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FUTURE OF THE FOURTH AMENDMENT: THE PROBLEM WITH PRIVACY, POVERTY AND POLICING

Kami Chavis Simmons*

For decades, the reasonable expectation of privacy has been the primary standard by which courts have determined whether a “search” has occurred within the meaning of the Fourth Amendment. The Supreme Court’s recent decision in *U.S. v. Jones*, however, has reinvigorated the physical trespass doctrine’s importance when determining whether there has been a “search” triggering constitutional protection.¹ Recognizing the unpredictability of the reasonable expectation of privacy doctrine and that doctrine’s bias against the urban poor, many scholars hope that the *Jones* opinion may ameliorate the class divide that has developed in Fourth Amendment jurisprudence.

This Article argues that while *Jones* has reiterated that a physical trespass may trigger Fourth Amendment protection, this holding alone will not result in any appreciable strengthening of the privacy rights of the urban poor. The manner in which urban, inner-city communities are over-policed and the aggressive law enforcement strategies employed in these areas, along with the current constitutional regime that has allowed these practices to flourish, are primarily responsible for the privacy inequities.²

In the United States, our political and economic structure has always allowed for a certain degree of stratification among different socio-economic groups. Privacy rights are changing for everyone.³ In our society, it is widely accepted that wealthier people are able to purchase lifestyles that may afford them more comforts than the poor.

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¹ *U.S. v. Jones*, 132 S. Ct. 945 (2012).

² See generally William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1272 (1999).

³ See, e.g., Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1444–45 (2012). There is certainly an argument to be made that privacy rights are changing for all – especially those who can afford electronics or devices that are more easily “searched” or susceptible to government surveillance. *Id.*

Such basic inequalities are a way of life. Society should, however, be less willing to accept the disturbing reality that income or wealth increasingly determines the amount of protection the Constitution guarantees. Nowhere is this “Constitutional inequality” more apparent than when analyzing the Supreme Court’s Fourth Amendment jurisprudence and its application in determining when the government has violated an individual’s privacy rights.

Scholars have long argued that the traditional “reasonable expectation of privacy” analysis used to determine whether the government has violated the Fourth Amendment tends to disadvantage groups on the lower end of the socioeconomic spectrum because their jobs and homes (or lack thereof) afford them less privacy than their wealthier counterparts.⁴ William Stuntz’s discussion of this dilemma in his 1999 essay entitled *Distribution of Fourth Amendment Privacy*, details how Fourth Amendment doctrine disadvantages the disadvantaged.⁵ Since Stuntz published his essay, modest improvements in police-community relations may have occurred across the country, but for inner-city urban communities, tensions between police and residents have become exacerbated.⁶ The debate

⁴ See *id.* at 1392–93.

⁵ Stuntz, *supra* note 2, at 1272–73.

⁶ In recent years, policies such as stop-and-frisk in New York City have sparked criticism with many, arguing that the policy is implemented in a racially discriminatory manner. See Steven Zeidman, *Whither the Criminal Court: Confronting Stops-and-Frisks*, 76 ALB. L. REV. 1187, 1195 (2013) (“[T]he NYPD brazenly uses *Terry* to defend, and perpetuate, vast numbers of stops-and-frisks and enormous racial disparities in who gets stopped.”). Several high-profile deaths of unarmed African American men have sparked mass protests nationwide; for example, on January 1, 2009, Oscar Grant was fatally shot by a Bay Area Transit officer in Oakland, CA. Michael McLaughlin, *Ex-Transit Officer Who Killed Oscar Grant, Unarmed Black Man, Wins Lawsuit*, HUFFINGTON POST (Aug. 2, 2014, 1:59 AM), http://www.huffingtonpost.com/2014/07/01/oscar-grant-lawsuit-bart-officer_n_5548719.html. In New York City, Eric Garner, an unarmed African-American man, died after being placed in a chokehold on July 17, 2014 after officers approached him for selling untaxed cigarettes. See James Queally & Alana Semuels, *Eric Garner’s Death in NYPD Chokehold Case Ruled a Homicide*, L.A. TIMES (Aug. 1, 2014, 9:24 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-garner-homicide-20140801-story.html>. Meanwhile, the now notorious killing of Michael Brown, an unarmed teen, in Ferguson, Missouri, has served to bring these inequities back into the mainstream consciousness. Wesley Lowery & Mark Berman, *Police Wound Man Amid Protests Over Michael Brown Killing*, WASH. POST, (Aug. 13, 2014) <http://www.washingtonpost.com/news/post-nation/wp/2014/08/13/report->

