrants, the vast majority of which appear to be for minor offenses.").

against police departments that do so,[153] the difficulty of establishing such liability makes this claim ring hollow.[154]

Together, mass criminalization, the low standard for conducting stops on the basis of noncriminal infractions, and the high-crime area doctrine make stopping people in and around public and patrolled housing astonishingly easy. Identifying potential infractions is a simple task, and even when clear violations of the myriad rules and regulations governing life in public housing are not apparent, a law enforcement officer does not face a difficult challenge in articulating "reasonable suspicion" of some infraction when patrolling a high-crime area.[155] And, when police have specific authority to enter the common areas of buildings that are typically not accessible to the public, the people they encounter in them—doing their laundry, checking their mail, taking out their garbage, and just going about their daily lives—may find themselves stopped and forced to account for their presence.

B. Arrest for Anything

Police also deploy arrest as a tool of control in public and patrolled housing. Courts typically embrace the notion that police use arrests to start criminal proceedings, but police have expansive authority to use arrests for virtually any purpose. As Rachel Harmon has pointed out, arrests serve a variety of purposes, e.g., to maintain order, to gather evidence, and to deter crime.[156] These purposes—as well as patently illegitimate ones like asserting power or "Collars for Dollars" arrests that allow officers to accrue overtime[157]—are all on display in public and patrolled housing.

153. *Id.* at 2064 (citing Monell. v. N.Y. City Dep't of Soc. Servs., 436 U.S. 658, 690 (1978)).

154. *See* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 430 (2016) (arguing that municipalities effectively enjoy sovereign immunity because of the high causation standard for Section 1983 claims brought against them under *Monell v. Dep't of Social Services*).

155. *See* Ferguson & Bernache, *supra* note 141, at 1590–91.

156. Harmon, *Why Arrest?*, *supra* note 9, at 333–59. Josh Bowers has similarly described the phenomenon of "non-law-enforcement searches and seizures" as being "without uniform purpose or objective," with some being "mechanisms of 'regulatory' social control," and "others of 'community caretaking.'" Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognizable Point of a "Pointless Indignity,"* 66 STAN. L. REV. 987, 1005 (2014).

157. The "Collars for Dollars" phenomenon has been documented in several American cities. *See, e.g.*, Alan Feuer & Joseph Goldstein, *The Arrest Was a Bust. The Cops Got Overtime Anyway*, N.Y. TIMES (Feb. 19, 2018), https://www.nytimes.com/2018/02/19/nyregion/new-york-police-overtime-pay-trial.html [https://perma.cc/8WNZ-CUD6] (describing the arrest of bodega cashier who alleged that NYPD officers arrested him only to pursue overtime and that it was a citywide practice); Lisa Getter et

The Fourth Amendment poses no barrier to these uses of arrest in public and patrolled housing because it asks only whether there was probable cause for *some* offense at the time of arrest.[158] As with stops, given the wide range of rules and regulations that govern conduct within and around public and patrolled housing, arrests are very easy to produce. Accordingly, in public and patrolled housing, police utilize arrests in response to the most minor of offenses in the hallways, lobbies, and other common spaces.[159] This practice undermines the sanctity of the home, which is usually protected by the Fourth Amendment.[160]

Through two cases, the Supreme Court opened the door to police practices that utilize arrests for even very minor offenses: *Atwater v. City of Lago Vista*,[161] and *Virginia v. Moore*.[162] In both, the Court approved arrests for unquestionably trivial acts: driving without a seatbelt and driving on a suspended license. Together, they signal that the Court is unbothered by the high costs of arrest and, more importantly, give law enforcement carte blanche to arrest for virtually anything.

Atwater involved a proverbial "soccer mom"[163] who was arrested for failing to seat belt herself and her children.[164] After the initial stop, the officer "'yell[ed]' something to the effect of '[we]'ve met before' and '[y]ou're going to jail.'"[165] He also denied Atwater's request to "take her 'frightened, upset, and crying' children to a friend's house nearby."[166] He then arrested Atwater and transported her to a local police station,

al., *Innocent Caught in Web of Cops' Overtime Abuse*, MIAMI HERALD (July 15, 1997, 11:17 PM), https://www.miamiherald.com/latest-news/article1929039.html [https://perma.cc/44JN-LGBV] (describing practice in Miami); Peter Moskos, *Collars for Dollars*, REASON (June 29, 2011 10:30 a.m.), http://reason.com/archives/2011/06/29/collars-for-dollars [https://perma.cc/96BK-RVNT] (describing practice in Baltimore).

158. *See* discussion *infra* notes 170–172 and accompanying text.

159. *See, e.g.*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEP'T 37–38 (2016); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 21 (2014); Chase, *supra* note 105.

160. Stern, *supra* note 1, at 912–16.

161. 532 U.S. 318 (2001).

162. 553 U.S. 164 (2008).

163. Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419, 419 (2002).

164. *Atwater*, 532 U.S. at 323–24.

165. *Id.* at 324 (alterations in original).

166. *Id.* But, the Court noted "Atwater's friend learned what was going on and soon arrived to take charge of the children." *Id.*

where she was booked and held for "about one hour" before a bond hearing.[167] The officer who arrested her did so even though the maximum punishment authorized by the Texas statute requiring seat belts was a $50 fine.[168]

Although the Court recognized that "the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment,"[169] that did not stop it from adopting a bright-line rule for judging the propriety of arrests under the Fourth Amendment:

> [T]he standard of probable cause "applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations." . . . [Officers acting with probable cause are] authorized . . . to make a custodial arrest without balancing costs and benefits or determining whether or not [the] arrest was in some sense necessary.[170]

That is, probable cause is sufficient to justify an arrest, regardless of the circumstances.[171] In short, "probable cause means never having to give a reason."[172]

Seven years later, in *Virginia v. Moore*, the Court doubled down on its position that the Fourth Amendment poses no impediment to arrests for minor offenses. There, police arrested a driver "for the misdemeanor of driving on a suspended license, which is punishable under Virginia law by a year in jail and a $2,500 fine."[173] A search incident to arrest of the car revealed cash and a small amount of crack cocaine.[174] Moore sought to suppress the cash and cocaine because

167. *Id.*

168. *Id.* at 323 (citing TEX. TRANSP. CODE ANN. § 545.413(d) (West 1999)).

169. *Id.* at 346–47. Unsurprisingly, Justice O'Connor's dissent on behalf of four justices emphasized the majority's recognition that the arrest was a "'pointless indignity' that served no discernible state interest." *Id.* at 360 (O'Connor, J., dissenting).

170. *Id.* at 354 (quoting Dunaway v. New York, 442 U.S. 200, 208 (1979)).

171. Although the Court allowed that "individualized review" is appropriate when an arrest "[i]s 'conducted in an extraordinary manner, unusually harmful to [the citizen's] privacy or even physical interests,'" *id.* at 352–53 (quoting Whren v. United States, 517 U.S. 806, 818 (1996)), it did not explain what such circumstances might be. Given that the *Atwater* arrest involved probable cause for a minor offense punishable by only a fine, as well as "gratuitous humiliations," *id.* at 346, it is difficult to think of a scenario that would now be deemed "extraordinary."

172. Bowers, *supra* note 156, at 1001.

173. Virginia v. Moore, 553 U.S. 164, 167 (2008).

174. *Id.*

"[u]nder state law, the officers should have issued Moore a summons instead of arresting him."[175] Virginia's explicit policy *against* arrest for this minor offense had no bearing on the reasonableness of the officer's actions under the Fourth Amendment. Instead, the majority reasoned that "[a] State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional."[176]

Together, *Atwater* and *Moore* leave little doubt that arrests for even the most minor infractions—even noncriminal ones—will survive constitutional muster. Although some district courts have opined otherwise,[177] the weight of authority supports arrests in such circumstances. This makes arrest readily available for use in public and patrolled housing.

Remarkably, the Supreme Court expressed no concern about the costs of arrests. Instead, the *Atwater* majority "wonder[ed] whether warrantless misdemeanor arrests need constitutional attention, and there [was] cause to the think the answer [was] no."[178] The evidence cited in support of this conclusion was that judicial review of whether there was probable cause to support any arrest is required within forty-eight hours, that at least eight states had "more restrictive safeguards through statutes limiting warrantless arrests for minor offenses," and "it is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason."[179] Of course, the cited formal, legal safeguards say nothing about actual practices of any police department. And *Atwater* itself did not support the notion that police departments will be particularly proficient at policing themselves to limit warrantless arrests for minor arrests.[180]

175. *Id.*

176. *Id.* at 174.

