

Knowing Your Place: The Police Role in the Reproduction of Racial Hierarchy

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ABSTRACT

The enforcement of criminal law by the public police is justified as enforcing civility: codes of public conduct that ensure civilians can walk down the street feeling confident about their safety and security. Civility is, however, a socially contingent phenomenon, one that often reinforces demands to acknowledge and respect some person’s social status or social role. In a society constituted by socially oppressive roles and statuses, criminal law’s enforcement of civility enforces and reinforces that oppression.

In the United States, civility, as experienced and enforced by the public through the law and the police, entrenches a racial hierarchy in which people of color are supposed to know their place, both literally and politically. When people of color appear in spaces that are coded white, or in ways that insist on equality, then they are likely to be characterized as disordering and disorderly. Because policing, for the last forty years, has organized itself around enforcing civility-based norms of public order, often (following the “Broken Windows” model) using off-the-books harassment or even violence, people of color—and especially Black people—along with members of other marginalized groups, are peculiarly vulnerable to police violence. While the police are the means by which this civility-based, public order violence is dispensed, they do so in the name of and with the tacit sanction of vast swaths of the public.

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The people on the street were primarily black; the officer who walked the street was white. The people were made up of “regulars” and “strangers.” Regulars included both “decent folk” and some drunks and derelicts who were always there but who “knew their place.” Strangers were, well, strangers, and viewed suspiciously, sometimes apprehensively.

—James Q. Wilson & George L. Kelling¹

INTRODUCTION

In the United States, violence and pain is at the core of policing.² The dominant account of the police function identifies pain, or at least violence that causes pain, as definitive of policing.³ Whenever the police encounter the public, they are—as part of their core function—willing to deploy pain to overcome resistance to their demands.⁴ But there are, nominally, limits to the pain that the police get to deploy. Legitimately, police get to inflict pain upon others to the degree criminal law and the Fourth Amendment say is proportionate.⁵

When the police inflict disproportionate violence or pain, the dominant view is that the police subjectively misperceive the threat posed or the ability to tolerate pain.⁶ The use of violence is reasonable, given the officer’s subjective point of view.⁷ The better view, however, is that the police inflict violence and pain based on community and institutional norms of desert.⁸ The police reinforce group-based social norms of who belongs where and what the permissible consequences are for being out of place.⁹

1 James Q. Wilson & George L. Kelling, *Broken Windows*, in *CRITICAL ISSUES IN POLICING* 455, 456 (Roger G. Dunham & Geoffrey P. Alpert eds., 7th ed. 2015).

2 See, e.g., JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW* 37 (1993).

As long as some members of society do not comply with law and resist the police, force will remain an inevitable part of policing. Cops, especially, understand that. Indeed, anybody who fails to understand the centrality of force to police work has no business in a police uniform.

Id.

3 See EGON BITTNER, *THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY* 39 (1970) (“[T]he police are nothing else than a mechanism for the distribution of situationally justified force in society.”).

4 See SKOLNICK & FYFE, *supra* note 2, at 37.

5 See SETH W. STOUGHTON, JEFFREY J. NOBLE & GEOFFREY P. ALPERT, *EVALUATING POLICE USES OF FORCE* 30–35 (2020).

6 See *id.* (discussing constitutional standards for the police use of force).

7 See *id.*

8 Cf. Wilson & Kelling, *supra* note 1, at 456.

9 See *id.*

These social norms are not legal or constitutional norms, but the norms of one community pitted against another. In these cases, the police act as vigilantes on behalf of the white community and its norms of respectability¹⁰ or civility:¹¹ norms that exclude Black people from white spaces. Here, the problem is not that white-dominated communities or the police misperceive where Black people belong, but that they seek to enforce racialized norms of civil order by dictating who belongs where.

For fifty years, policing scholars have argued that the police are engaged in two separate activities. The first is enforcing criminal laws on the books. The second is enforcing various conceptions of order and respectability *off-the-books*.¹² These two activities appeal to separate normative orders, each with its own distinctive source of authority,¹³ for their justification. Criminal law is a form of public order that has its source in the law of the state; the other conceptions of social order are more parochial and are constituted by the practices of some distinctive community or rules and practices of the police themselves.¹⁴ Most important, policing scholars associate the core role of the police as the second activity: enforcing informal, parochial norms of order rather than the formal norms of criminal law.¹⁵

¹⁰ P.A.J. WADDINGTON, *POLICING CITIZENS* 42 (1999) (“[W]hat police do is not to maintain order by preventing or quelling disorder, but to order social relationships in conformity with prevailing notions of respectability.”).

¹¹ See, e.g., Jon Bannister, Nick Fyfe & Ade Kearns, *Respectable or Respectful? (In)civility and the City*, 43 *URB. STUD.* 919, 925–26 (2006).

¹² See, e.g., WADDINGTON, *supra* note 10, at 42.

¹³ See, e.g., JOSEPH RAZ, *THE AUTHORITY OF LAW* 45–48 (1979) (endorsing the “strong social thesis” in which the sources of law as a normative system are fully identified by social sources).

¹⁴ See, e.g., Otwin Marenin, *Parking Tickets and Class Repression: The Concept of Policing in Critical Theories of Criminal Justice*, 6 *CONTEMP. CRISES* 241, 258–60 (1982) (discussing two sources of order: a public or “general” order, which has its source in the law enacted by the state; and private or “specific” order, which has its sources either in community or police institutional standards of conduct).

¹⁵ See, e.g., JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL* 6–8 (4th ed. 2011) (discussing the difference between law and order and emphasizing the police commitment to order); Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*, in *POLICING* 150, 162 (Tim Newburn ed., 2005) (identifying the police as officials whose primary task is responding to disorder, i.e., “events [that] contain[] ‘something-that-ought-not-to-be-happening-and-about-which-somebody-had-better-do-something-now’”); Carl B. Klockars, *The Dirty Harry Problem*, 452 *ANNALS AM. ACAD. POL. & SOC. SCI.* 33, 43 (1980) (describing the problem of off-the-books order enforcing as “at the core of the police role”); RAZ, *supra* note 13, at 152–53 (distinguishing between rules that are valid in terms of their sources and valid *tout court* because morally or politically justified).

For centuries, the role of the police as watchmen was judged primarily not in terms of its compliance with appropriate procedures but rather in terms of its attaining a

Practices of civility constitute the moral, political, social, and cultural ways that we recognize and respond to each other as participants in a shared community. We treat each other civilly, on this view, when we follow the social norms of civic order in a given society in ways that promote public tranquility and safety.¹⁶

The practices of public civility are not arbitrary.¹⁷ Public civility is the sort of civility that members of a particular society extended to each other just in virtue of their membership in that society.¹⁸ “Public conduct is . . . governed by conventions about how one interacts with strangers—not making eye contact, avoiding physical contact, not talking too loudly, and so on—and conduct which breaches these conventions may disturb both particular individuals and the social order itself.”¹⁹ The conventions governing public interaction on the street, however, do not apply the same to everyone, everywhere. They are structured by the social roles and statuses people occupy and assign to each other during these encounters. Different social groups may have the power to enforce their own parochial standards of civility, either

desired objective. The objective was order, an inherently ambiguous term but a condition that people in a given community recognized when they saw it.

Wilson & Kelling, *supra* note 1, at 462. In addition to being distinguished by their formal or parochial sources, the different normative orders may be valid or invalid.

¹⁶ See, e.g., NEIL MACCORMICK, INSTITUTIONS OF LAW 208 (2007) (“[T]he civility of civil society is partly dependent on the state’s establishing or maintaining an adequate body of criminal law, and sustaining adequate institutions for securing its observance, judging on allegations of crime, and carrying out the punishments to which convicted persons have been sentenced.”); Marenin, *supra* note 14, at 258 (describing the general order produced by the state through policing as “the capacity of the state to guarantee public tranquility and safety”).

¹⁷ See MacCormick, *supra* note 16, at 208.

¹⁸ Criminology professor Otwin Marenin states that public civility may vary given the type of state (feudal, capitalist, socialist, and so on) or the type of government (monarchy, autocracy, democracy, and so on). See Marenin, *supra* note 14, at 258–59. We may be able to tell much about the sort of society in which we live in by the type of civility that is enforced. The society may *claim* to be a capitalist democracy, and so extend the sort of civility in which everyone is treated, in public at least, as equals. It may *in practice*, however, turn out to be an autocracy, in which different groups or classes are treated in public according to a hierarchy that enforces standards of public deference to other, more privileged groups within the polity. See *id.* The conflict between the professed state organization and its actual practice may cause some deep problems of description: Is the state really an autocracy, or is it still a democracy that on occasion fails to live up to its values? Where the police are involved, that issue is translated into the question of whether the police are doing their job in an autocracy and properly enforcing oppressive public standards of civility; or whether the police are failing to do their job in a democracy, and improperly enforcing oppressive partisan standards of civility. Plausibly, abolitionism is organized around the argument that the United States—or at least many of its municipalities—constitutes an autocracy in which the police enforce racially oppressive norms, and that abolishing the police is one step toward reconstituting these governments as democracies. Cf. *id.*

¹⁹ Lindsay Farmer, *Disgust, Respect, and the Criminalization of Offense*, in CRIME, PUNISHMENT, AND RESPONSIBILITY 273, 288 (Rowan Cruft et al. eds., 2011).

through informal social pressure or by encouraging state officials to replace public order and its norms of civility with those of the parochial social group or institution.

Establishing and enforcing formal and informal codes of civility, respect, and respectability depends upon the choices and actions of persons²⁰ asserting their power to maintain and restore the civil order—and with it their sense of comfort or propriety—by putting everyone back in their proper places. Enforcement of those codes become sites of struggle and resistance between people and groups over the social roles and structures through which they encounter each other—whether those roles and structures grant standing to compel compliant behaviors, and what sort of sanction to exact for noncompliance.

Policing is one way of asserting power over another person within the routines of public civility. Within the practice of civility, a police response signals that the offender has impermissibly given offense to the public order by acting against the code of public conduct in a manner that justifies a state response.²¹ The police enforce public civility when they perceive that someone has violated the standards of respectability contained in some society's code of civic order by failing to express appropriate respect for some decent-but-vulnerable person.²² The police enforce parochial, community, or institutional norms of civility when they enforce the nonpublic and partisan standards of conduct that have their source in the practices or rules of particular communities within that society. The civic order may be corrupted in

²⁰ As political theorist Iris Marion Young emphasizes, “social structures exist only in the action and interaction of persons; they exist not as states, but as processes.” IRIS MARION YOUNG, *POLITICAL RESPONSIBILITY AND STRUCTURAL INJUSTICE* 5 (2003). These processes operate as a “confluence of institutional rules and interactive routines, mobilization of resources, and physical structures; these constitute the historical givens in relation to which individuals act, and which are relatively stable over time.” *Id.* at 4.

²¹ *See, e.g.*, 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* 1–2 (1988) (defining giving offense as producing a disliked mental state in another without justification or excuse).

²² *See* Farmer, *supra* note 19, at 286. As law professor Lindsay Farmer puts it, in policing civility:

[T]he law is not concerned with offensiveness as such, as a quality of the conduct, but the failure to respect the sensibilities of others regardless of the content of those sensibilities. . . . This then relies on an understanding of community as composed of decent, hard-working, but essentially vulnerable, people who respect the rights of others. This vulnerability is exploited by the few who are hostile or indifferent to the feelings of others, and the aim is to enable those communities to take responsibility for dealing with anti-social behaviour.

