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## THE DATABASING OF FREDDIE GRAY

Robert Koulish\*

### I. WAS FREDDIE GRAY'S DEATH AN UNINTENDED CONSEQUENCE OF CITISTAT<sup>1</sup> AND ITS PROGENY IN BALTIMORE?

Freddie Gray's death must be seen in the context of Baltimore entering a new age of policing in a data-driven society. It is an age in which police engage in racial profiling, preemptive policing, and where laws that should safeguard residents actually help to legitimize excessive police force.<sup>2</sup> Such policing techniques are evident throughout Sandtown-Winchester, the Baltimore neighborhood where Freddie Gray lived and where he met his fateful end in the back of a police van. Freddie Gray's death represents a systemic problem that is not easily addressed by the courts. Consider the police trials of three Baltimore City officers, where three officers were exonerated and charges against three others were dropped.<sup>3</sup> The trials represent the limits of the law in holding police accountable for the death of one unarmed African American male in their custody.

### II. WHAT BROUGHT POLICE INTO FREDDIE GRAY'S NEIGHBORHOOD ON APRIL 12, 2015? WHAT INCENTIVE DID POLICE HAVE TO GIVE CHASE TO FREDDIE GRAY AND WHY WAS HE ARRESTED?

These questions were never answered at trial. Freddie Gray's family lawyer, Billy Murphy, suggested the motive for his arrest was that he was "running while Black," which was not sufficient to find

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<sup>1</sup> MAYOR'S OFFICE OF CITISTAT, CITY OF BALTIMORE, <http://citistat.baltimorecity.gov> (last visited Dec. 16, 2016).

<sup>2</sup> See generally Faiza Patel, *Be Cautious About Data-Driven Policing*, N.Y. TIMES (Dec. 3, 2015, 1:20 PM), <http://www.nytimes.com/roomfordebate/2015/11/18/can-predictive-policing-be-ethical-and-effective/be-cautious-about-data-driven-policing>.

<sup>3</sup> Kevin Rector, *Charges Dropped, Freddie Gray Case Concludes with Zero Convictions Against Officers*, BALT. SUN (July 27, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-miller-pretrial-motions-20160727-story.html>.

the officers guilty.<sup>4</sup> To address why police chased him that day, we must examine a variety of systemic factors that brought police into contact with Freddie Gray. First, Baltimore makes use of state-of-the-art surveillance technologies that enable police to monitor, and thus render suspicious, impoverished African American neighborhoods.<sup>5</sup> Second, this occurs under the auspices of zero-tolerance policing strategies that provide incentives for putting people into the criminal justice system.<sup>6</sup> Surveillance technologies add economies of scale and interoperability to law enforcement's gaze over African American neighborhoods. Third, military armor and techniques add a menacing shift in enforcement paradigms from "protect and service" to treating neighbors as hostile enemies.<sup>7</sup> As a result, I argue that Baltimore's post-panoptic police regime gave rise to the chase, stop, frisk, arrest, and death of Freddie Gray, all sanctioned by law.

Post-panoptic regimes deploy technologies of power, which appear to the public as racially neutral and to the courts as quite legal but which have particularly deleterious effects on communities of color. In short, this essay is intended as a brief query into the limits of law to track largely digitalized structural deficiencies in the criminal justice system.

To help understand Freddie Gray's final encounter with police, it is important to recognize it within the context of Baltimore's digital enforcement regime. Baltimore relies heavily on high tech surveillance strategies—rather than community policing efforts—to patrol minority neighborhoods. African Americans bear the brunt of surveillance because Baltimore is a highly segregated city, and surveillance is disproportionately deployed in minority neighborhoods. East and West

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<sup>4</sup> Keith L. Alexander, *Representing Freddie Gray's Family: A Venerable Lawyer in Cases Involving Race, Police and Death*, THE WASH. POST (July 25, 2015), [https://www.washingtonpost.com/local/crime/baltimores-joe-louis-of-law/2015/07/25/a2db5bca-20b3-11e5-bf41-c23f5d3face1\\_story.html](https://www.washingtonpost.com/local/crime/baltimores-joe-louis-of-law/2015/07/25/a2db5bca-20b3-11e5-bf41-c23f5d3face1_story.html).

<sup>5</sup> See Laura Moy, *Yet Another Way the Baltimore Police Target Black People*, SLATE (Aug. 18, 2016, 1:19 PM), [http://www.slate.com/blogs/future\\_tense/2016/08/18/baltimore\\_police\\_use\\_surveillance\\_technology\\_to\\_target\\_black\\_neighborhoods.html](http://www.slate.com/blogs/future_tense/2016/08/18/baltimore_police_use_surveillance_technology_to_target_black_neighborhoods.html).

<sup>6</sup> See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 24 (Aug. 10, 2016), <https://www.justice.gov/opa/file/883366/download> [hereinafter *DOJ Report*].

<sup>7</sup> See WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING, ACLU 3 (2014).

Baltimore are disproportionately lit with blue light cameras and other surveillance technologies.<sup>8</sup> As data is collected, crime patterns are discerned and ‘high crime areas’ are highlighted in the City’s police databases. Within these areas, residents, who are nearly all black, are made suspect<sup>9</sup> which unleashes even more intrusive enforcement initiatives and practices.

The digital enforcement regime starts with *CitiStat*, a statistics-based tracking system established in 1999.<sup>10</sup> *CitiStat* maps data on a variety of categories of crime and stores it on central databases within a central city command center that in turn deploys police to high crime areas. As it plays out, the performance of beat cops gets assessed in terms of the number of pursuits, stops, frisks, and arrests that can be checked off in those ‘high crime’ areas.<sup>11</sup>

The method of policing is predictive with an almost exclusive reliance on measurable data to report when and where crimes are likely to occur.