177. *See, e.g.*, Glasgow v. Beary, 2 F. Supp. 3d 419, 424 (E.D.N.Y. 2014) ("The constitutionality of a full custodial arrest based only on probable cause for a non-criminal traffic infraction is unclear and dubious."); Smith v. Kelly, No. C11-623RAJ, 2012 WL 1605123, at *5 (W.D. Wash. 2012) (holding that the police officer violated the Fourth Amendment by arresting the plaintiff for jaywalking, a noncriminal offense); Bostic v. Rodriguez, 667 F. Supp. 2d 591, 609 (E.D.N.C. 2009) (holding that the police officer violated the plaintiff's Fourth Amendment rights by arresting him for "remain[ing] belligerent" and "waving his hands" while the plaintiff remained seated in his car).

178. Atwater v. City of Lago Vista, 532 U.S. 318, 351–52 (2001).

179. *Id.* at 352.

180. Richard Frase offered a compelling account of the deficiency of the Court's analysis, highlighting the virtual uselessness of probable cause hearings to protect the interests of arrestees, who likely would prefer remaining free to a prompt hearing reviewing their arrest. *See* Richard Frase, *What Were*

In stark contrast to the *Atwater* majority's position, there is no doubt that police routinely make arrests for low level offenses. As Wayne Logan has pointed out, case law supports this position, as does the sheer volume of arrests for minor offenses.[181] "An estimated ten million misdemeanor cases are filed annually,"[182] dwarfing the one million felony convictions secured every year. As recounted in Part I, many police departments have explicitly adopted order maintenance strategies that explicitly aim to arrest a high number of people for minor offenses.[183]

In sum, the Court has made clear that it has no Fourth Amendment quarrel with arrests for almost anything that take place almost anywhere besides the interior of a person's home.[184] When this broad power is used in places where the laws or rules are wide-ranging, such as in places where mass criminalization is the norm, the police have virtually unchecked authority to arrest. Moreover, such arrests are especially attractive when enforcement-oriented policing strategies are favored.

They Thinking? Fouth Amendment Unreasonableness in Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329, 365–68 (2002).

181. Logan, *supra* note 163, at 429–32.

182. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314–15 (2012).

183. *See supra* notes 84–93 and accompanying text. For example, the NYPD alone has arrested a huge number of people for minor offenses in recent years, roughly 200,000 people annually, reflecting a significant uptick since the NYPD adopted Broken Windows policing strategies. Amanda Geller, *The Process Is Still the Punishment: Low-Level Arrests in the Broken Windows Era*, 37 CARDOZO L. REV. 1025, 1032 (2016) (highlighting data showing that the number of misdemeanor arrests ranged from 189,630 to 236,857 between 2003 and 2012). "Between 1993 and 2010 the number of misdemeanor arrests [by the NYPD] almost doubled." Issa Kohler-Haussman, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 630 (2014). "At least two million arrests over the past two decades are attributable to increased misdemeanor enforcement." K. Babe Howell, *The Costs of Broken Windows Policing: Twenty Years and Counting*, 37 CARDOZO L. REV. 1059, 1063 (2016). The NYPD made roughly an additional 200,000 nonfelony arrests in 2014 as compared to 1989. *Id.* And between 2000 and 2004, the NYPD arrested approximately 17,000 people annually for low level offenses not included in New York's Penal Law. K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. OF L. & SOC. CHANGE 271, 283 & n.65 [hereinafter Howell, *Broken Lives from Broken Windows*].

184. And, as noted above, the Supreme Court's decision in *Heien v. North Carolina* allows arrests even when police are wrong about the law. *See supra* note 123.

C. Search for Anything: The Search Incident to Arrest Exception to the Warrant Requirement

An examination of the search incident to arrest exception to the warrant requirement is also necessary to understand the diminished Fourth Amendment rights of public and patrolled housing denizens. Unlike the standards for stops and arrests, which are now fairly well settled, this doctrine is in flux with a substantial split among lower courts as to whether mere probable cause of an arrestable offense is sufficient to trigger the exception to the warrant requirement, or whether an actual arrest is required. Resolution of this question has substantial ramifications for the right of people in public and patrolled housing to be free from unreasonable searches.

It is accepted that a warrant generally is required before a police officer conducts a search.[185] The Supreme Court has observed that the warrant requirement reflects the constitutional guarantee that a neutral magistrate, rather than a police officer, ordinarily should decide whether a search is justified:

> The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.[186]

Accordingly, the "basic rule" is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions."[187]

The Supreme Court first acknowledged the search incident to arrest exception to the warrant requirement more than a century ago,[188] but

185. Terry v. Ohio, 392 U.S. 1, 20 (1968) ("[T]he police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . . .").

186. McDonald v. United States, 335 U.S. 451, 455–56 (1948).

187. Arizona v. Gant, 556 U.S. 332, 338 (2009) (quoting Katz v. United States, 389 U.S. 347, 357 (1968)); *see also* Jones v. United States, 357 U.S. 493, 499 (1958) (explaining that Supreme Court has "jealously and carefully drawn" only a few, narrowly defined exceptions to the warrant requirement).

188. *See* Weeks v. United States, 232 U.S. 383, 392 (1914) (noting the "right on the part of the Government, always recognized under English and

confusion about its scope and meaning has reigned since. In 1969, the Court attempted to clear up the confusion in *Chimel v. California*,[189] when it held that the "proper extent" of a search incident to arrest is "a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."[190] This rule significantly narrowed the scope of searches that had been approved previously.[191] But even with *Chimel* in place, "[b]y design, . . . searches incident to arrest are both thorough and invasive."[192]

American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime").

189. 395 U.S. 752 (1969).

190. *Id.* at 762–63.

191. Over approximately the next fifty years following *Weeks*, the Court flip-flopped as to whether the exception permitted a search of only the person and the area immediately surrounding him or her, or a comprehensive search of the location where the arrest was effected, including homes. *Compare* United States v. Rabinowitz, 339 U.S. 56, 61 (1950) (quoting *Weeks*, 232 U.S. at 392) (permitting a search of "the place where the arrest is made in order to find and seize things connected with the crime" as a search incident to arrest), *and* Harris v. United States, 331 U.S. 145 (1947) (holding that the search of an apartment where an arrest was made for forged checks met Fourth Amendment standards), *and* Marron v. United States, 275 U.S. 192 (1927) (upholding search of residence where an arrest was made), *and* Agnello v. United States, 269 U.S. 20, 30 (1925) (noting, in dictum, permissibility of search of "the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed"), *with* Trupiano v. United States, 334 U.S. 699 (1948) (rejecting search of arrest site), *and* United States v. Lefkowitz, 285 U.S. 452 (1932) (holding search of desk drawers and cabinet unlawful), *and* Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) (holding unlawful search of office where arrest occurred), *and* Carroll v. United States, 267 U.S. 132 (1925) (holding that officers lawfully searched an automobile based on probable cause that the vehicle contained intoxicating liquor).

192. Seth W. Stoughton, *Modern Police Practices:* Arizona v. Gant*'s Illusory Restriction of Vehicle Searches Incident to Arrest*, 97 VA. L. REV. 1727, 1768 (2011). Instructions for police officers on how to conduct a search incident to arrest from "[a] widely circulated law enforcement text first published in 1980" are illuminating:

> Your search should be systematic, so you cover [the arrestee's] entire body from his head to his toes. A good place to look first is around the suspect's midriff . . . .
>
> After checking the waist area, go to the top of his head and check all areas down to his toes. Work from top to bottom, right to left—and maintain the same search system on *each* suspect. That way you won't forget any area.