Id.

two ways: (1) by incorporating parochial norms of public order in the formal legal standards of conduct; or (2) by enforcing informal community norms instead of, or in addition to, these formal legal norms. In the contemporary United States, the civic order reflects both of these vices, so that civility as a norm of social ordering has a hierarchical organization,²³ and operates against the backdrop of race-, gender-, class-, and place-targeted hyperincarceration and mass surveillance.²⁴

Given the fundamental role that informal community norms play in structuring the police response to the public on the street,²⁵ incivility is not so much a specific criminal wrong as much as an affront to the cultural, esthetic, and social sensibilities of “upright” citizens.²⁶ Traditionally, incivility has included a failure to attend to culturally entrenched, hierarchical codes of conduct. These codes of conduct persist through various social expectations of who belongs where and how they should behave in public. Incivility, on this view, includes not knowing one’s place and by being out of place, disordering the sensibilities of those who want to assert their cultural, social, or political belonging.

The disorderings and reorderings enacted through the practices of civility, structured by legally and socially permissible responses to perceptions of incivility,²⁷ not only reflect racial categories but constitute them. Where the risk of disordering “decent” or “respectable”

²³ See, e.g., James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1375 (2000) (“Some historically low-status populations in the United States—especially racial minorities, most especially African Americans—display, of course, a strong sense that America is a place with a history of social hierarchy.”).

²⁴ See Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 964 (2002) (arguing that policing in the United States is “fundamentally about race and place, a project in social positioning that rendered [Black men as] the racial embodiment of social transgression” (footnote omitted)); Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 659, 678–79 (2020).

²⁵ Cf. RICHARD V. ERICSON, *REPRODUCING ORDER: A STUDY OF POLICE PATROL WORK* 16 (1982) (describing the police as retrofitting the law to justify actions that they take independently of the law, so that “[o]urs is not a government of law; it is a government of men who use law”).

²⁶ Indeed, the ability to remain upright and look another in the eye, rather than having to bow and scrape, is a feature of social egalitarianism that may conflict with certain versions of civility. See, e.g., QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* 95–96 (1998) (contrasting republican virtue of “upright” character with vice of “cringing” servility); JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* 21 (Meir Dan-Cohen ed., 2012).

²⁷ See MARTHA C. NUSSBAUM, *THE MONARCHY OF FEAR* 131 (2018) (“Gary David Comstock found that the cause for this choice of target was not a deep-seated hatred, but simply the belief (often on the part of drunken youths seeking to act out and create trouble) that the police didn’t care about these people and thus one could assail them with impunity.”).

sensibilities is structured by racial, gender, class, ableist, and other hierarchies, acting appropriately means knowing one's place by recognizing one's responsibility to make the dominant person feel good.²⁸ It is up to those perceived as disordering to respond in ways that express and restore the social hierarchy, by engaging in submissive performances to mollify the fears or concerns of the decent.²⁹

Ordinarily, calling the police on a stranger is an extreme response to the disordering presence of some person on the street. For the most part, so long as it does not directly affect us, what strangers do on the street is none of our business.³⁰ Normally, we have standing to critique the behavior of others only if we have some special relationship with them.³¹ However, at least one prominent theory of policing considers the presence of socially vulnerable people on the street as a ground for interference. This theory treats the activities of the poor and unhoused as, in effect, a form of incivility, and identifies the police role as responding to the sort of parochial, esthetic concerns that produce disorderings.³²

The classes of people who are vulnerable to this sort of criminalizing discipline are identified by their categories of race, class, gender, national origin, sexual identity, disability, and so on. We are constituted in specific ways as raced, gendered, classed, embodied, housed,

²⁸ Farmer, *supra* note 19, at 286.

²⁹ *See id.*

³⁰ *See, e.g.,* Michelle Madden Dempsey, *Public Wrongs and the 'Criminal Law's Business': When Victims Won't Share*, in CRIME, PUNISHMENT, AND RESPONSIBILITY, *supra* note 19, at 254, 257. Indeed, nosiness may itself constitute a form of incivility. *See* Cheshire Calhoun, *The Virtue of Civility*, 29 PHIL. & PUB. AFFAIRS 251, 253 (2000).

³¹ Dempsey, *supra* note 30; *see* PHILIPPA FOOT, *Approval and Disapproval*, in VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 189, 192–93 (2002).

³² Wilson & Kelling, *supra* note 1, at 465, 467 (emphasizing the role of policing, whether by “watchmen” such as the Guardian Angels, or by the police, in maintaining social cohesion); James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<https://perma.cc/4J4T-E9WB>] (“Because of the nature of community life in the Bronx—its anonymity, the frequency with which cars are abandoned and things are stolen or broken, the past experience of ‘no one caring’—vandalism begins much more quickly than it does in staid Palo Alto, where people have come to believe that private possessions are cared for, and that mischievous behavior is costly. But vandalism can occur anywhere once communal barriers—the sense of mutual regard and the obligations of civility—are lowered by actions that seem to signal that ‘no one cares.’”); *see also* JAMES Q. WILSON, THINKING ABOUT CRIME 9 (rev. ed. 2013) (describing as one of the causes of crime, the fact that “the social bonds—the ties of family, of neighborhood, of mutual forbearance and civility—seem to have come asunder”). For a brief critique of this “incivility research” and James Q. Wilson’s leading role in it, *see, for example,* Timothy Phillips & Philip Smith, *Rethinking Urban Incivility Research: Strangers, Bodies and Circulations*, 43 URB. STUD. 879, 880–81 (2006).

and so on by the places in which status is precarious, the types of discipline contemplated by the socially superior, the performances necessary to mollify those superiors who threaten to discipline them, the availability of state-sanctioned violence as part of the disciplinary process, and other practices and performances of responding to incivility. These practices of subordination define what it means to be Black in terms of the expectations and vulnerabilities that structure encounters between people of different races, and the means through which superiors can assert their power through particular identities and use them to put others in their place.³³

These powers and liabilities structure the sort of community we share, including its terms. The moral, political, social, and cultural values of the community are expressed through the way we constitute groups as especially vulnerable to having social superiors call down these coded collective responses during one of these encounters. In other words, criminalization—using state-authorized and state-justified physical threats to put Black people “in their place”—expresses choices that constitute (and do not simply reflect) racial categories and racial power. Police willingness to participate in the various degradation rituals that constitute race, class, gender, sexual identity, does not merely reflect, but actively produces and reproduces racial hierarchy and white supremacy.³⁴

In Part I, I introduce the concept of civility and civil order, demonstrate how the civil order provides a code of conduct that we use to shape the way we interact with each other in public, and criticize those who fail to live up to its standards. I argue that civility is a “cold” and conservative virtue because it plausibly preserves hierarchical differences in social rankings, depending upon the civil order used to measure civility.

In Part II, I suggest that policing proceeds according to these hierarchically ranked codes of conduct. Conduct offensive to public civility is primarily identified by breaches of social rules. These codes, in part, assign social status and power to different groups based on their social role. These codes can conflict, however, producing competing, inconsistent demands on civility. Some codes refer to concepts of moral and political participation. Others are structured along lines of

³³ See Carbado, *supra* note 24, at 947–50, 952, 964.

³⁴ See, e.g., John Van Maanen, *The Asshole*, in CRITICAL ISSUES IN POLICING, *supra* note 1, at 143, 148 (“[P]olice are both representatives of the moral order and a part of it.”); ERICSON, *supra* note 25, at 7 (describing the role of the police as to maintain and reproduce the existing social order).

race, gender, class, disability, sexual identity and orientation, and so on. They establish who has the socially situated power to take offense, and so who must engage in the socially situated work of anticipating and preemptively acting so not to give offense.

In Part III, I use the concept of civility to critique Feinberg's famous discussion of offensive conduct and criminal law.³⁵ Claiming offense, on this account, is as much a feature of social power as a mental or psychological phenomenon. Feinberg's account is compatible with influential accounts of police and policing and defines the role of the police as violently enforcing community standards of offensiveness. On this "broken windows" account of the police, their role is to replicate local, community-generated codes of conduct, often explicitly in contrast with the law generated by the state. The "broken windows" response allows for race-based, off-the-books harassment and even violence to reinforce local codes of conduct, and explains how and why the police react so violently against people who appear out of place.

I. CIVILITY AND CIVIL ORDER

Criminal law is the primary vehicle through which the state guarantees civil order by enforcing nonnegotiable rules of mutual interaction and social cooperation among citizens.³⁶ The basic idea is that criminal law exists to ensure peaceful relations between strangers on the street.³⁷ Or as Professor Neil MacCormick put it: "The comparatively modern development of a specialized body of criminal law,

³⁵ See generally 2 FEINBERG, *supra* note 21.

³⁶ See, e.g., VINCENT CHIAO, *CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE* 46 (2019) ("[T]he rule-enforcing function of criminal justice institutions is . . . more fundamental than whatever other functions they may fulfill."). Chiao argues that the regulatory function of criminal law in preserving stable social cooperation is definitive of criminal law, rather than punishing extralegal moral wrongs. *Id.* at 43. He shares this approach with MacCormick. See MACCORMICK, *supra* note 16, at 207–208; see also LINDSAY FARMER, *MAKING THE MODERN CRIMINAL LAW* 39–58 (2016) (describing MacCormick as regarding criminal law as regulating civil order). Although Chiao's is not a theory of criminal law as being a law of civility, his theory is compatible with it given that he "emphasizes the continuities between criminal law and regulatory law." CHIAO, *supra*, at 68. To his credit, he recognizes the ways in which a notion of criminal law that engages in a cost-benefit analysis of using the mechanisms of the state's criminal process to enforce any and all conduct must account for the potential of that process to dominate individuals, including along race and class lines. See *id.* at 88 (discussing racial profiling in the context of stop-and-frisk).

³⁷ MACCORMICK, *supra* note 16, at 4 ("States can be . . . theatres for the development of 'civil society', in which relations of civility subsist between strangers who extend to each other a kind of impersonal trust. Individuals within civil society, even when they are strangers to each other, do not view each other as presumptive threats to their safety or to the security of their property.").

backed-up by organized police forces and related law-enforcement agencies, working alongside a system of public prosecution before specialist courts, has been a condition of a progressively greater civility in civil society.”³⁸ On this view, criminal law and the police step in when public cooperation breaks down and someone needs to impose a sense of order on the community.³⁹ As we shall see, the trend in policing has been to regard certain forms of incivility as triggering a punitive response, and certain groups as categorically uncivil.

A. *Civility Defined*

The value of civility derives from the familiar idea that, for people to live in relative peace together, societies need a set of rules governing the way its members treat each other.⁴⁰ These rules of civil order form systems of norms constructed by human beings and understood by the members of that society as generating more or less specific standards of conduct. These codes of conduct will vary according to different social statuses and roles constituted as part of the civic order.

Civility is simply the act of acknowledging, during an encounter with some other person, their social status or role and behaving toward them with respect⁴¹ according to the standards associated with that sort of recognition.⁴² Civility is thus an expressive and communi-

³⁸ *Id.* at 207.

³⁹ Chad Flanders calls this feature of the police and criminal law “imposed order.” Chad Flanders, *Criminal Justice and the Liberal Good of ‘Order,’* 70 U. TORONTO L.J. 102, 104 (2020). Flanders has assured me that, unlike MacCormick, he does not equate the order of criminal law with concepts of civility-maintenance.

⁴⁰ See Calhoun, *supra* note 30, at 255–56; Richard Boyd, ‘*The Value of Civility?*,’ 43 URB. STUD. 863, 865 (2006).