The databases store information from a variety of high tech sources. A Cessna flying above the city takes aim at 30 square miles of greater Baltimore and transmits images to the database.<sup>12</sup> Lower to the ground, more than 700 blue light cameras as part of the *CitiWatch Community Partnership*,<sup>13</sup> another *CitiStat* initiative, also feed data into *CitiStat* databases. On the ground, police are also assisted by

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<sup>8</sup> *Id.*

<sup>9</sup> See Lily H. Newman, *How Baltimore Became America’s Laboratory for Spy Tech*, WIRED (Sept. 4, 2016, 7:00 AM), <https://www.wired.com/2016/09/baltimore-became-americas-testbed-surveillance-tech/>.

<sup>10</sup> *Overview*, MAYOR’S OFFICE OF CITI STAT, CITY OF BALTIMORE, <http://citistat.baltimorecity.gov/about-citistat> (last visited Dec. 16, 2016).

<sup>11</sup> See, e.g., MALCOLM K. SPARROW, *MEASURING PERFORMANCE IN A MODERN POLICE ORGANIZATION*, NEW PERSPECTIVES IN POLICING 18 (Mar. 2015), <https://www.ncjrs.gov/pdffiles1/nij/248476.pdf>.

<sup>12</sup> Jayne Miller, *Baltimore Police Department Uses Sophisticated Aerial Camera Surveillance System*, WBAL-TV 11 (Aug. 25, 2016, 3:23 PM), <http://www.wbaltv.com/article/baltimore-police-department-uses-sophisticated-aerial-camera-surveillance-system/7102482>.

<sup>13</sup> Luke Broadwater & Justin George, *City Expands Surveillance System to Include Private Cameras of Residents, Businesses*, BALTIMORE SUN (Oct. 30, 2014, 8:25 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-citiwatch-20141029-story.html>.

stingrays, which are referred to as a “digital stop and frisk” for African American neighborhoods.<sup>14</sup> Stingrays mimic cell towers to attract cell phone signals, which enables police to track movements secretly and without warrants.<sup>15</sup> Although stingrays were challenged in the Fourth Circuit for violating the Fourth Amendment rights of cell phone users in the vicinity,<sup>16</sup> and actually found unconstitutional by the Maryland Court of Special Appeals,<sup>17</sup> civil rights groups filed a complaint with the FCC about the use of stingrays in Baltimore as late as August 2016.<sup>18</sup>

With all of this data from digital hotspots fed into central databases, police have gained an immense capacity to engage in predictive policing particularly in “high crime areas,” a code word for “African Americans.”<sup>19</sup> With such capacity at hand, city initiatives like *Operation Ceasefire* provide instructions for police to enter a neighborhood, as they did in Sandtown-Winchester on April 12, 2015.<sup>20</sup> With such authorization, police can chase, stop, frisk, and arrest almost anyone per whim under the auspices of *Illinois v. Wardlow*,<sup>21</sup> a neoliberal Court decision that gave police license to chase innocent bystanders, like Freddie Gray, who run on sight.<sup>22</sup> *Wardlow* declared that unprovoked flight in the presence of police in a high crime area is sufficient to generate reasonable suspicion for the

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<sup>14</sup> Ian Duncan, *FCC Complaint: Baltimore Police Breaking Law with Use of Stingray Phone Trackers*, BALT. SUN (Aug. 16, 2016, 12:03 PM), <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-stingray-fcc-complaint-20160816-story.html>.

<sup>15</sup> *Id.*

<sup>16</sup> *United States v. Graham*, 824 F.3d 421, 448 (4th Cir. 2016) (Wynn, J., dissenting) (“By acquiring vast quantities of Defendants’ location information... without Defendants’ consent, the government... engaged in a search... [that] violated the Fourth Amendment.”).

<sup>17</sup> *State v. Andrews*, 227 Md. App. 350, 134 A.3d 324 (2016)

<sup>18</sup> Duncan, *supra* note 4.

<sup>19</sup> *DOJ Report*, *supra* note 6, at 29.

<sup>20</sup> Justin Fenton et al., *Anti-Gun Ceasefire Program Struggling in Baltimore*, BALT. SUN (May 30, 2015, 4:12 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-ceasefire-troubles-20150530-story.html>.

<sup>21</sup> *Illinois v. Wardlow*, 528 U.S. 119 (2000).

<sup>22</sup> Joseph G. Jarret, *To Flee or Not to Flee: The Implications of Illinois v. Wardlow on the Practice of Criminal Law in Florida*, 74 FLA. B. J. 96, 96 (2000) (“One faction [of criminal justice scholars] will insist that it is an accepted axiom of criminal law that... ‘the righteous are as bold as a lion.’”) (quoting *Proverbs* 28:1).

police to give chase.<sup>23</sup> This scenario provides the likely the reason Billy Murphy said Freddie Gray was arrested because he was “running while black.”<sup>24</sup>

Hence, the post-panoptic regime combines state of the art technologies, city operations, and legal doctrine to surveil “high crime” areas and give chase almost at will and by law. As *Operation Ceasefire* put officers into the neighborhood, and *Wardlow* gave license to chase, *CitiStat* incentivized police to engage in preemptive stops, searches, and arrests.

Freddie Gray hardly stood a chance. Given the number of categories checked that morning, the Freddie Gray intervention likely contributed to a particularly effective day for police in Sandtown-Winchester. And, were it not for some video-footage of Freddie Gray being dragged to the police van, the arresting and transporting officers might well have earned merit points for their treatment of Freddie Gray.

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<sup>23</sup> Wardlow, *supra* note 21, at 119.

<sup>24</sup> See *Freddie Gray's Death in Police Custody—What We Know*, BBC NEWS (May 23, 2016), <http://www.bbc.com/news/world-us-canada-32400497>.