The Court's reasoning for limiting searches incident to arrest to the arrestee's person and area within his immediate control rested on the justifications for the exception: ensuring that arrests are not compromised, protecting arresting officers, and preventing the destruction of evidence.[193] That said, in *United States v. Robinson*,[194] the Court definitively ruled that *any* arrest is sufficient to invoke the exception, relying heavily on the notion that police officers face the risk of violence and injury in taking potentially armed suspects into custody no matter how minor the arrest charge.[195] In *Gustafson v. Florida*,[196] a companion case to *Robinson*, the Court made clear that this rule applied even without any concern about the destruction of evidence by upholding the search of a driver arrested for a minor driver's license

> No area of the body or item of clothing should be immune from searching. Adversaries have been known to carry guns in the crotch of their pants . . . inside their hats . . . up their sleeves . . . on cords around their necks . . . under coats and vests . . . or fastened to their arms or legs by rubber bands or tape. Sometimes, they hide them in slings and bandages . . . . Others have carried guns taped in their arm pits or under their breasts.
>
> A favorite spot for concealing weapons, often overlooked, is inside boots . . . .
>
> Male officers (and female officers, too, for that matter) are often reluctant to search a male suspect's crotch area . . . .
>
> Similarly, male officers may be hesitant about searching female prisoners on the street . . . . In searching a female, first pull out her blouse tail if it's tucked in; sometimes guns or other weapons will fall out. Also consider unsnapping her bra and shaking it by its straps . . . . In checking between and under her breasts, on the insides of her thighs and around her crotch, use the edge of your hand. This can protect you against accusations of improper advances.

Id. at 1768–69 (alterations in original) (quoting RONALD J. ADAMS ET AL., STREET SURVIVAL: TACTICS FOR ARMED ENCOUNTERS 261–63 (1980)).

193. *Chimel*, 395 U.S. at 762–63. The Court also quoted Justice Frankfurter's observation that "the history and experience which [the Fourth Amendment] embodies and the safeguards afforded by it against the evils to which it was a response" is the "test of reason which makes a search reasonable." *Id.* at 765 (quoting *Rabinowitz*, 339 U.S. at 83 (Frankfurter, J., dissenting)).

194. 414 U.S. 218 (1973).

195. *Id.* at 235.

196. 414 U.S. 260 (1973).

offense.[197] In short, "it is the fact of custodial arrest which gives rise to the authority to search."[198]

Wayne Logan aptly described the import of these rulings:

> Taken together, *Robinson* and *Gustafson* marked a significant advance in police authority to search incident to arrest. No longer did the law require an evidentiary nexus between the items seized and the basis for arrest; nor must there be a discernible threat to officer safety. Police were freed to conduct full-body searches subsequent to any arrest, and permitted to seize any and all weapons or contraband they might find. In sum, for the first time, the Court laid down a "bright-line rule" that tied search incident authority to the occurrence of a "lawful custodial arrest," without regard to the factual particularities of the police-citizen encounter.[199]

As noted above, the question that has more recently been percolating through the lower courts regarding this exception is whether mere probable cause of an arrestable offense is sufficient to trigger the exception to the warrant requirement or whether an actual arrest is required. In 1996, the Supreme Court arguably provided an answer to that question in *Knowles v. Iowa*,[200] when it held that the exception was not properly applied when a police officer searched a motorist to whom he had already issued a ticket for speeding.[201] The officer had intended to send the motorist on his way until "under the driver's seat he found a bag of marijuana and a 'pot pipe,'"[202] but instead an arrest then followed the discovery.[203] In a unanimous opinion, the Court held that the two rationales for the search incident to arrest exception identified in *Robinson*—"(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later

197. *Id.* at 265 ("It is sufficient that the officer had probable cause to arrest the petitioner and that he lawfully effectuated the arrest and placed the petitioner in custody . . . . [T]he arguable absence of 'evidentiary' purpose for a search incident to a lawful arrest is not controlling.").

198. *Id.* at 266.

199. Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 394 (2001) (internal citations omitted).

200. 525 U.S. 113 (1998).

201. *Id.* at 114.

202. *Id.*

203. *Id.*

use at trial"[204]—did not justify a search incident to citation.[205] It recognized that the interest in officer safety "[did] not by itself justify the often considerably greater intrusion attending a full field-type search."[206]

Although *Knowles* appears to provide a clear answer (in the negative) to the question of whether a search incident to mere probable cause is permissible,[207] its meaning has been debated extensively in the lower courts. Of particular importance is the set of cases finding no constitutional quarrel with "warrantless searches without initial arrests simply when (1) probable cause to arrest exists independent of the fruits of the search and (2) the arrest, conducted after the search, is deemed broadly contemporaneous."[208] Those cases largely rest on *Rawlings v. Kentucky*,[209] in which the Supreme Court, seemingly unwittingly, identified the contemporaneity of a search to an arrest as relevant to the permissibility of a search incident to arrest, even though the search preceded the defendant's arrest.[210] In the nearly four decades since *Rawlings* was decided, numerous courts have interpreted it to permit searches incident to arrest that occurred before arrest, including when there is little or no reason to believe that arrest was inevitable.[211]

204. *Id.* at 116 (citing United States v. Robinson, 414 U.S. 218, 234 (1973)).

205. *Id.* at 117.

206. *Id.*

207. Wayne Logan has pointed out that the Court's decision in *Cupp v. Murphy*, 412 U.S. 291 (1973) also supports the notion that a custodial arrest must have been effectuated for the search incident to arrest exception to apply. Logan, *supra* note 199, at 406 & n.163 (citing *Cupp*, 412 U.S. at 296 ("Where there is no formal arrest, . . . a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence on his person. . . . [W]e do not hold that a full *Chimel* search would have been justified . . . without a formal arrest and without a warrant.")).

208. Logan, *supra* note 199, at 408.

209. 448 U.S. 98 (1980).

210. *Id.* at 111. There, after detaining people at a house where they had intended to arrest another man on drug charges, police searched a purse and discovered drugs. *Id.* at 100–01. After a man identified the drugs as his, the officers searched him and discovered additional contraband. *Id.* at 101.

211. Logan collected cases reflecting this phenomenon as of 2001. *See* Logan, *supra* note 199, at 408 n.171. More recent appellate cases reflecting this trend include the following: United States v. Diaz, 854 F.3d 197 (2d Cir. 2017); United States v. Powell, 483 F.3d 836 (D.C. Cir. 2007) (en banc); United States v. Currence, 446 F.3d 554, 557 (4th Cir. 2006); United States v. Smith, 389 F.3d 944, 951 (9th Cir. 2004); United States v. Montgomery, 377 F.3d 582, 588 (6th Cir. 2004); *see also* Knop v. State, No. 11-0692, 2012 WL 3589980, at *3–5 (Iowa Ct. App. Aug. 22, 2012) (finding that the pre-arrest search of the defendant was valid because the

The risk that this doctrine poses to residents and visitors of public and patrolled housing is grave. *United States v. Diaz*,[212] recently decided by the Second Circuit, illustrates this dynamic well. It involved a search followed by arrest in the patrolled hallway of a Bronx private apartment building enrolled in the Trespass Affidavit Program/Operation Clean Halls.[213] As noted above, the Clean Halls program allows NYPD officers to patrol the hallways and other common areas of private apartment buildings.[214] In *Diaz*, the defendant was "sitting next to a bottle of vodka and holding a red plastic cup."[215] At a suppression hearing, the officer who ultimately arrested Diaz testified that "she did not initially intend to arrest Diaz, only to issue him a summons for violating New York's open-container law."[216] After ordering him to stand and produce identification, Diaz's "fumbl[ing] with his hands in his jacket pockets and rearrang[ing] his waistband," inspired the officer to frisk Diaz, revealing a gun.[217] Upon discovery, he was arrested.[218]

In heavy reliance on *Rawlings* and prior Second Circuit precedent, the Second Circuit concluded that the frisk was properly considered a search incident to arrest.[219] It distinguished *Knowles* because the search

officers had "probable cause to arrest [the defendant] for . . . traffic violations" at the time of the search); State v. Sherman, 931 So.2d 286, 297 (La. 2006) (holding that where police have probable cause to arrest and conduct a search incident to arrest, "the fruits of that search may not be suppressed merely because the police did not intend to arrest the suspect for the offense for which probable cause existed"); State v. O'Neal, 921 A.2d 1079, 1086–87 (N.J. 2007) (holding that a warrantless search of the defendant was lawful because the police officers had probable cause at the time of the search to arrest the defendant for a drug offense, even though the search preceded the arrest). *But see* Ochana v. Flores, 347 F.3d 266, 270 (7th Cir. 2003) ("Generally, it is legal to search a vehicle incident to a lawful custodial arrest" but a "traffic citation alone" does not justify such a search, "even if there is probable course for the traffic stop, or probable cause to arrest the driver for the traffic violation."); Belote v. State, 981 A.2d 1247, 1252 (Md. 2009) ("Where there is no custodial arrest, however, these underlying rationales for a search incident to arrest do not exist.").