⁴¹ The relationship between civility and respectability is thus a close one. Respectability is, among other things (as the word suggests) a social power: the ability or power to command respect from another. I have elsewhere suggested that “[r]espect, including self-respect, is . . . an expressive virtue, and it requires the respecer to acknowledge the value of the person respected and their choices and commitments, as manifested through the way the respecer acts toward the person respected.” Eric J. Miller, *The Moral Burdens of Police Wrongdoing*, 97 RES PHILOSOPHICA 219, 243 (2020).

⁴² This definition reconciles some of the features of civility canvassed by Waldron, Calhoun, and Boyd. See Jeremy Waldron, *Civility and Formality*, in CIVILITY, LEGALITY, AND JUSTICE IN AMERICA 46, 49 (Austin Sarat ed., 2014); Calhoun, *supra* note 30, at 256; Boyd, *supra* note 40, at 864–68; ANDREW PETERSON, CIVILITY AND DEMOCRATIC EDUCATION 35–49 (2019) (collecting the various discussions of civility).

cative activity,⁴³ often engaged in as a way of undertaking or extending some people's joint participation in a common enterprise.⁴⁴

Civility is what law professor Jeremy Waldron calls a "cold" virtue.⁴⁵ It is marked by a certain formality because it is focused on the impersonal features of some other person's status or role rather than the warmer virtues of fellow-feeling or benevolence.⁴⁶ Families that insist on civility as the primary mode of interaction are likely to lack displays of affection.⁴⁷ Even in affectionate families, children may sometimes test the bounds of civility by speaking in ways that challenge the status of a parent—calling them by their first name, for example—and seek to upset parent-child hierarchies by treating the parent-authority-figure as an equal.⁴⁸ Some parents may be fine with this challenge to the peace and order of their family; others may strongly resist it.

Public civility may be egalitarian or hierarchical, depending upon the nature of the society and its political organization of social roles. Hierarchical civility normally requires that even superiors treat inferi-

43 See Calhoun, *supra* note 30, at 255 ("The function of civility . . . is to *communicate* basic moral attitudes of respect, tolerance, and considerateness.").

44 Where others see sociability, *see, e.g.*, PETERSON, *supra* note 42, at 35–37, my definition of civility preserves the idea that civility often involves some shared participation in a common activity without requiring that all the participants share warm feelings toward each other or even agree over the nature of the activity. The reason for being civil is to communicate a baseline of respect for someone's social role or standing, and one might do so for the further reason that a civil person wants the other to stick around to hear what they have to say. Certainly, hoping someone sticks around to jointly participate in some shared practice requires some "human connection." *Id.* at 38. The social-role and hierarchy-preserving nature of civility, however, makes it distinct from the civic friendship model of political community that Aristotle envisioned. *See id.* at 40; *see also* Michael J. Meyer, *Liberal Civility and the Civility of Etiquette: Public Ideals and Personal Lives*, 26 SOC. THEORY & PRAC. 69, 79–83 (2000) (discussing civility as a virtue in the context of a close-knit community). One can be civil to a political opponent without sharing some "fellow-feeling and well-wishing" toward them. PETERSON, *supra* note 42, at 41. Indeed, one can be civil whilst plotting their downfall.

45 Waldron, *supra* note 42, at 49. Waldron's definition of civility as a cold virtue stands in contrast with Steven Carter's view that civility requires "an attitude of respect, even love, for our fellow citizens." STEPHEN L. CARTER, *CIVILITY*, at xii (1998).

46 See Waldron, *supra* note 42, at 49. Civility, I want to maintain, has an important relation to this kind of formality. Civility may not be formality, but it involves a willingness to respect the formalities of an interaction and to put one's feelings toward the person you are dealing with—whether they are warm feelings, hostile feelings, or feelings of indifference—to one side, at least in the sense of subordinating them to and disciplining them with the rules prescribed for the interaction.

47 See Waldron, *supra* note 42, at 50 ("Civility is a virtue for relationships that have a potential for antipathy rather than affection, or mutual disinterest rather mutual concern.").

48 *See, e.g.*, BELL HOOKS, *TALKING BACK* 5 (1989) ("In the world of the southern black community I grew up in, 'back talk' and 'talking back' meant speaking as an equal to an authority figure. It meant daring to disagree and sometimes it just meant having an opinion.").

ors in a manner that recognizes the responsibilities that go along with an elevated social role. In contemporary democracies, public civility tends to be egalitarian, rejecting differences in rank to emphasize that everyone counts equally as a member of the polity. The parent-child example illustrates that civility does not necessarily do away with social rank, but rather may require preserving it. On this view, civility both reveals and conceals social power embedded in our civil order.⁴⁹ One reason for insisting on civility is to require that another recognize and acknowledge status-conferred social or political power, especially when it is power over an “uncivil” person.⁵⁰ Civility thus may preserve the social order, but often does so in a conservative way⁵¹—reproducing existing social power structures and repressing challenges to them.

Liberal accounts of civility often seek to minimize this aspect of the virtue,⁵² and treat civility as “free agreement reached on the basis of shared political values.”⁵³ On the liberal account, in their public and political capacity, individuals encounter each other primarily as moral *persons* and act toward each other in ways that communicate respect for that moral and political role.⁵⁴ That certainly involves a ranking, but it elevates all of us to the ranks of “equal,” as Waldron puts it.⁵⁵

49 See Linda M.G. Zerilli, *Against Civility: A Feminist Perspective*, in CIVILITY, LEGALITY, AND JUSTICE IN AMERICA, *supra* note 42, at 107, 111, 115.

50 See *id.* at 117.

51 The sense of “conservative” here is politically neutral. My thanks to Chad Flanders for pointing this out to me.

52 See Zerilli, *supra* note 49, at 111, 115.

53 Anthony Simon Laden, *Two Concepts of Civility*, in A CRISIS OF CIVILITY? 9, 13 (Robert G. Boatright et al. eds., 2019) (quoting JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 117–18 (2001)).

54 This liberal understanding of civil inclusiveness is often matched by an Aristotelian one of civil friendship. See Peterson, *supra* note 42, at 40. In each case, the civilian is supposed to recognize their fellows as members of the “same inclusive collectivity.” Zerilli, *supra* note 49, at 115. Membership in a shared community, however, may come with conditions attached, which include preserving the social hierarchy. *Id.*

55 See WALDRON, *supra* note 26, at 14 (“[O]ur modern conception of human dignity retains . . . its ancient and historical connection with rank . . . it expresses the idea of the high and equal rank of every human person . . .”). Liberals tend to assume that reasonable dialog is ensured by promoting interaction on the level of moral personhood. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 217 (rev. ed. 1999) (discussing the duty of civility as a form of reciprocal rational engagement). It is not clear, however, that such is the case. Waldron suggests that the goal of civility is to make sure adversaries stick around to listen to each other. Waldron, *supra* note 42, 59–60 (discussing civility as the work of staying present). It may be that people are more likely to stick around if they feel respected in the thick sense of having their status and role acknowledged, rather than having to share the stage, as it were, with inferiors. On this view, we are civil because we wish to preserve both the encounter and the lines of communication during that encounter.

Another way of interacting with other people is to recognize them, not merely as fellow moral beings, but as civic beings—*civilians*—with a particular status or role within our social order.⁵⁶ In a hierarchically differentiated civil society, the social ranking of different statuses and roles are often an important part of the civil order. We treat people with respect by recognizing their status or role. In that case, people are civil to the extent that they know their places in society are attendant to these different rankings, and uncivil to the extent that they undermine these hierarchies.

Members of a community have good reasons to be civil. Civility is one way of ensuring civil peace by recognizing and reproducing the existing civil order.⁵⁷ Reasons for civility may be—but need not be—political reasons; however, these sorts of reasons are too often conservative reasons that seek to preserve the civil order's hierarchies, roles, and ranks, rather than change them. Where the civil order is dominative of various groups, reasons other than civility will argue in favor of change and may—but need not—argue in favor of being uncivil.⁵⁸ Whatever the intentions of change-agents, members of a dominant group may perceive change as uncivil even if not intended as such.⁵⁹

In any encounter there may be multiple competing forms of civility at issue. One person may demand that they are treated civilly—in the (public) moral and political sense—as an equal, while another may demand that they are treated civilly—in the (partisan) civil society sense—by recognizing their status and role. Each may think the other treats them disrespectfully.⁶⁰ Here, the issue is not necessarily that one or the other derogates from some ideal of civility. Remember, the ideal of civility requires communicating appropriate respect for an-

⁵⁶ For the distinction between persons and civilians (which he calls “citizens”), see Meyer, *supra* note 44, at 73.

⁵⁷ See, e.g., FARMER, *supra* 36, at 27; R.A. DUFF, *THE REALM OF CRIMINAL LAW* 152 (2018).

⁵⁸ See, e.g., Zerilli, *supra* note 49, at 107–31; Waldron, *supra* note 42, at 49 (“[S]ometimes it is important to be rude, to act outraged, or just to burst through the established liturgies that define and protect an existing form of life.”).

⁵⁹ Zerilli, *supra* note 49, at 108 (“[T]hroughout American history, disenfranchised minorities such as women and African Americans have been regularly accused of incivility just by virtue of daring to show up in public and press their rights claims.”).

⁶⁰ For example, Calhoun notes that holding open a door for a woman is civil according to patriarchal norms that the woman may reject as undermining her standing as a social and political equal. Calhoun, *supra* note 30, at 262–63. Holding a door open for someone carrying a bunch of groceries, however, does not carry the same political baggage, and so may not create a conflict of civilities. Meyer, *supra* note 44, at 72.

other according to the formal code of conduct appropriate to their social role.⁶¹ In a plural society, individuals may be able to occupy multiple social roles at any given time—parent, playmate, confidant—and insisting on that role may or may not be more important than establishing and maintaining a relationship sufficient to sustain some encounter.

Incivility, on this view, may be more than just a form of rudeness.⁶² Incivility threatens social status or social roles and thereby threatens the order that sustains them. It encourages the other to walk away, rather than stay and engage.⁶³ On my view of civility, however, the general way civility comes into play is that some person is affronted by another's breach of some standard of behavior. The affront is both personal and public: it impugns some status or role or otherwise communicates disrespect for the individual in their personal or public capacity, and so reorders the social hierarchy in ways that undermine the offended person's social standing. The offended person then seeks some way to restore the social order, and their status or role within it, by holding the other publicly accountable.

B. *Civil Order Established*

Codes of civility are created and maintained through collaborative and contested practices of recognition and respect that assign people social statuses or roles on the basis of which they can interrelate with each other. Respect is a practice of demanding and giving attention to the—often hierarchically differentiated—social statuses of people interacting through these norms,⁶⁴ where each is understood as occupying a particular social role in a particular social context. The work of placing people within their social roles, with their attendant powers, duties, and rights, gives a social meaning and structure to those roles and relationships.⁶⁵ These emotional reactions may even be called for by the relevant standards; our social rules can be used to evaluate and critique our emotional responses to establish whether we

⁶¹ See Calhoun, *supra* note 30, at 260.

⁶² See, e.g., Anthony T. Kronman, *Civility*, 26 CUMB. L. REV. 727, 742 (1996) (rejecting incivility as merely rudeness).

⁶³ Waldron, *supra* note 42, at 46, 59–60; see Kronman, *supra* note 62, at 733 (phrasing this thought in terms of participating in the “common good”).

⁶⁴ Miller, *supra* note 41, at 231–35.

⁶⁵ See, e.g., A.M. Honoré, *Real Laws*, in LAW, MORALITY, AND SOCIETY 99, 112 (P.M.S. Hacker and J. Raz, eds., 1977) (describing the rules for ascribing people to social roles, in this case, legal ones).

react with the appropriate feelings. A person's failure to express outrage at some slight to their social standing is itself subject to criticism.