212. 854 F.3d 197 (2d Cir. 2017).

213. *Id.* at 200–01.

214. *See supra* notes 54–57 and accompanying text.

215. *Diaz*, 854 F.3d at 200.

216. *Id.*

217. *Id.* at 200–01.

218. *Id.* at 201.

219. *Id.* at 205–09 (discussing United States v. Ricard, 563 F.2d 45 (2d Cir. 1977)). The court declined to address whether the frisk was lawful pursuant to *Terry v. Ohio*, 378 U.S. 1 (1968). *Diaz*, 854 F.3d at 209 n.16.

at issue took place *before* the officer issued a ticket.[220] In the *Diaz* encounter, it "thus remained uncertain . . . whether the encounter would lead to an arrest; the dangers to the officer that accompany the prospect of arrest therefore remained present."[221] It further re-casts the description of officer safety concerns in *Robinson* and *Knowles* as ones attendant to encounters where there is the *possibility* of arrest rather than actual arrests.[222]

Diaz is emblematic of how Fourth Amendment law and targeted or hot spots policing practices combine to result in extraordinarily weak protections for people who live in or frequent hot spots, including public or patrolled housing, targeted by police. Pursuant to *Diaz*, police officers in the Second Circuit are free to search people on the basis of probable cause of some arrestable offense without fear that any evidence recovered will be suppressed.[223] Thus, people who live in patrolled housing who, like all people, are very likely to commit some offense in or around their homes, are subject to extensive searches "incident to arrest" even if they are never arrested and the searching officer never intended to arrest them.[224] The likelihood of committing such infractions is especially high because mass criminalization is at work, effectively providing law enforcement with carte blanche to search people.[225]

220. *Id.* at 206.

221. *Id.*

222. *Id.* at 207 ("Where there is a basis for an arrest, an officer has reason to be concerned for her safety until she issues a citation and the stop ends.").

223. Because New York's highest court ruled differently on this issue, police departments within New York may not be instructing their officers to exploit this doctrine. *See People v. Reid*, 26 N.E.3d 237, 240 (N.Y. 2014) ("Where no arrest has yet taken place, the officer must have intended to make one if the 'search incident' exception is to . . . app[ly].").

224. It is worth noting that *Diaz* and similar cases leave open the possibility that a court could find a police officer personally liable for violating the Fourth Amendment if she conducted a search on the basis of mere probable cause, but an arrest did not immediately follow. Such claims would likely arise in a Section 1983 action. *See, e.g.*, Bennett v. City of Eastpointe, 410 F.3d 810, 824 (6th Cir. 2005) (noting, in a Section 1983 action, that the search incident to arrest exception did not apply to frisk of youths stopped by police officers for "riding double" because there was no actual arrest). But Section 1983 actions often fail to deter police misconduct. *See* Carbado, *supra* note 12, at 519–24 (explaining why the qualified immunity doctrine and indemnification practices limit liability against police officers in Section 1983 cases).

225. Tracey Maclin's description of why such searches gain attention infrequently is instructive:

> [Searches] are low-visibility affairs. Even though individual privacy has been invaded, individuals subjected to such searches are not likely to complain because it is probably not worth the

D. Policing Public and Patrolled Housing in New York City: "Just Go to the Well"[226]

The experience in New York City is useful for an examination of how these Fourth Amendment doctrines, which are already acknowledged to provide weak protection for the urban poor, can be exploited by police departments intent on using their maximum authority in places they deem problematic. The New York City Police Department's recent practices in both public and private housing offer a window into how a police focus on hot spots can operate to the detriment of Fourth Amendment protection for those who live in or frequent locations targeted by police.[227] Given that hot spots policing is not one-size-fits-all, no case study can or should be considered emblematic of how any particular police department will implement its chosen hot spots strategy.[228] But the New York City experience illustrates how an order maintenance approach in combination with the limited legal rights and special rules that apply in public and patrolled housing make the Fourth Amendment's protection against unreasonable searches and seizures effectively vanish.

Spread-out over 175,000 apartments in five boroughs, approximately 400,000 people live in public housing developments operated by the New York City Housing Authority ("NYCHA").[229] And, like other locales, policing practices in NYHCA are rooted in part in the public perception of public housing as a major site of urban disorder and criminality in New York City. Policing practices in and

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> bother. As a result, these searches are not likely to be brought to the attention of police supervisors, nor are they likely to merit the concern of politicians or the press. Police officers understand this phenomenon. As a result, they know they have carte blanche to undertake these searches just about whenever they please.

Maclin, *supra* note 2, at 244.

226. Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES (July 11, 2010), https://www.nytimes.com/2010/07/12/nyregion/12frisk.html [https://perma.cc/WXY8-8LEA].

227. *See* Davis v. City of New York (*Davis II*), 959 F. Supp. 2d 324 (S.D.N.Y. 2013); Ligon v. City of New York, 925 F. Supp. 2d 478 (S.D.N.Y. 2013); Davis v. City of New York (*Davis I*), 902 F. Supp. 2d 405 (S.D.N.Y. 2012).

228. As explained above, some police departments implement hot spots policing using order-maintenance policing strategies, while others focus on problem-oriented policing or community policing. *See supra* notes 84–97 and accompanying text.

229. N.Y.C. HOUS. AUTH., NYCHA 2018 FACT SHEET 1 (2018), https://www1.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Fact-Sheet_2018_Final.pdf [https://perma.cc/7SM8-PRT6].

around NYHCA developments are partly responsible for that perception.

The role of the NYPD in NYCHA developments has evolved over time. Until it merged with the NYPD in 1995, NYCHA had its own police force, the Housing Authority Police Department ("HAPD").[230] HAPD members historically enjoyed strong relationships with NYCHA residents and utilized an approach that most strongly resembles community policing.[231] One important aspect of the HAPD's strategies was its hyper-local assignment of officers to particular developments for years at a time, allowing them to develop relationships with residents.[232] The HAPD moved to embrace Broken Windows strategies in the 1980s and early 1990s as drug problems reached epidemic levels. Its embrace of HUD's Drug Elimination Program is a good example. As noted above, this HUD program provided funds to local public housing authorities to combat drug use and crime.[233] As implemented in New York City, the biggest component of the Drug Elimination Program was Operation Safe Home, which "focused on increasing the presence of uniformed officers and law enforcement activities . . . with the goal of providing a more secure living environment . . . by combating serious crime."[234] The chief method used to reach that goal was frequent patrols by teams of officers designed to "'take back' a development building by building."[235] The program grew from forty-eight officers in 1991 to 400 officers and fifty-seven sergeants in 1995, when the NYCHA police force merged with the NYPD.[236]

The NYPD maintained the focus on frequent patrols and other Broken Windows strategies after HUD ended the Drug Elimination Program. Since 1995, the NYPD has provided all police services in NYCHA, including both "baseline," i.e., "ordinary and routine" police services, as well as specialized "above Baseline Services."[237] The NYPD

230. Fritz Umbach, The Last Neighborhood Cops: The Rise and Fall of Community Policing in New York Public Housing 161 (2011).

231. *Id.* at 47–52 (describing HAPD's practices between 1960 and 1980).

232. *Id.*

233. Fagan et al., *Race and Selective Enforcement in Public Housing*, *supra* note 9, at 423 ("The primary goal of DEP was to reduce drug use, drug sale, drug-related crime and collateral crime problems by strengthening both formal and informal social control in public housing developments.").

234. *Id.* at 427.

235. *Id.*

236. *Id.* at 427–28.

237. Memorandum of Understanding between the New York City Housing Authority and the City of New York on Merger of the New York City Housing Authority Police Department and the New York City Police Department at 7, *Davis II*, 959 F. Supp. 2d 324 (S.D.N.Y. Sept. 16, 1994) (1:10-cv-00699-AT-HBP), ECF No.176-1 [hereinafter NYCHA MOU].

is also the entity designated to enforce NYCHA's "House Rules,"[238] which embrace all manner of behavior, including some that seem intended to mimic criminal law, such as bars on trespassing and entry into restricted areas.[239] For example, until recent litigation, the NYCHA's House Rules banned "lingering," a rule so vague that enforcement depended on the predilections of the officer on patrol.[240] But the House Rules also cover issues that one would not expect the police to address, such as waste disposal, moving permits, TV antenna installation, and barbecue permits.[241]

As described above, certain private apartment buildings in New York City are also the sites of an intense police presence. Through the Trespass Affidavit Program ("TAP"), also known as Operation Clean Halls, the NYPD receives permission from private landlords to patrol the common areas of apartment buildings.[242] The original focus of the program was "narcotics sales taking place in the common areas of private buildings, such as lobbies, stairwells, and rooftops."[243] It later expanded to include other criminal activity and quality of life offenses in the buildings.[244]

NYCHA has paid tens of millions of dollars for "above Baseline" services annually, such as its vertical patrol program and additional narcotics enforcement and patrol services. *Id.* (describing above baseline services); Amended Complaint at 43, *Davis II*, 959 F. Supp. 2d 324 (S.D.N.Y. 2010) (No. 1:10-cv-00699-AT-HBP) (payments ranged between $58 million and $88 million from 1995 to 2008).

238. NYCHA MOU at 8–9 ("The City, through its police officers, is hereby empowered to enforce such NYCHA rules and regulations and perform such other duties as shall be determined from time to time by the City and NYCHA.").

239. *See* NYCHA Highlights of House Rules, Lease Terms and Policy, *Davis II*, No. 1:10-cv-00699-AT-HBP (S.D.N.Y. July 20, 2012) ECF 194-28.

240. According to an anonymous housing commander, "'Getting your mail, that's not lingering . . . . But if you're hanging out with your friends, or sitting in the stairways for a period of time, that's lingering.'" J. David Goodman, *Police Patrols in New York Public Housing Draw Scrutiny*, N.Y. TIMES (Dec. 15, 2014), https://www.nytimes.com/2014/12/16/nyregion/amid-calls-for-police-reform-little-scrutiny-of-public-housing-patrols.html [https://perma.cc/R7NR-9PXP]. NYCHA agreed to remove the ban on lingering from its House Rules pursuant to the settlement of a class action. Stipulation of Settlement and Order at 10, *Davis II*, 959 F. Supp. 2d 324 (S.D.N.Y. Jan. 7, 2015) (No. 1:10-cv-00699-AT-HBP).

241. NYCHA Highlights of House Rules, Lease Terms and Policy, *supra* note 239, at 2, 3.

242. Ligon v. City of New York, 925 F. Supp. 2d 478, 484–85 (S.D.N.Y. 2013).

243. *Id.* at 517 (internal citations omitted).

244. *Id.* at 517–18.

One policing tactic common to both NYCHA and TAP buildings is the use of "vertical patrols." Such patrols "consist of two or more police officers combing the interior of a . . . building—from roof to basement—in an attempt to locate and apprehend trespassers, drug dealers, and other criminals."[245] In NYCHA buildings alone, the NYPD conducts hundreds of thousands of vertical patrols each year.[246] And in both and NYCHA and TAP buildings, the NYPD is often a regular presence, encountering residents and their visitors inside and around the buildings, to the point that some residents have described the NYPD as an occupying force.[247]

The New York experience lays bare the weakness of Fourth Amendment protections for those who reside in and frequent patrolled housing. Two recent class actions challenged the NYPD's NYCHA and TAP stop and trespass arrest practices, which were developed in the late 2000s.[248] Although the cases challenged practices as violative of the Fourth Amendment, they also revealed troubling stops and arrests that were perfectly lawful. For example, a NYCHA resident was stopped, frisked, and ultimately arrested, along with his friend, because he was sitting on his own building's "roof landing," the platform on the top of the stairwell that is connected to the roof through a door."[249] Given that the New York Penal Law specifically bans trespassing in public housing buildings where there are "conspicuously posted rules or regulations governing entry and use,"[250] the argument about the arrest's legality turned on whether the plaintiff and his guest had adequate

245. Adam Carlis, Note, *The Illegality of Vertical Patrols*, 109 COLUM. L. REV. 2002, 2003 (2009).

246. *Id.*

247. A federal court quoted the following statement of a NYCHA resident leadership group's president:

> [W]henever I have an opportunity to talk to someone in law enforcement who might listen, my question to them is: Suppose I came into your neighborhood tonight and you were in civilian attire and you were on your way to the store to get milk and cookies for your kids, and I stopped you the way some of your personnel do, what would you do? How would you feel about that?
>
> . . .
>
> When this type of practice is instituted and done to people on a regular basis . . . I use the term "penal colony," it's almost like we have been colonized for a decade.

Davis II, 959 F. Supp. 2d 324, 333–34.

248. *See Davis II*, 959 F. Supp. 2d 324 (S.D.N.Y. 2013); *Ligon*, 925 F. Supp. 2d 478 (S.D.N.Y. 2013); *Davis I*, 902 F. Supp. 2d 405 (S.D.N.Y. 2012).

249. *Davis I*, 902 F. Supp. 2d at 419 & n.78.

250. N.Y. PENAL LAW § 140.10(e) (McKinney 2019).

notice that the roof landing was an area where a person's presence was prohibited.[251] With sufficient notice, the arrest of the resident on his own building's roof landing would have been valid. Similarly, a young Bronx man was legally stopped when he, his cousin, and a friend approached his grandmother's TAP building and "knocked loudly" because they didn't have a key.[252] These cases of lawful encounters, along with the dozens of unlawful ones at the heart of the cases,[253] reveal that the NYPD did not hesitate to detain and question people in and around NYCHA and TAP buildings. It was so easy to identify the grounds for conducting stops in NYCHA buildings that one NYPD supervisor instructed officers to "[j]ust go the well"—the lobbies of public housing buildings—to locate people to stop.[254] As one NYCHA resident summarized the situation: "'If you're standing in front of the building, you can't do that . . . . You can't sit in the park after dusk. They don't let you do much around here.'"[255] Ultimately, the district court found that NYPD's training regarding TAP "taught officers the following lesson: stop and question first, develop reasonable suspicion later."[256]

Many residents of public and patrolled housing in New York City have had experiences similar to the plaintiffs'. According to surveys conducted by a non-profit legal organization in 2008, 72 percent of residents surveyed in one public housing project reported that they had been stopped by NYPD officers, including 41 percent who were stopped

251. *Davis I*, 902 F. Supp. 2d at 420–22. NYCHA later issued a document titled "Highlights of House Rules, Lease Terms and Policy," to clarify that presence on roof landings was barred. *Id.* at 422.

252. *Ligon*, 925 F. Supp. 2d at 504, 526 & n.346 (S.D.N.Y. 2013). He was also frisked—which turned into an extensive and illegal search, involving the removal of his pocket's contents. *Id.* at 505.

253. For example, in *Ligon v. City of New York*, concerning TAP, the district court found that nine of the eleven stops about which the plaintiffs offered testimony were illegal. *Id.* at 526. The court also cited an analysis of the NYPD's records of stops, demonstrating at least 400 stops in a single year made because of mere presence outside of TAP buildings, and over two dozen affidavits prepared by the Bronx District Attorney's Office documenting decisions to decline to prosecute arrested persons who were stopped solely because they were entering, exiting, or simply near TAP buildings in violation of the Fourth Amendment. *Id.* at 545–49; Report of Plaintiff's Expert Dr. Jeffrey Fagan, Ligon v. City of New York, 925 F. Supp. 2d 478 (S.D.N.Y. July 27, 2012) (No. 1:12-cv-02274-SAS-HBP), ECF 44-5.