The social roles through which we recognize others as fellow human beings are not merely the positive, warm, and intimate ones—parent, sibling, or friend; they also include cool, cold, disparaging, or dehumanizing ones—teacher, officer, administrator, panhandler, gang member, illegal alien, or superpredator.⁶⁶ Only other humans can pose a threat to the currently established social order. Only other humans can act disrespectfully or act in ways that communicate disrespect. Accordingly, responding to other humans as a threat to our social order is not to fail to recognize their shared humanity, but precisely to recognize them as humans and as a threat, and seek to strip their humanity away from them as a means of cowing them.

The *ways* in which some pose a threat to others within the social order depend upon the social role and statuses of the some and the others. These social orders, with their roles, statuses, institutions, and so on are likely to have thick systems of power associated with them, such that a person may be more empowered along some social dimensions and less along another. Kate Mann states that “under even moderately non-ideal conditions, involving, for example, exhaustible material resources, limited sought-after social positions, or clashing moral and social ideals, the humanity of some is likely to represent a double-edged sword to others.”⁶⁷ Our social status depends upon particular contexts; a white, cisgendered, upper-middle class male may be able to assert power in some contexts—in a fancy restaurant, for example—but not in other places—in a women's shelter, for example.

These are socially structured roles that only human beings can access (whether intentionally or not, and whether by choice or not). These are socially intelligible acts that only human beings can perform (often *because* they must be performed with the sort of intelligence and rationality that we ascribe to humans). A dog can disobey, but only a human can question someone's authority or call them out, and so on.

⁶⁶ In her book *Down Girl*, Kate Manne discusses the use of these terms to enforce a social structure of racial oppression. See KATE MANNE, *DOWN GIRL* 152 (2018) (“Think of the terms ‘thug,’ ‘welfare queen,’ ‘urban youth,’ or even ‘looter,’ as they figure in current political discourse in the United States. These are all primarily terms used by whites to refer disparagingly to black Americans.”). Manne thinks that certain dehumanizing terms are used to signal and enforce an “‘us’ and ‘them’ mentality” from the perspective of individuals “in a particular social position or who occupy a certain rank in one of many potential intra-human hierarchies (including those that have their basis in supposed moral values).” *Id.* (emphasis omitted).

⁶⁷ *Id.* at 148.

The work of recognition, humanization, and dehumanization need not be particularly hard. The point of structures of systemic oppression, in part, is to create stereotypical social roles that are ready for us to use. Criminal law plays an important role in the construction of race—but also poverty, sexual orientation, and so on—in which bifurcating the world into good and bad, threatening and comforting, suspicious and innocent allows us to confirm our relative social standing in ways that remove “potentially polluting ambiguities which would threaten elevated . . . beliefs and ideals,”⁶⁸ blunt our concern for the other, and limit the obligation to extend compassion.⁶⁹

II. POLICING RESPECTABILITY

The language of respectability pervades ethnographic accounts of police understandings of public conduct.⁷⁰ Jerome Skolnick, in one of the most influential studies of the attitudes of police patrolmen, asserted that the police tend to sort the population into classes of respectable people and criminals.⁷¹ This grouping into broad social roles is quite clearly an activity structured by norms: a social practice. The social practice of the police when engaged in policing is usually separated by sociologists into two broad classes: on the one hand, the practice of policing according to law, and on the other, the practice of enforcing community-sanctioned notions of order.⁷² One feature dis-

⁶⁸ See Cyrus Tata, *Humanizing Punishment? Mitigation and “Case-Cleansing” Prior to Sentencing*, 9 OÑATI SOCIO-LEGAL SERIES 659, 664 (2019).

⁶⁹ One of the important roles of the concept of race in securing subordination is establishing an inherent distinction between people. Conceiving the criminal as the “other” blunts our concern for him in meting out punishment. To the extent the criminal is viewed as fundamentally different than oneself, compassion is less likely. Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1025–26 (2004).

⁷⁰ See, e.g., Van Maanen, *supra* note 34, at 144; Wilson & Kelling, *supra* note 1, at 465; Waddington, *supra* note 10, at 61–62.

⁷¹ SKOLNICK, *supra* note 15, at 195.

⁷² In a famous passage, Jerome Skolnick discusses the conflict of interests presented by the practice of policing:

The ideology of democratic bureaucracy emphasizes initiative rather than disciplined adherence to rules and regulations. By contrast, the rule of law emphasizes the rights of individual citizens and constraints on the initiative of legal officials. This tension between the operational consequences of ideas of order, efficiency, and initiative, on the one hand, and legality, on the other, constitutes the principal problem of police as a democratic legal organization.

SKOLNICK, *supra* note 15, at 5. Bittner frames this dilemma as a conflict between “two relatively independent domains of police activity. In one, their methods are constrained by the prospect of the future disposition of a case in the courts; in the other, they operate under some other consideration and largely with no structured and continuous outside constraint.” Egon Bittner, *The*

tinguishing the two is that law enforcement is oriented toward criminal prosecutions through the courts, whereas enforcing order begins and ends on the streets.⁷³ Hence, policing according to law is to some extent structured by practices attentive to judicial oversight, whereas street-policing, because it is less visible,⁷⁴ is structured by practices determined, for the most part, by the police themselves.⁷⁵

Thus, “the great disdain and disgust held by many police officers toward certain predefined segments of the population,”⁷⁶ are not simply psychological affects: they are a power possessed by the police that the police use to constitute groups of people as entitled to, or owing, certain conduct to each other.⁷⁷ Police judgments of the respectable and the contemptible constitutes—or as Canadian criminologist Richard Ericson puts it, reproduces⁷⁸—preexisting, middle class expectations of cultural norms surrounding class and race. The expectation is that respectable citizens support these middle-class values, even if they do not manifest them. The lower class, racial minorities, and so on are expected to know their place and support (i.e., not challenge) these values.⁷⁹

Civility plays a central role in contemporary discussions of the police and policing. Civility—or what the police call “respectability”—structures the encounters between police and civilians. Categorizing individuals as socially respectable or not is a social power.⁸⁰ In exercising that power, the “police have internalized a standard of conduct which dictates that they must control and regulate all situations in

Police on Skid-Row: A Study of Peace Keeping, 32 AM. SOCIO. REV. 669, 700 (1967). Marenin makes the same distinction in terms of general order—“the interests of all in regularity . . . the capacity of the state to guarantee public tranquility and safety”—and specific order—“the use of state power to promote particular interests.” Marenin, *supra* note 14, at 258–59; Wilson & Kelling, *supra* note 1, at 456.

⁷³ See Bittner, *supra* note 72, at 699–700; Wilson & Kelling, *supra* note 1, at 456.

⁷⁴ See Bittner, *supra* note 72, at 702 & 702 n.11 (citing Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960)) (discussing low-visibility policing).

⁷⁵ See *id.* at 701–02.

⁷⁶ Van Maanen, *supra* note 34, at 144.

⁷⁷ See, e.g., Miller, *supra* note 41, at 250–51.

⁷⁸ The term is coined by Richard Ericson. ERICSON, *supra* note 25, at 7 (“[T]heir everyday actions are directed at reproducing the existing order (the ‘normal or efficient state’) and the order (system of rules) by which this is accomplished.”).

⁷⁹ Miller, *supra* note 41, at 250–52.

⁸⁰ We might call this the power to interpret what category to apply to a civilian. See, e.g., WADDINGTON, *supra* note 10, at 62 (“[F]or there is ample scope for individual officers to interpret what and who is ‘respectable.’ The fact that they intervene *authoritatively* also means that their interpretations tend to prevail. Police action in any encounter tends to be very context-specific, but it is still respectability that is frequently at issue.”).

which they find themselves.”⁸¹ Police authority is embodied as a form of physical control over the nature of the encounter. The officer’s authority is both personal—bound up with the officer’s own ability to physically overpower others—and public—standing for the civic order protected by the state. Any encounter constitutes a contest between police and civilian in which the stakes are personal and professional disgrace, and can lead to embarrassment, insult, and injury, even death.⁸² In this contest, the police internalize a feeling of absolute authority.⁸³ They perceive themselves (and project themselves) as aristocracy of control rather than professional citizens.⁸⁴

If civility requires a person to communicate respect for another’s social role and standing, then “respectability” entails that the civilian demonstrate respect for the police by recognizing the police’s ability to physically overpower them. Members of the public communicate that recognition by acting in a nonthreatening, physically and temperamentally compliant manner.⁸⁵ This form of civility is implicitly gendered and abled because it is constituted by the nature of the physical threat each officer seeks to muster to dominate any encounter. Even women officers must buy into this hypermasculine performance if *they* wish to avoid being mistreated by people (including other officers) who are uncivil and disrespectful of their police authority—those people who the police refer to as “an asshole.”⁸⁶

The physically embodied nature of police authority vests a great deal of power in the police to determine the nature of the encounter. The police may always resort to concerns for their physical safety and that of the public to justify escalating the encounter, to demand ever more forcefully and then with materially dominative violence that the civilian treat the police with appropriate respect. Given both the police officer’s public authority and danger-driven understanding of their role,⁸⁷ the police officer may feel justified in insisting on this code of civility on the street. On the streets during an encounter, the cost of recognizing another as a fellow member of a shared commu-

⁸¹ Van Maanen, *supra* note 34, at 148.

⁸² *See id.* at 145, 148.

⁸³ *See id.* at 148.

⁸⁴ *See id.* at 144.

⁸⁵ *See, e.g.,* Waddington, *supra* note 10, at 63 (“Deferring to police authority is also a token of respectability that is quickly established.”).

⁸⁶ *Cf.* Van Maanen, *supra* note 34, at 148.

⁸⁷ David A. Harris, *How Fear Shapes Policing in the US*, in *THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES* 200, 204 (Tamara Rice Lave & Eric J. Miller eds., 2019) (describing fear producing emphasis on danger that characterizes police training and psychology).

nity, of a shared civic order, is recognizing the ways in which the other is: “potentially *dangerous* and *threatening* in ways only a human being can be—at least relative to our own, distinctively human sensibilities. She may, for example, threaten to undermine you.”⁸⁸ The characteristic police response in the United States may be to reject the rationality of anyone who does not properly recognize the stakes of an encounter by challenging the police role. Doing so renders the civilian automatically unreasonable, incomprehensible, and irrational,⁸⁹ and so justifies a dehumanizing response to control and discipline the personal and public threat posed by this disordering incivility.⁹⁰

The civility structuring police-civilian encounters is thus deeply hierarchical and communicates thick norms about the police, civil order, and civilians.⁹¹ Communicating respect for the police role will depend, in part, on the code of civility structuring the respective places of police and civilian in the civil order. The police may always resort to force to overcome challenges to their authority. What sorts of threats and challenges trigger such a response depend upon the social status of the civilian that they encounter, and the way that the civilian acts toward the police. Not every civilian is equally threatening to the police sense of personal, physical, and public authority.

Some groups are—according to the dominant civil order—inherently uncivil.⁹² These groups have more work to do than others to convince the police that they are nonthreatening and respectful. Less significant differences in rank may permit more civil performances from the police, communicating *their* understanding and acknowledgment of the civilian’s social standing.⁹³

The police role in enforcing civic order through public degradation is captured by Egon Bittner’s influential claim that “the police are nothing else than a mechanism for the distribution of situationally justified force in society.”⁹⁴ Bittner recognized that policing is what he

⁸⁸ MANNE, *supra* note 66, at 148.