254. Rivera et al., *supra* note 226.

255. Goodman, *supra* note 240.

256. *Ligon*, 925 F. Supp. 2d at 538.

up to five times per year.[257] In another development, 63 percent of residents who reported having been stopped had been stopped at least once in the previous year.[258] In response to a 2011 survey of NYCHA residents, one-third reported that they or a family member "ha[d] been stopped by police in his/her own building or development."[259] In recent focus groups and community forums held as part of the "Joint Remedial Process" that followed resolution of the cases, NYCHA residents communicated that they "often felt overly surveilled and heavily policed."[260]

Thus, even following high-profile class actions, the lack of effective Fourth Amendment limits allows the NYPD to utilize aggressive enforcement practices in NYCHA and TAP buildings. Once inside or on the grounds of a NYCHA or TAP building, the NYPD continues to have authority to enforce federal, state, and local laws, no matter how trivial. Although New York law permits stops only when misdemeanors and felonies are suspected,[261] it allows police officers to arrest for any "offense," including non-criminal ones.[262] Following *Atwater* and *Moore*, this New York law almost certainly complies with the Fourth Amendment. Accordingly, an officer may approach a person for the purpose of issuing a citation or conducting an arrest for virtually anything—e.g., smoking cigarettes, littering, or riding a bicycle on the sidewalk—and the encounter may well end with a criminal case and all of its associated costs. In short, when the NYPD targets public and patrolled housing, the Fourth Amendment's protection against unreasonable seizures is effectively non-existent.

257. NEW YORK LAWYERS FOR THE PUBLIC INTEREST, NO PLACE LIKE HOME 10 (2008).

258. *Id.* at 12.

259. CAAAV: ORGANIZING ASIAN CMTYS. ET AL., A REPORT CARD FOR THE NEW YORK CITY HOUSING AUTHORITY (NYCHA) 10 (2011).

260. ARIEL E. BELEN ET AL., NEW YORK CITY JOINT REMEDIAL PROCESS ON NYPD'S STOP, QUESTION, AND FRISK, AND TRESPASS ENFORCEMENT POLICIES, FINAL REPORT AND RECOMMENDATIONS 264 (2018), https://www.jamsadr.com/files/uploads/documents/articles/belen-new-york-city-joint-remedial-process-may-2018.pdf [https://perma.cc/S4QM-4G7Q].

261. *See* N.Y. CRIM. PROC. LAW § 140.50(1) (McKinney 2016).

262. *See* § 140.10(1)(a) (allowing arrest by police officer for "[a]ny offense when he or she has reasonable cause to believe that such person has committed such offense in his or her presence"); *People v. Taylor*, 294 A.D. 2d 825 (N.Y. App. Div. 2002) (upholding arrest for violation of non-criminal open container ordinance); *People v. Lewis*, 50 A.D.3d 595 (N.Y. App. Div. 2008) (upholding arrest for violation of two sections of New York City Arts and Cultural Affairs Law, both non-criminal offenses).

The New York City example, revealing abuses similar in kind to those exposed by Justice Department investigations in Baltimore and Newark and private litigation in numerous other cities,[263] demonstrates that targeted policing in public and patrolled housing does not always inure to the benefit of residents and others who find themselves in and around hot spots for legitimate reasons. Although hot spots policing sounds "smart" in concept, getting stopped, arrested, and searched by police in your own building is anything but. Unsurprisingly, the New York City example and others show that when mass criminalization is exploited, hot spots policing techniques are not always met with approval by the communities where they are implemented. Although residents of housing complexes plagued by crime surely want safety and security, they are also sometimes confronted with substantial limitations on their Fourth Amendment rights.

III. MASS CRIMINALIZATION IN PUBLIC AND PATROLLED HOUSING AND FOURTH AMENDMENT VALUES

The costs of mass criminalization and policing strategies targeted at public and patrolled housing are high. On a macro level, programmatic stop and frisk, arrests, and searches create alienation between law enforcement agencies and the communities they serve, undermine the legitimacy of the police department and entire justice system, promote stereotypes about people of color, direct funds towards the criminal justice system rather than other services, and harm public health.[264]

The toll on individuals can be extraordinarily steep as well. Even when they face only minor charges, those who are arrested face especially significant consequences, both direct and collateral.[265]

263. *See supra* notes 59–75 and accompanying text.

264. *See* Cooper, *supra* note 7, at 21–26 (describing use of racial profiling by NYPD and social control of young black and Latinx males as a result of programmatic stop and frisk); M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding "Zero-Tolerance" Policing as a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 410–11 (2011) (describing the "critical mass of harms" that result from order maintenance policing); Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2321 (2014) (describing survey results indicating that young men in New York City who reported more police contact pursuant to NYPD stop and frisk policy also reported more trauma and anxiety); Howell, *Broken Lives from Broken Windows*, *supra* note 183, at 306–12 (describing community-level harms of zero tolerance policing).

265. *See* Fabricant, *supra* note 264, at 407–09 (describing consequences of convictions); Howell, *Broken Lives from Broken Windows*, *supra* note 183 at 293–306 (same); Huq, *supra* note 9, at 2429–39 (same); Natapoff, *supra* note 182, at 1323–27 (same); Jenny Roberts, *Why Misdemeanors Matter:*

Conviction is not necessary; mere arrests can cause significant harm, such as the loss of a job or home.[266] This risk is amplified in public housing. HUD *requires* public housing agencies to utilize lease terms that subject a tenant to eviction if a member of the tenant's household or a guest engages in criminal activity, whether on or off the premises of the housing development.[267] A public housing agency may pursue eviction even when the tenant is completely unaware of the household member's criminal or drug activity.[268] With this draconian lease provision, it is easy to see how police encounters in public housing could lead to eviction, a traumatizing event.[269] In the same vein, relatively low level criminal charges frequently result in probation, and probation

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Defining Effective Advocacy in the Lower Criminal Courts, 45 U.C. DAVIS L. REV. 277, 297–306 (2011) (same).

266. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 852–54 (2015) (describing collateral consequences of arrests and recounting tale of Bronx man, a plaintiff in *Ligon v. City of New York*, whose job was jeopardized following an arrest for trespassing in patrolled housing due to automatic suspension of his security guard license upon arrest); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 491–92 (2010) (detailing how arrest or conviction can affect access to housing).

267. HUD v. Rucker, 535 U.S. 125, 127 (2002) (interpreting statutory provision that allows eviction because of a conviction for "any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity") (quoting 42 U.S.C. § 1437d(l)(6)).

268. *Id.* at 136 (holding that the statute "requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity").

269. In his ethnographic study of families facing eviction and its aftermath in Milwaukee, Matthew Desmond evocatively summarized the impact of eviction as follows:

> Losing your home and possessions and often your job; being stamped with an eviction record and denied government housing assistance; relocating to degrading housing in poor and dangerous neighborhoods; and suffering from increased material hardship, homelessness, depression, and illness—this is eviction's fallout. Eviction does not simply drop poor families into a dark valley, a trying yet relatively brief detour on life's journey. It fundamentally redirects their way, casting them onto a different, and much more difficult, path. Eviction is a cause, not just a condition, of poverty.

MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 298–99 (2016).

violations require eviction from public housing.[270] Far from making home a refuge, the risk of encounters with police officers are uniquely high in public housing.[271]

In addition, certain community-wide harms of order maintenance policing are especially significant in public and patrolled housing. In particular, two previously identified by Aziz Huq with regard to programmatic stop and frisk generally are noteworthy. *First*, there is the notion that negative experiences with the criminal justice system "dampen[] . . . civic participation . . . in ways that, over time, conduce to diminished political power."[272] Specifically, "contact with the criminal justice system, including nonconsensual stops, has a substantial and statistically significant effect on trust in government," reducing the likelihood of voting.[273] Political power does not usually reside with the low-income residents of public and patrolled housing, a historically marginalized group.[274] Policing practices that further diminish it mean that the political priorities of residents of public and patrolled housing are given short shrift. A brief example from Harlem is illustrative. There, in response to growing tensions and fears of violence, a group of public housing residents from two developments called for services and programs for youth in their communities.[275] Their

270. Gustafson, *supra* note 99, at 667 n.109 (citing Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, Title IX, § 903, 110 Stat. 2185, 2348–49 (1996) (codified as amended at 42 U.S.C. § 1437 (2012))).