⁸⁹ Van Maanen, *supra* note 34, at 145.

⁹⁰ For example, a disease model of violence can produce these dehumanizing effects. See, e.g., Yxta Maya Murray, *The Pedagogy of Violence*, 20 S. CAL. INTERDISC. L.J. 537, 557 (2011).

⁹¹ BITTNER, *supra* note 3, at 11 (“[T]he differential treatment . . . reflects . . . the distribution of esteem, credit, and desserts in society at large.”).

⁹² See *id.* at 10–11.

⁹³ See *id.* at 12 (“[J]ust as the young-poor-black expects unfavorable treatment, so the old-rich-white expects special consideration from the policeman. And when two such persons are in conflict, nothing will provoke the indignation of the ‘decent’ citizen more quickly than giving his word the same credence as the word of some ‘ne’er-do-well.’”).

⁹⁴ *Id.* at 39.

called a “tainted occupation,”⁹⁵ in which “the taint that attaches to police work refers to the fact that policemen are viewed as the fire it takes to fight fire, that they in the natural course of their duties inflict harm.”⁹⁶ The idea that the core of policing is inflicting harm produces—in what Bittner clearly takes to be the civil, middle-class, white public—“mixed feelings . . . [about the police officer as a character] who is ambivalently feared and admired,” and regarded both positively and negatively.⁹⁷

Bittner’s definition is telling in the context of policing civic order. He famously regards that the police are officials whose primary task is to respond to disorder—“events [that] contain[] ‘something-that-ought-not-to-be-happening-and-about-which-somebody-had-better-do-something-now.’”⁹⁸ His previous definition of “the police” entails that what the police do—respond with violence—is the distinctive method of intervention that constitutes these officials as police. To be a police officer, according to Bittner, is to use force and “nothing else.”⁹⁹ Not to use force is not to be police. It is this feature of the police that makes them frightening to the civic minded. However, so long as they respond to calls from the civilized public, direct police violence away from them, and direct it onto the offensive public, then the community will accept the police and policing. The police thus empower themselves *as police* only when they distribute violence to put the offensive back in their place.¹⁰⁰

Policing scholars suggest that, as a matter of sociological fact, police reflect and replicate the dominant social, civil order of the societies in which the police are embedded. In the United States, society is structured by a civic order that hierarchically stratifies groups based on race, class, gender, as well as being ableist, xenophobic, and so on. All of this means that when the police perceive a significant difference in rank between themselves and a civilian, then communicating respect requires certain abilities on the part of the civilian, such as the capacity to subordinate themselves to the control of the officer and to communicate deference. For certain groups, including people of color, unhoused people, and people with disabilities, there may be major obstacles to convincing the police that they are civil.

⁹⁵ *Id.* at 6.

⁹⁶ *Id.* at 8.

⁹⁷ *Id.* at 7.

⁹⁸ Bittner, *supra* note 15, at 162.

⁹⁹ BITTNER, *supra* note 3, at 39.

¹⁰⁰ See, e.g., SKOLNICK, *supra* note 15, at 80.

A. *George Floyd and Eric Garner*

Black people who do not conform to racist, oppressive social norms appear uncivil, disorderly, and *out of place*.¹⁰¹ For example, the deaths of George Floyd and Eric Garner are both examples of police reacting to people who they presumed to be uncivil. This escalated as Floyd and Garner “failed” to abide by the social norms of civility and respectability that structure police-civilian encounters.

In the case of Floyd in 2020, Minneapolis police officers responded to a call that Floyd had passed a fake twenty dollar bill at a grocery store and appeared to be drunk and uncooperative.¹⁰² When the police arrived, Floyd followed their orders until the officers arrested him and attempted to place him in a police car, at which point Floyd “stiffened up, fell to the ground, and told the officers he was claustrophobic.”¹⁰³ Floyd was then dragged into and out of the police car, and Officer Derek Chauvin knelt on his neck in violation of police protocol, ignoring Floyd’s plea for eight minutes and forty-six seconds, and killing Floyd.¹⁰⁴

In the case of Garner in 2014, infamously, three police officers approached Garner after having been tipped off that he was selling loose cigarettes.¹⁰⁵ Garner walked away, saying, “Every time you see me, you want to mess with me. I’m tired of it. It stops today. . . . [P]lease just leave me alone.”¹⁰⁶ The officers placed him in a chokehold, wrestled him to the ground, and killed him.¹⁰⁷

In each case, a Black person failed to cooperate with the police and the police responded violently, suffocating them to death. Their conduct fit within what criminologist John Van Maanen calls an “everyday typification scheme . . . [structuring] the expectations, thoughts, feelings, and behaviors of the police,”¹⁰⁸ and what I have called a code

¹⁰¹ See, e.g., WADDINGTON, *supra* note 10, at 61 (describing policing as designed “to keep people ‘in their place’”).

¹⁰² See *George Floyd: What Happened in the Final Moments of His Life*, BBC NEWS (July 16, 2020), <https://www.bbc.com/news/world-us-canada-52861726> [<https://perma.cc/985N-6YM2>].

¹⁰³ *Id.* (quoting Complaint at 2, *Minnesota v. Chauvin*, No. 27-CR-20-12646 (D. Minn. May 29, 2020)).

¹⁰⁴ *Id.*

¹⁰⁵ Associated Press, *From Eric Garner’s Death to Firing of NYPD Officer: A Timeline of Key Events*, USA TODAY (Aug. 20, 2019, 10:49 AM), <https://www.usatoday.com/story/news/2019/08/20/eric-garner-timeline-chokehold-death-daniel-pantaleo-fired/2059708001/> [<https://perma.cc/AQV8-PMCA>].

¹⁰⁶ JOSEPHINE ROSS, A FEMINIST CRITIQUE OF POLICE STOPS 128 (2021).

¹⁰⁷ See *id.*

¹⁰⁸ Van Maanen, *supra* note 34, at 145.

of civility or respectability.¹⁰⁹ Van Maanen's police code of civility identifies three characters: people who are suspicious, people who are not suspicious and compliant, and people who challenge the police.¹¹⁰ This third group, dubbed "assholes,"

are stigmatized by the police and treated harshly on the basis of their failure to meet police expectations arising from the *interaction situation itself*. . . . Consequently, the asshole may well be the recipient of what the police call "street justice"—a physical attack designed to rectify what police take as personal insult. Assholes are most vulnerable to street justice, since they, as their title implies, are not granted status as worthy human beings.¹¹¹

Some groups—among them Black people, but also the homeless, people with mental disabilities, and so on—are presumptively stigmatized in this way. Suspicious people, who do not fit their surroundings,¹¹² become assholes when they fail to act civilly—that is, when they fail to follow police commands. Police violence against Black people, and other groups that do not know their place, is thus not an accidental part of policing or a misperception of the reasonable amount of force to be used in the United States, but a core feature of social norms of public order—who belongs where and what are the consequences for being out of place.

These norms of civil order played out in the police killings of Floyd and Garner. Floyd, due to his psychological infirmity, was temperamentally incapable of recognizing and acknowledging the personal, physical, public authority wielded by the police. Garner, perhaps due to prior interactions with the police, chose not to.¹¹³

Focus on the latter encounter: the police killed Garner as the conclusion of a civility contest—a dispute between different, competing modes of evaluating conformity to socially acceptable codes of conduct. Garner and the police each appealed to different norms of civility embedded in different understandings of the prevailing civic order. The police adopted their professional, institutional standards of civility-as-respectability. Garner sought to assert his standing as a rights-holding citizen to be free from unjustified seizures.¹¹⁴

¹⁰⁹ Miller, *supra* note 41, at 31; see also WADDINGTON, *supra* note 10, at 42.

¹¹⁰ See Van Maanen, *supra* note 34, at 145.

¹¹¹ *Id.*

¹¹² See WADDINGTON, *supra* note 10, at 61–62.

¹¹³ Ross, *supra* note 106, at 128.

¹¹⁴ This understanding of a criminal suspect's rights to full and equal citizenship as a form of dignity and respect is often associated with the Warren Court's criminal process jurisprudence.

Garner demanded the police recognize him as a moral individual entitled to equal consideration as a citizen under the rule of law. He demanded that the police demonstrate respect for him as a full-blown, rights-bearing member of the legal, political, and moral community. Legal scholar Patricia J. Williams has described the stance of Black people standing on their rights as “the marker of our citizenship, our relation to others . . . a conception of civil rights, . . . the right to expect civility from others.”¹¹⁵

Law professor Josephine Ross explains that Garner had violated the New York health code by selling loose cigarettes.¹¹⁶ The police could have, at most, engaged in a brief *Terry*¹¹⁷ stop:¹¹⁸ “a temporary seizure for the purpose of questioning limited to the purpose of the stop . . . to verify or dispel the suspicion that the immigration laws were being violated.”¹¹⁹ Garner appears to have insisted on his right to walk away, stating “[p]lease just leave me alone. . . . [e]very time you see me, you want to mess with me. I’m tired of it. It stops today.”¹²⁰ Garner’s plea ought to be understood as a demand for civility, to be treated with respect.

Instead of respecting Garner’s plea, the police tried to engage in a full-blown arrest.¹²¹ They approached Garner from the perspective of the aristocracy of control, conferring upon him the sort of respect and civility demanded by their personal, physical, and public understanding of their authority. From the police’s perspective, Garner’s only options were to comply or be uncivil. The police response to Garner’s failure to recognize their aristocracy of control was to reestablish their code of civility by *forcing* Garner to respect them: first, by seek-

See I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 11 (2011).

¹¹⁵ PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 164–65 (1991). Ironically, insisting on one’s Fourth Amendment rights requires civilians to challenge the police. See, e.g., Scott E. Sundby, *The Rugged Individual’s Guide to the Fourth Amendment: How the Court’s Idealized Citizen Shapes, Influences, and Excludes the Exercise of Constitutional Rights*, 65 UCLA L. REV. 690, 723 (2018) (“The premise that a citizen must stand and assert his rights as a Hispanic American being confronted by INS agents or as a young African American man standing on a street corner as four cars brimming with police descend, seems downright surreal.”).

¹¹⁶ ROSS, *supra* note 106, at 127 n.12 (discussing the legal basis for detaining Garner).

¹¹⁷ *Terry v. Ohio*, 392 U.S. 1 (1968).

¹¹⁸ See, e.g., ROSS, *supra* note 106, at 127–28.

¹¹⁹ *Florida v. Royer*, 460 U.S. 491, 498 (1983).

¹²⁰ Josephine Ross, *What the #MeToo Campaign Teaches About Stop and Frisk*, 54 IDAHO L. REV. 543, 548 (2018) (quoting Susanna Capelouto, *Eric Garner: The Haunting Last Words of a Dying Man*, CNN (Dec. 8, 2014, 7:31 PM), <https://www.cnn.com/2014/12/04/us/garner-last-words/index.html> [<https://perma.cc/8638-3G9L>]).

¹²¹ See, e.g., *supra* note 106, at 128.

ing to psychologically compel him to consent to a search of his pockets, then, when he did not, by physically overpowering him.¹²² Their assault denied not only Garner's appeal to moral and political recognition; like the police assault of Floyd, the police denied Garner's standing as a worthy human being, as someone recognizably in physical distress. Indeed, the whole point of the police violence was to punish Garner and Floyd for their incivility, both presumptive, in being Black, and as experienced by the police, in being noncooperative with particular commands.