271. It is noteworthy that minimal process is typically available to address minor criminal charges. Arrests for misdemeanors and other minor infractions often result in quick guilty pleas, and consequently, no meaningful opportunities to challenge the constitutionality of the actions that ultimately led to arrest. *See* Natapoff, *supra* note 182, at 1345–47. Officers' actions escape challenge when suppression hearings, the primary vehicle used to challenge the constitutionality of searches and seizures, simply do not happen.

272. Huq, *supra* note 9, at 2437–38.

273. *Id.* at 2438 (citing AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 150–51 (2014)).

274. *See* Mary Pattillo, *Investing in Poor Black Neighborhoods "As Is," in* PUBLIC HOUSING AND THE LEGACY OF SEGREGATION 31–46 (Margery Austin Turner, Susan J. Popkin & Lynette Rawlings, eds., 2009) (describing lack of political influence of low income tenants); LEONARD FREEDMAN, PUBLIC HOUSING: THE POLITICS OF POVERTY 200–01 (1969) (same with respect to public housing residents).

275. *Harlem Residents: We Asked the City for Help, We Got a Raid Instead*, JUVENILE JUSTICE INFO. EXCH., (June 5, 2014), https://jjie.org/2014/06/05/harlem-residents-we-asked-city-for-help-we-got-a-raid-instead/107031/ [https://perma.cc/8BUX-9TFY]; Jennifer Gonnerman, *A Daughter's Death*,

efforts went unheeded, and instead, the NYPD and Manhattan District Attorney's office conducted a massive raid of the developments—then the biggest in New York City history—which resulted in over forty arrests.[276]

Second, Huq pointed to a reduction in "collective efficacy" for communities bearing the brunt of programmatic stop and frisk, i.e., "'the linkage of mutual trust and the shared willingness to intervene.'"[277] Collective efficacy creates social control that addresses crime.[278] This could be especially useful in public and patrolled housing, where community members have regular and repeated contact with each other; all benefit when they can rely on each other to help preserve safety and security. Police practices that operate to impede collective efficacy have obvious deleterious effects. This is particularly noteworthy given that one study indicates that experiencing frequent police stops and police intrusiveness during stops can predict criminal behavior by those subjected to the stops.[279] Overall, the community-wide harms generally associated with order maintenance practices are concentrated and localized such that the marginalization of the residents of public and patrolled housing is further cemented.

In sum, the Fourth Amendment functions in public and patrolled housing to support the use of order-maintenance police practices that further marginalize impoverished communities. The powers to stop, arrest, and search are extraordinary under modern Fourth Amendment jurisprudence, and together, they are highly dangerous for the rights of people who could easily commit noncriminal infractions in places where mass criminalization is in play, such as public and patrolled housing. Fourth Amendment law also does nothing to impede the importation of pernicious racial stereotypes and in fact allows them to flourish by permitting pretextual stops. Indeed, through (low) bright-line standards that allow stops, arrests, and searches for virtually anything,

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NEW YORKER (Oct. 5, 2015), https://www.newyorker.com/magazine/2015/10/05/a-daughters-death [https://perma.cc/33AZ-BN2N].

276. J. David Goodman, *Dozens of Gang Suspects Held in Raids in Manhattan*, N.Y. TIMES (June 4, 2014), https://www.nytimes.com/2014/06/05/nyregion/dozens-of-suspected-gang-members-arrested-in-raid-of-2-harlem-housing-projects.html [https://perma.cc/C7BR-SMF9].

277. Huq, *supra* note 9, at 2438 (quoting Robert J. Sampson, *Neighborhood Effects, Causal Mechanisms, and the Social Structure in the City*, *in* ANALYTIC SOCIOLOGY AND SOC. MECHANISMS 227, 232 (Pierre Demeulenaere, ed., 2011)).

278. *Id.*

279. Tom R. Tyler et al., *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization*, 11 J. OF EMPIRICAL LEGAL STUD. 751, 773–74 (2014) (finding that frequency of stops and police intrusiveness during stops were "significant predictors of criminal behavior").

Fourth Amendment law facilities police actions made on the basis of such stereotypes and permits the use of the criminal justice system to impose social control on an unpopular group.

IV. PROVIDING PROTECTION AND RESTORING DIGNITY TO PUBLIC AND PATROLLED HOUSING RESIDENTS

Only complex answers are available to the challenging question of how to address the legal deficiencies that allow public and patrolled housing to become occupied territories in ways that completely bely traditional notions of the sanctity of the home. This Article suggests that they rest in three categories: rethinking Fourth Amendment standards so that they reflect the traditional protection for the home; limiting the authority of local and state actors through the adoption of state constitutional and legal standards that reject the cramped interpretations of the Fourth Amendment; and devising local policies to reject targeted and hot spots strategies that resemble occupation. Each is amplified below.

A. Answering Open Questions of Fourth Amendment Law

A key reason for the weak Fourth Amendment protection of public and patrolled housing residents is the Supreme Court's traditional focus on searches rather than seizures. The Court has developed numerous standards with searches in mind rather than seizures. As Lauryn Goldin has observed, seizures are the "neglected sibling" in Fourth Amendment law.[280] The cost of the Supreme Court's inattention to the interests at stake in defining Fourth Amendment standards for seizures rather than searches has an ever-expanding universe of conditions under which seizures may take place.

Two clarifications of Fourth Amendment law would significantly improve constitutional protections for residents of public and patrolled housing such that the Supreme Court's avowed protection for the home is more consistent. *First*, courts should clarify that *Terry* stops are not permitted when law enforcement officers suspect only noncriminal infractions. *Second*, courts should make clear that the search incident arrest exception to the warrant requirement applies only when an arrest actually takes place. These areas are particularly important because both are gateways to greater intrusions in contravention of fundamental Fourth Amendment interests.[281]

280. Lauryn P. Gouldin, *Redefining Reasonable Seizures*, 93 DENV. L. REV. 53, 59 (2015).

281. This Article has identified several other areas of Fourth Amendment law that allow significant intrusions by law enforcement officers into the lives of public and patrolled housing residents. Because others have offered extensive critiques of these issues and offered laudable suggestions for doctrinal improvements, this Article does not propose additional

In contrast with a "consensual encounter" that a "reasonable person" feels they can terminate at any point, a *Terry* stop constitutes a significant show of police authority. When an officer may claim that a person is not free to leave—the *sine qua non* of a *Terry* stop—further incursions on the stopped person's freedom of movement and privacy can quickly follow. The initiation of a *Terry* stop allows an officer to ask invasive questions, run a records check, or perhaps demand that the stopped person stand in the hallway outside their door. Frisks also frequently accompany stops, even greater invasions of personal space, privacy, and autonomy.[282] Given that the fundamental justification for *Terry* stops—crime control—is unavailable, stop authority should be unavailable as well.

In addition, since infractions are, by definition, exceedingly minor violations of the law, investigations of the type permitted by *Terry* are simply unnecessary. In *Terry* itself, Officer McFadden suspected a serious crime—burglary—that virtually all would agree warrants police attention. In stark contrast, public urination, loitering, and other typical minor infractions are not occurrences that require investigation of any kind; if a police officer observes such an offending behavior, they usually may address it by issuing a ticket or summons on the spot; the questioning and records checking that typically accompany *Terry* stops are simply unnecessary. As noted above, some states' laws recognize as much, barring stops unless felonies or certain misdemeanors are suspected.[283]

The minor infractions that fit this category can be distinguished from the traffic infractions for which courts have usually permitted stops.[284] At least traffic laws have some safety rationale; the same cannot always be said for minor infractions of the type often enforced in public and patrolled housing.[285] Moreover, given that *Terry* represents a significant deviation from the Fourth Amendment standards for seizures and the intrusions it creates can be substantial, its expanded application should not be assumed.

Similarly, the expansive search authority that some police departments assert once an officer has mere probable cause of an

observations in those areas. *See* Ferguson & Bernache, *supra* note 141 (offering suggestions for clarifying and improving the high-crime area doctrine); Frase, *supra* note 180 (same for arrest authority for minor infractions); Logan, *supra* note 163 (same for arrest authority for minor infractions).

282. *See, e.g.*, Harris, *Factors for Reasonable Suspicion*, *supra* note 6, at 684.

283. *See supra* note 121 and accompanying text.

284. *See* Woods, *supra* note 120, at 712–13 & n.181 (collecting cases).