For people of color or other socially subordinated groups, performing police civility has political and moral costs, not least to that person's sense of self-respect. As law professor I. Bennet Capers puts it:

The law-abiding minority who negotiates the criminality script by being overly obsequious, by not asserting his right to proceed, his right not to answer questions, or his right not to grant consent, is doing more than accepting a "racial tax" or . . . performing "racial-comfort." In declining to assert any rights guaranteed by the Bill of Rights, he is assuming the position of a second-class citizen, or three-fifths of a citizen, or a denizen, or an at-will citizen allowed autonomy only at the discretion of the law officer.¹²³

Professor Capers points out that these degrading performances of civility occur against the backdrop of a ritualized history of enforced servility.¹²⁴ In demanding these particular performances, the police articulate and enforce a socially specific civil order, one that is not defined by, and may even be prohibited by law.¹²⁵

B. The Obligations of Solicitude

Floyd's and Garner's primary offense was not some form of *wrong*—impermissibly, that is inexcusably and unjustifiably engaging in some prohibited conduct. It was not the crime they were alleged to have committed that triggered the violent police response—in each case, the police violence came long after. Instead, their primary offense was a form of *wrongdoing*—the breach of a duty of civility owed

¹²² See, e.g., *id.* at 127–28 (claiming that the police lacked probable cause to seize or search without obtaining Garner's consent).

¹²³ Capers, *supra* note 114, at 28 (footnotes omitted).

¹²⁴ See *id.* at 29.

¹²⁵ Its unlawfulness is quite consistent with its being mandated by police understandings of propriety and respect. See, e.g., SKOLNICK, *supra* note 15, at 10.

by one person to another.¹²⁶ The offensive or uncivil conduct breaches formal or informal codes of civility imposing a duty to recognize the status of (normally) straight, white people and make them feel comfortable. The unhoused person does no wrong by taking a seat on the bus having failed to wash; the gay couple does not act in an unjustified or unexcused way by kissing in public; Black youths do nothing impermissible by hanging out in groups of three or more with no apparent purpose,¹²⁷ or by walking home late at night.¹²⁸

What all these people do, however, is act out of place, failing to anticipate and placate the discomfort of white folks or other socially dominant groups disordered by their presence. These grievance-style responses are triggered by the ways in which the disordering targets of these emotions fail to anticipate and attend to the superior through the norms of civility, and neglect to respond in socially, politically, and culturally appropriate ways: by apologizing, by flirting, by turning down their music, by avoiding hanging out in groups or in public places, by crossing the street, and so on.

On this view, knowing one's place is a positive duty of various groups of civilians. These groups—people of color, people with disabilities, people who lack housing, gay and transgendered people—are vulnerable to a criminalizing response because our norms of public civility identify them as distasteful, disgusting, dirty, and dangerous. The police can, in turn, make demands of deference from the civilized¹²⁹ public based on their need to use violence to control the offensive people that make their work. The civilized, however, will only find police work disgusting, distasteful, dirty, and dangerous to the extent that it engages with offensive outsiders—individuals that the civilized public themselves find disgusting, distasteful, dirty, and dangerous. In other words, people *not* like themselves.

The socially sanctioned presumption that Black people ought to know their place requires that Black, but also disabled people and unhoused people, and so on, shoulder the burden of recognition that they are objects of contempt, disdain, disgust, and fear. The social role

126 For the differences between wrongs and wrongdoings, see John Gardner, *Wrongs and Faults*, in APPRAISING STRICT LIABILITY 51, 54–56 (Andrew Simester ed., 2005) (describing wrongs as unjustified acts and wrongdoing as acts in breach of a duty).

127 See *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999).

128 See *Kolender v. Lawson*, 461 U.S. 352, 361 (1983).

129 The contrast between “civilized” white people and uncivilized Black people in the context of criminal law research and policy is a longstanding feature of United States politics and culture. See KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS* 90, 99, 123, 128, 244 (2010).

of Black people, along with and including members of other socially precarious groups, is to ensure that they respond in socially scripted ways that reaffirm their social role. The politics of civility includes the power to demand anticipatory mollifying performances from subordinated groups. These performances take a particular shape for Black people when they elicit responses of fear or contempt and so require specific performances of compliance and deference. A Black man should cross the street to avoid others when walking alone at night.¹³⁰ Black people should not drive cars that are too expensive. They should not hang out in groups in white-coded spaces. They should not challenge white people in the park. Black presence should be understood as organized around mitigating unjustified white offenses because “in a white-controlled world, a person’s very survival can depend on learning to anticipate hostility. There is hardly anywhere they can go to avoid encountering anti-Black social values and practices.”¹³¹

Practices of civility are specific, concrete ways in which structures of oppression operate in the contemporary United States. The social standards of civility create different expectations depending on the place in which people of color are encountered (the workplace, the dorm, the street) and when the additional characteristics of gender and gender presentation, sexual orientation, disability, and lack of housing are added into the mix. These further intersectional characteristics elicit further responses—of condescension or disgust,¹³² for example—with the corresponding expectations of solicitude and self-erasure.¹³³ Civility expresses itself through relationships in which the dominant person claims an entitlement to be treated in ways that address their social position and standing—the proper treatment is demanded and subordinates are punished for failing to behave in the correct way.

¹³⁰ See Brent Staples, *Black Men and Public Space*, HARPER’S, Dec. 1986, at 19, 19–20.

¹³¹ Elvira Basevich, *Self-Respect and Self-Segregation: A Du Boisian Rejoinder to Kant and Rawls*, SOC. THEORY & PRAC. (forthcoming) (manuscript at 2) (on file with author); see Devon W. Carbado & L. Song Richardson, *The Black Police: Policing Our Own*, 131 HARV. L. REV. 1979 (2018) (book review) (discussing the Du Boisian requirement of doubled consciousness in white spaces).

¹³² See NUSSBAUM, *supra* note 27, at 106–25.

¹³³ See, e.g., LENNARD J. DAVIS, *THE END OF NORMAL: IDENTITY IN A BIOCULTURAL ERA* 5 (2014); ROSEMARIE GARLAND-THOMSON, *STARING* 31 (2009).

III. CIVIL ORDER AND DISORDER

Civil disorder of the kind relevant to policing and criminal law is the subject of “incivility studies,” which seek to understand the psychological threat posed by categories of people who are present in the wrong place. On this view, incivility justifies criminalization because of the disorder or discomfort caused by “unpleasant or offensive gangs of threatening youths; children hanging around in town centres and shopping centres; people selling things on the street; and distress caused by prostitutes, vagrants, beggars, drunks or buskers.”¹³⁴

Drawing on the “broken windows” hypothesis of political scientist James Q. Wilson and criminologist George L. Kelling,¹³⁵ “[t]he core problem of the normal science of urban incivility research is the relationship of minor indiscretions and signs of disorder to crime and fear of crime, to neighbourhood levels of economic and social capital and to quality of life.”¹³⁶

A. Criminalizing Disorder

In one of the most influential definitions of the police role, Wilson and Kelling, in their famous *Broken Windows* article, assert that “[t]he essence of the police role in maintaining order is to reinforce the informal control mechanisms of the community itself.”¹³⁷

[P]olice activity on the street [should] be shaped, in important ways, by the standards of the neighborhood rather than by the rules of the state[.] . . . [T]he role of the police . . . [should be] judged primarily . . . in terms of its attaining . . . order[:] . . . a condition that people in a given community recognize[] when they s[ee] it. . . . Ordinarily, no judge or jury ever sees the persons caught up in a dispute over the appropriate level of neighborhood order.^[138] . . .

¹³⁴ ADRIAN BECK & ANDREW WILLIS, CRIME AND SECURITY 31 (1995).

¹³⁵ See generally Wilson & Kelling, *supra* note 1.

¹³⁶ Phillips & Smith, *supra* note 32, at 880. Phillips and Smith demonstrate that incivility is conceived of in psychologistic terms:

This rough-and-ready hypothesis about mental process was soon firmed up into a vision where outcomes could be serious in scope and structural and behavioural in quality and not simply modifications to subjectivity. . . . They operate as a specifically visual semiotic system that signals decline and danger, generates negative perceptions of place, suggests that street-level informal social control is weak and so drives away upstanding or socially and economically mobile citizens.

Id. at 880–81.

¹³⁷ Wilson & Kelling, *supra* note 1, at 462.

¹³⁸ Bittner notes this reality as an empirical fact, rather than normatively endorsing it as Wilson and Kelling do. According to Bittner, “[T]here appear[s] to exist two relatively indepen-

[S]ociety wants . . . an officer to have the legal tools to remove undesirable persons from a neighborhood when informal efforts to preserve order in the streets have failed. . . . [That is] to perform, in the only way they can, a function that every neighborhood desperately wants them to perform. . . . What the police in fact do is . . . [i]n the words of one officer, “ . . . kick ass.” . . . The tacit police-citizen alliance . . . is reinforced by the police view that the cops and the gangs are the two rival sources of power in the area, and that the gangs are not going to win.¹³⁹

The Wilson and Kelling conception of the police thus expressly endorses the police as the partisan agents of the local community engaged in discretionary and often off-the-books acts of violence.

We do not need to think that all policing is “broken windows” policing to recognize the ways in which policing is organized around catering to dominant understandings of offense, and to enforce off-the-books harassment of the offensive classes. Wilson, for example, powerfully conveys the sense in which the norms of social interaction generate norms of civility and civil order that are (and he believes, ought to be) enforced by the police. Wilson states, “Around one’s home, the places where one shops, and the corridors through which one walks there is for each of us a public space wherein our sense of security, self-esteem, and propriety is either reassured or jeopardized by the people and events we encounter.”¹⁴⁰

Wilson’s (and Kelling’s) focus on individual psychological reactions to incivility, and their role in justifying the criminalization of others, is mirrored by Feinberg’s lengthy discussion of the ways in which people can give and take offense and how that justifies the criminalization of their behavior in volume two of his book, *The Moral Limits of the Criminal Law*.¹⁴¹ Feinberg describes offense in terms of psychology: a disliked or distasteful state of mind.¹⁴² Broadly speaking, for Feinberg, *giving offense* entails impermissibly producing that state of mind in another person; and *taking offense* includes a further response of resentment or grievance felt by the person whose

dent domains of police activity. In one, their methods are constrained by the prospect of the future disposition of a case in the courts; in the other, they operate under some other consideration and largely with no structured and continuous outside constraint.” Bittner, *supra* note 72, at 700.

¹³⁹ See Wilson & Kelling, *supra* note 1, at 462–64.

¹⁴⁰ WILSON, *supra* note 32, at 18.

¹⁴¹ See generally FEINBERG, *supra* note 21.

¹⁴² See *id.* at 2.

mental state is disturbed.¹⁴³ This mentalist definition presents racism as a passive state of ignorance achieved through innocent exposure to faulty beliefs. If we dig a little further, we see that this definition misrepresents the extent to which taking offense and the norms of civility, which constitute and define it, are created and enforced through the collaborative activity of the community.

Feinberg elaborates on giving and taking offense in the context of a bus ride in which various passengers board and misbehave in more or less egregious ways, and asks the reader to imagine what their psychological response would be. Three of his examples reveal the limitations of the psychological approach to offense. Feinberg asks to think how we would react to having a smelly person sit down next to a passenger on the bus;¹⁴⁴ a gay couple kissing on the bus;¹⁴⁵ and passengers on the bus with racist or sexist paraphernalia.¹⁴⁶ Whilst I have not included the most egregious conduct even within the categories just mentioned, Feinberg clearly thinks that, in each case, even the activities at the less egregious end of the scale are capable of provoking a disliked or disordering psychological impact upon the passive observer.¹⁴⁷ All of these examples, then, are capable of fitting the mental state definition of “offense,” producing respectively feelings of “revulsion,”¹⁴⁸ “disgust” and “hatred,”¹⁴⁹ and “anger . . . fear, and a feeling of humiliation and impugned ‘honor.’”¹⁵⁰ So long as the person giving offense acts impermissibly, that is, without justification or excuse, then

¹⁴³ See *id.* at 2–3.