285. This suggestion is not meant to downplay the significant intrusions that car stops often constitute and the even greater ones to which they often lead. *See generally* Harris, *supra* note 122.

arrestable offense leads to significant infringements on Fourth Amendment rights and should be cabined. Instead of simply being questioned, which alone can be harassing, searches are often intense physical invasions.[286] Wayne Logan has suggested that the trigger for the search incident to arrest exception to the warrant requirement should therefore be the "intent-manifestation" approach, i.e., whether an officer has demonstrated both an intent to arrest and whether there is evidence of "an officer's intent to follow through with the prosecution."[287] The California Supreme Court utilized a similar approach when it held that the search incident exception did not apply to a search that followed a stop of a bicyclist for failing to stop at a stop sign.[288] New York's Court of Appeals, that state's highest court, has adopted part of this test permitting application of the exception only when an officer intends to make an arrest.[289] Either of these approaches is a significant improvement over the free-for-all that ensues when courts permit application of the search incident to arrest exception merely because an officer identified probable cause of an arrestable offense.[290]

B. State Law

Answers to the problem of hyper-aggressive policing in public and patrolled housing also lie at the state level. In particular, state law—

286. *See* Stoughton, *supra* note 192, at 1768.

287. Logan, *supra* note 199, at 434.

288. People v. Macabeo, 384 P.3d 1189, 1219 (Cal. 2016) (holding that search incident exception did not apply, in part because there were no "objective indicia to suggest . . . that the officers would have arrested defendant in violation of state law").

289. *See* People v. Reid, 26 N.E.3d 237, 240 (N.Y. 2014) ("Where no arrest has yet taken place, the officer must have intended to make one if the 'search incident' exception is to be applied.").

290. Another option to address the Fourth Amendment's facilitation of aggressive policing in public and patrolled housing would be to revamp the key standards that underlie it. In particular, courts could develop standards that account for the special status of the home such that the treatment of people who in public and patrolled housing does not differ so wildly from residents of private homes. Fundamentally, such a change would rest on reconceptualizing the idea of "home" and the areas where residents are entitled to higher presumptions of Fourth Amendment protection. As noted above, the thresholds of the apartments of public and patrolled housing residents mark the beginning of traditional Fourth Amendment protection for the home. *See supra* note 105 and accompanying text. After crossing the threshold, residents find themselves not within protected curtilage, but in spaces that, for all intents and purposes, are the same as a public sidewalk. Of course, the similarities between public sidewalks and common areas of multi-unit buildings are limited.

whether constitutional or statutory—can be drafted or interpreted in two ways that will reduce the likelihood of abusive practices: rejecting the Supreme Court's decision in *Atwater* by narrowing arrest authority to ban arrests for minor infractions, and decriminalizing minor misconduct.[291]

With regard to arrest authority, states can make clear that arrests for minor offenses are banned under state law. States can accomplish this either legislatively, by enacting statutes that ban arrests, or through state courts interpreting state constitutions to ban arrests for minor offenses. Some state statutes already ban such arrests explicitly, but it is more common for states to attempt decriminalization by mandating that fines are the appropriate penalty rather than jail time.[292] With the latter approach, the Supreme Court's decision in *Virginia v. Moore* makes clear that merely limiting the punishment options will not necessarily thwart arrests. As noted above, the Court held there that the Fourth Amendment allowed an arrest for driving with a suspended license even though Virginia law allowed only issuance of a citation for that offense.[293]

Alternatively, state courts where state constitutional protections for searches and seizures are not co-extensive with the Fourth Amendment can limit arrest authority under state law.[294] Specifically,

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291. In accordance with the recommendations in Part IV.A, *supra*, states may also interpret their state constitutions so that their respective Fourth Amendment analogues bar stops for minor infractions and application of the search incident to arrest exception to the warrant requirement.

292. *See* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1079 (2015).

293. Virginia v. Moore, 553 U.S. 164, 178 (2008) ("[T]he arrest rules that the officers violated were those of state law alone, and . . . it is not the province of the Fourth Amendment to enforce state law. That Amendment does not require the exclusion of evidence obtained from a constitutionally permissible arrest.").

294. *See, e.g.*, State v. Hardaway, 36 P.3d 900, 910 (Mont. 2001) ("[T]he range of warrantless searches which may be lawfully conducted under the Montana Constitution is narrower than the corresponding range of searches that may be lawfully conducted pursuant to the federal Fourth Amendment."); State v. Eckel, 888 A.2d 1266, 1275 (N.J. 2006) (noting that the Supreme Court of New Jersey has "not hesitated [to] . . . afford [New Jersey's] citizens greater protection against unreasonable searches and seizures under [the New Jersey Constitution] than would be the case under its federal counterpart"); People v. Diaz, 612 N.E.2d 298, 299 (N.Y. 1993) (rejecting extension of "plain view" exception to the warrant requirement to encompass the "plain touch" of contraband under New York Constitution); State v. McKinney, 60 P.3d 46, 48 (Wash. 2002) (explaining that Washington Constitution's protections against searches and seizures are "qualitatively different from those provided by the Fourth Amendment to the United States Constitution"). In some states, constitutional protection for searches and seizures is co-extensive with the

state constitutional protections can be interpreted to require the suppression of arrests for minor misconduct and any evidence gathered as a result of such arrests. Although the Fourth Amendment does not bar such arrests, local and state authorities are bound by state constitutional law and typically act accordingly.

C. Local Laws and Policies

Policy change at the local level, by police departments, public housing authorities, or local governments, is also available to reform hyper-aggressive policing practices in public and patrolled housing. Because most of these entities have direct policymaking authority over the law enforcement agencies that patrol public and patrolled housing, reform achieved at this level is likely to have the most immediate impact.

First and foremost, police departments that work in public and patrolled housing can choose to target public and patrolled housing only when necessary. More specifically, they can adopt the proven hot spots policing strategies that rely on rigorous data analysis to identify locations that are actual hot spots. As noted above, public housing is frequently subjected to outsized police attention because of stereotypes about the people who live there.[295] Contrary to this discriminatory approach, police departments should embrace community policing or problem-oriented policing models that have proven effective at addressing crime without the collateral damage to the dignity, autonomy, and freedom of law-abiding people who live in public and patrolled housing.

Local governments, with the authority to regulate the law enforcement agencies within their jurisdictions, can also require police departments to undertake policing strategies that inflict the least harm on Fourth Amendment interests in public and patrolled housing. This approach may be particularly potent if local governments have authority over local public housing authorities and similar entities that can directly manage the scope of rules enforced by police.

Conclusion

The protection against unreasonable searches and seizures offered by the Fourth Amendment in public and patrolled housing does not resemble that available to denizens of other locales. Such homes are not impenetrable "castles" that law enforcement can breach only when meeting stringent standards. Instead, largely because of the vast array of behavior that is regulated in public and patrolled housing, law enforcement officers have broad authority to stop, arrest, and search

Fourth Amendment. *See, e.g.*, People v. Macabeo, 384 P.3d 1189, 1212 (Cal. 2016) (noting limit on such protection under California law).

295. *See supra* notes 33–34 and accompanying text.

people in and around such locations. When police focus their attention on public and patrolled housing, whether through targeted programs or hot spots strategies, the result is significant abrogation of the right to be free from unreasonable searches and seizures by government agents.

This Article should not be read to suggest that police officers act in accordance with the full extent of their power in all situations. Police officers have extraordinary discretion and often exercise it wisely. But, as the New York City experience demonstrates, police practices that exploit the full extent of police powers to stop, arrest, and search in locations where mass criminalization is at work pose real risks to the privacy and liberty rights that are supposed to be protected by the Fourth Amendment.

Although reformers have called for the use of hot spots policing and "smart policing" in response to evidence of police misconduct such as programmatic stop and frisk, there are not significant limits on the potential for abuse given the Fourth Amendment standards outlined above. Even when these often-lauded strategies are implemented, police may stop, arrest, and search with abandon. They also remain free to rely on pernicious stereotypes. In short, for people like the residents of public and patrolled housing developments that are a bullseye for law enforcement, a focus on hot spots does not offer relief from the harms of programmatic stop-and-frisk and similar Broken Windows policies.