¹⁴⁴ “*Story 1.* A passenger who obviously hasn’t bathed in more than a month sits down next to you. He reeks of a barely tolerable stench. There is hardly room to stand elsewhere on the bus and all other seats are occupied.” *Id.* at 10.

¹⁴⁵ “*Story 21.* The two seats in front of you are occupied by male homosexuals. They flirt and tease at first, then kiss and hug” *Id.* at 12.

¹⁴⁶

Story 29. A passenger enters the bus straight from a dispersed street rally. He carries a banner with a large and abusive caricature of the Pope and an anti-Catholic slogan. (You are a loyal and pious Catholic.) *Story 30.* Variants of the above. The banner displays a picture of a black according to some standard offensive stereotype (Step ‘n Fetchit, Uncle Tom, etc.) with an insulting caption, or a picture of a sneering, sniveling, hook-nosed Fagin or Shylock, with a scurrilous anti-Jewish caption, or a similar offensive denunciation or lampooning of groups [along lies of national origin or gender].

Id. at 13.

¹⁴⁷ See *id.* at 14–21.

¹⁴⁸ *Id.* at 14–15.

¹⁴⁹ *Id.* at 20.

¹⁵⁰ *Id.* at 21.

(according to Feinberg) their actions are capable of being criminalized.¹⁵¹

The limitations of Feinberg's predominantly psychologicistic account becomes apparent in his discussion of the offense given by public displays of affection by gay people and the offense taken by people of color confronted by racist conduct. The psychological account suggests that our laws are justified in lockstep with mental responses to events and are created, modified, and terminated by when these responses reach a certain pitch.¹⁵² Our norms, and the various structures and institutions that uphold and enforce them, however, are not so easily reduced to tracking mental states that produce outrage.¹⁵³ As norms surrounding the social, political, and cultural status of gay people have shifted over the last thirty years, so has the propriety of taking offense to same-sex affection in public, even if the psychological impact of witnessing it may, for many people, remain the same as before.¹⁵⁴

Tellingly, when it comes to racial offense, Feinberg oddly flips his account. There are quite straightforward psychological responses that others adduce to contact with people of other races that Feinberg could have included on his *omnibus horribilis*, but did not. For example, Martha Nussbaum identifies racial offense as associated with perceptions in which people are predominantly "identified by their skin color or other surface features."¹⁵⁵ The racist perceives these other people as

more animal than we are, more sweaty, more smelly, more sexual, more suffused with the stench of mortality[. . . . An honest look at our heated debates about school integration in the 1950s shows that the fear of sexual contact between

¹⁵¹ See *id.* at 2.

¹⁵² See *id.* at 1.

¹⁵³ For a helpful discussion of Feinberg's criminalization project, see CHIAO, *supra* note 36, at 146–49.

¹⁵⁴ Compare Samantha Schmidt, *Americans' Views Flipped on Gay Rights. How Did Minds Change So Quickly?*, WASH. POST (June 7, 2019, 7:30 PM), https://www.washingtonpost.com/local/social-issues/americans-views-flipped-on-gay-rights-how-did-minds-change-so-quickly/2019/06/07/ae256016-8720-11e9-98c1-e945ae5db8fb_story.html [<https://perma.cc/FQU5-SMGK>], with Eric W. Dolan, *Straight Men's Physiological Stress Response to Seeing Two Men Kissing is the Same as Seeing Maggots*, PSYPOST (June 29, 2017), <https://www.psypost.org/2017/06/straight-mens-physiological-stress-response-seeing-two-men-kissing-seeing-maggots-49217> [<https://perma.cc/9Q9F-LC89>].

¹⁵⁵ NUSSBAUM, *supra* note 27, at 112.

black men and white women was at the very heart of the reluctance to integrate schools.¹⁵⁶

Elsewhere, Feinberg does address the

bigoted prejudices of a very widespread kind (e.g., against interracial couples strolling hand in hand down the main street of a town in the deep South) can lead onlookers to be disgusted and shocked, even “morally” repelled, by perfectly innocent activities, and we should be loath to permit their groundless repugnance to outweigh the innocence of the offending conduct. For these and similar reasons, the offense principle must be formulated in a very precise way, and supplemented by appropriate standards or mediating maxims, so as not to open the door to wholesale and intuitively unwarranted legal interference.¹⁵⁷

Legal philosopher John Tasioulas argues that this sort of handholding is not objectively wrong, and so it should not be the sort of public wrong that is the stuff of criminal law.¹⁵⁸ If that were all there was to it, then criminalizing handholding among same-sex couples would be what philosophy professor Anthony Duff calls a “perversion” of criminal law: the government makes that which should not be criminalized, criminal.¹⁵⁹ The problem, however, is not the degree to which disgust is personal or impersonal, but to which gay or interracial handholding undermines norms of civic order in some particular community. If the civic order depends upon maintaining miscegenation and challenging that order may result in disorder or even violence, then the risk of disorder still counts as a (prudential) reason for preserving that order.

Focusing on these quite straightforward responses to people of color, responses that fit neatly within his typology of strong psychological reactions, such as disgust, hate, anger, and fear, would have required Feinberg to specify the race of the people who were taking offense: not only would they have been housed (offended at the unhoused) and straight (taking offense at gay people), but also white (taking offense at people of color).

¹⁵⁶ *Id.* at 120–21.

¹⁵⁷ 2 FEINBERG, *supra* note 21, at 25–26.

¹⁵⁸ John Tasioulas, *Crimes of Offense*, in INCIVILITIES 149, 154 (A.P. Simester & Andreas von Hirsh eds., 2006).

¹⁵⁹ See R.A. Duff, *Perversions and Subversions of Criminal Law*, in THE BOUNDARIES OF THE CRIMINAL LAW 88, 92 (R.A. Duff et al. eds., 2010) (“The criminal law is perverted when it is used for purposes that are not proper to it, or in ways that violate the values which should structure it. . .”).

In his efforts to avoid engaging the whiteness of civility, Feinberg gets wrong the psychological response for people of color who take offense at displays of racial animus. The appropriate reaction is not, as he claims, one of impugned honor. Person of color may properly feel fear, discomfort, anger, or the like. Whatever their mental discomfort or lack thereof, their feelings are not the source of the objective offense. What is offensive is that some person engages in “an act of peremptory, hostile, and supremely—often fatally—consequential identification that unceremoniously overrides its objects’ sense of themselves,”¹⁶⁰ not some psychologically disturbing act. Indeed, not just *any* psychologically disturbing act could count as racism, even acts that affect only the people of color on the bus. That is because racist acts target people by invoking codes of power and dominance based on race, rather than some other shared characteristic.

Taking offense or being offended is thus not simply some brute psychological reaction to some other person’s conduct. Instead, the giving and taking of offense is a socially structured activity—one that is importantly structured by norms of civility. The attitudes characteristic of taking offense are *critical reflective responses*¹⁶¹ toward conduct characteristic of the relevant activity or institution. What matters in defining and policing offense is the social practice of expressing resentment, grievance, indignation, blame, and so on,¹⁶² rather than the psychological experience that characteristically prompts such expression.¹⁶³ The psychological feelings are not necessary or even sufficient for the practice to exist;¹⁶⁴ what *is* necessary and sufficient are the standards of behavior and belief that constitute the practice and are available to individuals as standards of criticism to enforce conformity

¹⁶⁰ Barbara J. Fields, *Whiteness, Racism, and Identity*, INT’L LAB. & WORKING-CLASS HIST., Fall 2001, at 48, 48.

¹⁶¹ H.L.A. Hart also uses the term “critical reflective attitude” as I do to describe a common standard of behavioral patterns which are necessary to have a societal concept of “‘should,’ ‘right’ and ‘wrong.’” See H.L.A. HART, *THE CONCEPT OF LAW* 57 (3d ed. 2012).

¹⁶² Manne discusses a similar set of responses in the context of what “P.F. Strawson . . . calls ‘the reactive attitudes,’ such as resentment, blame, indignation, condemnation, and (for the first-personal analogues) guilt, shame, a sense of responsibility, as well as a willingness to accept punishment when one is held to deserve it.” MANNE, *supra* note 66, at xvi. Strawson and Hart both taught at the same college in Oxford when they came up with their accounts of reflective and responsive attitudes. See NICOLA LACEY, *A LIFE OF H.L.A. HART* 147, 170, 180 (paperback ed. 2006). While it is unclear whether the two conversed with each other about their respective theories, Hart was a friend of Strawson and defended Strawson’s philosophy to his peers. See *id.*

¹⁶³ HART, *supra* note 161.

¹⁶⁴ *Id.*

to the conduct, beliefs, and so on required by the relevant social practice.¹⁶⁵

Put simply, Feinberg not only ignores the norms of considerateness,¹⁶⁶ solidarity,¹⁶⁷ and compassion toward our fellows,¹⁶⁸ as well as seeking to support the person in their discomfort or distress, but also ignores the deference and submission or solicitude that in part constitute our norms of public civility.

B. *Policing Disorder*

On the “broken windows” view, the physical, material conditions of a neighborhood signal a breakdown of civil order. The claim that urban blight sends a clear message to civilians about the nature of a given neighborhood or community¹⁶⁹—which has its policing corollary

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The internal aspect of rules is often misrepresented as a mere matter of ‘feelings’ in contrast to externally observable physical behaviour. No doubt, where rules are generally accepted by a social group and generally supported by social criticism and pressure for conformity, individuals may often have psychological experiences analogous to those of restriction or compulsion. When they say they ‘feel bound’ to behave in certain ways they may indeed refer to these experiences. But such feelings are neither necessary nor sufficient for the existence of ‘binding’ rules. There is no contradiction in saying that people accept certain rules but experience no such feelings of compulsion. What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of ‘ought’, ‘must’, and ‘should’, ‘right’ and ‘wrong’.

Id.

¹⁶⁶ For example, philosopher Edna Ullmann-Margalit writes “that considerateness is the minimum that we owe to one another in the public space. By acting considerately toward strangers we show respect to that which we share as people, namely, to our common humanity.” EDNA ULLMANN-MARGALIT, *NORMAL RATIONALITY* 226 (Avishai Margalit & Cass R. Sunstein eds., 2017).

¹⁶⁷ See TOMMIE SHELBY, *WE WHO ARE DARK* 245 (First Harvard Univ. Press paperback ed. 2007) (discussing solidarity as the ability “to empathize with one another and sometimes . . . to provide mutual support”).

¹⁶⁸ See, e.g., MARTHA C. NUSSBAUM, *POLITICAL EMOTIONS* 314 (2013) (discussing civic compassion and the threats to it). On the limits of compassion as a political emotion, see Amia Srinivasan, *The Political Limits of Compassion*, in *POLITICAL EMOTIONS: TOWARDS A DECENT POLITICAL SPHERE* (Thom Brooks ed., forthcoming) (manuscript at 5) (“[S]hould I not also feel that distinctive sting of recognition and self-indictment that is the proper response to my complicity in the political structures that have caused and perpetuate this woman’s suffering, that have bought my privilege at the expense of her oppression?”).

¹⁶⁹ Eric J. Miller, *Role-Based Policing: Restraining Police Conduct “Outside the Legitimate Investigative Sphere,”* 94 CALIF. L. REV. 617, 619 (2006).

in the police designation of a neighborhood as high crime¹⁷⁰ or gang-ridden¹⁷¹—is often strongly raced and classed. The academic “obsession”¹⁷² on urban incivility as “physical or environmental incivilities such as graffiti, garbage and decay,”¹⁷³ and “with the grimy ‘block’ and dubious ‘neighbourhood,’”¹⁷⁴ is matched by a police practice of designating neighborhoods, blocks, and buildings as sites of incivility based in part upon background patterns of continuing racial segregation and stratification.¹⁷⁵ Policing on top of these wider historical trends bakes in racial hierarchy to police perceptions of respectability and civility.

The “broken windows” approach has validated the impulse to respond to general perceptions of disorder by calling upon a paramilitary force organized around the use of violence and the criminal process.¹⁷⁶ Wilson, Kelling, and Cole in their different articles and

170 The definitive case on the relevance of high-crime areas to policing is *Illinois v. Wardlow*, 528 U.S. 119 (2000). *California v. Hodari D.*, 499 U.S. 621, 622 (1991), however, is also a case in which the police asserted they were operating in a high-crime area. In both cases, the police barreled into the community, and the defendants fled. From the perspective of police civility or respectability, such flight is incomprehensible except in terms of consciousness of guilt. See, e.g., Van Maanen, *supra* note 34, at 145 (describing how the police regard failures to comply with their authority as “incomprehensible” because there can be no reason, as far as the police are concerned, for challenging police authority).

171 See, e.g., ANA MUNIZ, POLICE, POWER, AND THE PRODUCTION OF RACIAL BOUNDARIES 39 (2015) (“[P]olice use greater amounts of force depending on neighborhood context. . . . Scholars also find a ‘defended white neighborhood’ phenomenon among police. Black youth face the greatest discrimination by police in predominantly white areas that recently experienced an influx of African Americans. The classification of urban low-income black and brown people as alleged gang members is a dominant justification for heavy surveillance, control, detainment, and harsh sentencing in Los Angeles.” (citation omitted)).

172 Phillips & Smith, *supra* note 32, at 899.

173 *Id.* at 884 (emphasis omitted).

174 *Id.* at 899.

175 See, e.g., CHARLES W. MILLS, THE RACIAL CONTRACT 41–42, 48–49 (1997) (“The norming of space is partially done in terms of the *racings* of space, the depiction of space as dominated by individuals (whether persons or subpersons) of a certain race.”); Priscilla Ocen, *Beyond Ferguson: Integrating Critical Race Theory and the “Social Psychology of Criminal Procedure,”* in THE NEW CRIMINAL JUSTICE THINKING 236 (Sharon Dolovich & Alexandra Natapoff eds., paperback ed. 2019) (“The racial landscapes of both New York and Ferguson have been shaped by redlining and exclusionary housing policies that resulted in segregated housing patterns. Such patterns enable police to be deployed to regulate racially isolated and impoverished communities. The politically powerful are thus able to direct resources toward ‘tough on crime initiatives’ against minority communities without directly affecting affluent communities.” (footnote omitted)).

176 See, e.g., SKOLNICK, *supra* note 15, at 10 (“The organizational model of the police also influences their conception of order. To the degree that police are organized on a military model, there is also likely to be generated a martial conception of order. Internal regulations based on martial principles suggest external cognitions based on similar principles. The presence of an explicit hierarchy, with an associated chain of command and a strong sense of obedience, is

books conceive of the problem of white flight from urban areas, neither as a lack of public resources in housing, healthcare, employment, and education, nor as an issue of urban divestment combined with suburban investment in the postwar years.¹⁷⁷ Instead they suggest that the distasteful human reminders of urban disinvestment and poverty should be criminalized when they become too prominent in certain neighborhoods. To preserve orderly turf from the human blight of street poverty, disability, and racial diversity, the neighborhood community is permitted to call upon the police to engage in off-the-books and illegal state violence as a permissible tactic to corral the unsightly. The “broken windows” response rejects community building, shared investment in public health and social work institutions, and considerateness¹⁷⁸ or compassion,¹⁷⁹ or even guilty complicity¹⁸⁰ as the appropriate responses to poverty, disability, and houselessness. Instead, it defaults to a criminalizing response that privileges fear, disgust, contempt, and anger (directed not toward the system that produces precariousness,¹⁸¹ but toward the vulnerable). These emotions make possible the criminalization reaction, shifting responsibility from those who have the power to combat or allow government failure to the relatively powerless victims of it.

When the police inflict disproportionate violence or pain, the view enshrined in the criminal and constitutional law is that the police are justified, even if they misperceive the threat posed by the person they injure or kill.¹⁸² The use of violence is regrettable but reasonable, given the officer’s subjective point of view. And even when the use of violence to inflict pain is not justified, it is excused as an essential feature of the job, and ultimately a matter for internal discipline rather than public censure.

therefore likely to induce an attachment to social uniformity and routine and a somewhat rigid conception of order.”).

¹⁷⁷ See Wilson & Kelling, *supra* note 1. The attack on city governments during the postwar years. Redlining, property taxes, and so on.

¹⁷⁸ Edna Ullman-Margalit regards considerateness as the default public affect. See ULLMAN-MARGALIT, *supra* note 166, at 226 (“[C]onsiderateness is the minimum that we owe to one another in the public space.”).

¹⁷⁹ See, e.g., NUSSBAUM, *supra* note 168, at 314 (discussing civic compassion and the threats to it).

¹⁸⁰ See Srinivasan, *supra* note 168, at 5 (“[S]hould I not also feel that distinctive sting of recognition and self-indictment that is the proper response to my complicity in the political structures that have caused and perpetuate this woman’s suffering, that have bought my privilege at the expense of her oppression?”).

¹⁸¹ See *id.*; Amia Srinivasan, *The Aptness of Anger*, 26 J. POL. PHIL. 123, 123–44 (2018).

¹⁸² See Stoughton et al., *supra* note 5, at 30–35.

The better view is that calling down police violence to resolve public order offenses is one way in which dominant communities recognize and respond to the social status of groups that disorder or discomfit them. It is these communities' version of a proportionate response to some perceived incivility. When the police respond with "unnecessary" or "excessive" force or violence, they do not misperceive some threat or accidentally use "disproportionate" force. Instead, that degree of pain and violence is a core means of reinforcing partisan, racialized norms of how we experience people of color—but also people with disabilities, unhoused persons, transgendered people, and so on—during our encounters with them. This is the permissible range of responses upon encountering a person of color who is out of place in a particular social space, thus offending our parochial, racialized norms of civility, and then demonstrating who belongs where and what are the consequences for being out of place.

These social norms are not legal or constitutional norms, but the norms of one community pitted against another. On this view, the actions of the police act as the surrogates for the violence threatened and perpetrated by white vigilantes—Gregory and Travis McMichael who murdered Ahmaud Arbery;¹⁸³ Amy Cooper calling down the police on Christian Cooper;¹⁸⁴ and of course, George Zimmerman, who killed Trayvon Martin.¹⁸⁵ On this view, the problem of resisting and transforming racist police violence goes further than the institution of the police itself. *In ordinary cases*, the police act—and in at least some theories of policing,¹⁸⁶ *ought to act*—as vigilantes on behalf of the white community and its norms of respectability and civility; norms that exclude Black people from white spaces. Here, the problem is not that whites misperceive where Black people (and others, including people with disabilities) belong. Nor do they mistake the amount of force tolerable to keep Black people in their place. Instead, they use the police to enforce norms of who belongs where and endorse and support the police who respond with pain and violence. On this view,

¹⁸³ Richard Fausset, 2 *Suspects Charged with Murder in Ahmaud Arbery Shooting*, N.Y. TIMES (May 21, 2020), <https://www.nytimes.com/2020/05/07/us/ahmaud-arbery-shooting-arrest.html> [<https://perma.cc/9MCF-6R96>].

¹⁸⁴ Jan Ransom, *Amy Cooper Faces Charges After Calling Police on Black Bird-Watcher*, N.Y. TIMES (Oct. 14, 2020), <https://www.nytimes.com/2020/07/06/nyregion/amy-cooper-false-report-charge.html> [<https://perma.cc/Z9BC-ZYTN>].

¹⁸⁵ Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), <https://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html> [<https://perma.cc/W7HX-6M3J>].

¹⁸⁶ See Wilson & Kelling, *supra* note 1, at 465–66.

the police is every person, deputized to “kick ass” to ensure that our spaces are not disordered by fear of crime.¹⁸⁷

The ability to create and enforce a code of civility is a form of social power. That power is expressed, not only through the powerful person’s standing to demand specific subordinating performances, but through their ability to sanction noncompliance with those demands. The ways in which these powers are expressed are just the ways in which we constitute racism, misogyny, transphobia, ableism, xenophobia, and the rest. The goal of these responses is precisely to discipline and degrade the out-of-place individual for failing to pay sufficient attention to the contextual features of people and place.

Thus, when a grand jury declines to charge officer Darren Wilson for killing Michael Brown, a Black youth whose offense was jaywalking,¹⁸⁸ or when another grand jury declines to charge officer Daniel Pantaleo for killing Eric Garner, whose offense was selling loose cigarettes,¹⁸⁹ the community is not acting in a weird or irrational way. The grand jurors are not bamboozled by the prosecutor. They simply choose to endorse the acts of the police as within the bounds of reasonable behavior—within that community’s code of civility.

CONCLUSION

When the police engage in a street encounter, it is usually either because they have been called upon to *do something*, or have seen something that draws their interest and decided to do something about it. In such circumstances, they have a variety of choices.

The police officer could choose to engage in some kind of problem solving—promoting social justice and the interests of the Black (or unhoused or disabled) person by trying to mediate the issue, connecting the person to social resources (should they need them), or by counseling tolerance of people who are doing no harm. To respond in that way, however, is to fail to respect the police institution. It is to be uncivil by failing to communicate respectful solidarity with one’s fellow officers. In effect, it is to become an “asshole.”¹⁹⁰ It is to fail to use violence to resolve the situation—to distribute situationally justified

¹⁸⁷ *Id.* at 464.

¹⁸⁸ Jon Swaine, Paul Lewis & Dan Roberts, *Grand Jury Decline to Charge Darren Wilson for Killing Michael Brown*, GUARDIAN (Nov. 25, 2014, 4:23 PM), <https://www.theguardian.com/us-news/2014/nov/24/ferguson-police-darren-wilson-michael-brown-no-charges> [<https://perma.cc/8GY6-K5DQ>].

¹⁸⁹ Associated Press, *supra* note 105.

¹⁹⁰ See Van Maanen, *supra* note 34, at 145.

force (as Bittner would have it)¹⁹¹ or to kick ass (as Wilson and Kelling put it).¹⁹² To act in a characteristically police fashion, the officer must harass or arrest the disorderly.

Doing nothing—or, at any rate, the police equivalent of nothing—may prompt criticism of the police. When the *civilized* public call on the police to address the *disordering and offensive* people who blight their neighborhood, failing to act as expected—that is, failing to direct violence at those who do not know their place—provokes a *critical reflective response*. On this account, *doing nothing* includes problem solving or social justice responses because they are not police responses.

Police violence against Black people is thus not an accidental part of policing or a misperception of the reasonable amount of force to be used in the United States, but a core feature of social norms of public order—who belongs where and the consequences for being out of place. Policing Black people is simply community vigilantism in the United States. To resist the police is to resist those larger social norms that the police reproduce—norms that white bystanders weaponize to resist the resisters.

¹⁹¹ See BITTNER, *supra* note 3, at 39.

¹⁹² See Wilson & Kelling, *supra* note 1, at 464.