concerning privacy and poverty remains relevant, and Stuntz's proscriptions for shifting the Fourth Amendment from protecting privacy to other interests are perhaps more salient now than when he penned his essay.

From the beginning, it is essential to note why this Article limits its discussion to privacy issues as they relate to the "urban-dwelling poor," not just those who live in urban areas, and not just those who are poor. As I discuss below, the current standard for determining whether a search has occurred under the Fourth Amendment affords less privacy to those living in close quarters, hence the focus on urban area. In certain parts of the country, many impoverished residents may still live in single-family homes or in residential areas where police patrols and contact with police are less frequent than those within urban areas.⁷

Furthermore, it is axiomatic that neighborhoods experiencing concentrated urban poverty also experience policing in a markedly different manner than rural or suburban communities with more affluent residents.⁸ It is widely known, for example, that "[r]esidents of poor neighborhoods are more frequently subject to searches of their person in the form of overly aggressive stop and frisk tactics."⁹ The urban elite experience police protection in a different manner than those who live in "high crime areas" and generally have more privacy

police-wound-man-in-ferguson-protest-over-michael-brown-killing; see also Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. TIMES (Aug. 10, 2014), <http://www.nytimes.com/2014/08/11/us/police-say-mike-brown-was-killed-after-struggle-for-gun.html?r=0>.

⁷ William Stuntz clarifies this point by explaining that the urban poor, because of their class and location, are uniquely positioned to experience the inequities of the Fourth Amendment. Stuntz, *supra* note 2, at 1272 (explaining that while poverty is not exclusively an urban phenomenon, concentrated urban poverty creates its own set of issues – those who live in cities tend to live in apartment buildings and spend more time on the street, two situational contexts that afford them less privacy). He also notes that concentrated urban poverty has a racial dimension as well because poor blacks are more likely to live in cities, while poor whites are dispersed and tend not to live near large numbers of other poor whites. *Id.* at 1272–73.

⁸ See *id.* at 1271.

⁹ Amelia L. Diedrich, *Secure in Their Yards? Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment*, 39 HASTINGS CONST. L.Q. 297, 317 (2011).

within their urban dwellings, such as 24-hour doormen, passcodes and other features that enhance the privacy of these residents.¹⁰ The differences in the way law enforcement officers police and monitor the urban-dwelling poor is central to my thesis that the *Jones* opinion, with its emphasis on the physical trespass doctrine, will have little significance for the privacy rights of those living in these communities.

This Article will explain how current Fourth Amendment standards afford less protection to economically disadvantaged citizens (particularly, the urban-dwelling poor) when compared with more affluent citizens. I will also argue that this jurisprudence is largely unchanged by the Court's recent decision in *U.S. v. Jones*.

In *Jones*, the Court relies on the physical trespass doctrine in finding that the government violated a defendant's rights by attaching a Global Positioning System (GPS) tracking device on his car and tracking the vehicle for nearly a month.¹¹ In this way, the opinion in *Jones* does not reach the most pernicious government practices, including pre-textual traffic stops, which the Court has deemed Constitutional, and aggressive stop and frisk policies employed by many urban police departments. These tactics, which are employed almost exclusively in economically depressed, traditionally disadvantaged, and overwhelmingly minority areas, threaten the legitimacy of law enforcement in the precise areas that could benefit from increased cooperation between police and citizens to eradicate crime.

Finally, while this Article ultimately concludes that *Jones* is not the catalyst for the desperately needed doctrinal change, several extrajudicial solutions are suggested to ensure fair and just law enforcement strategies within the most vulnerable communities. Thus, the goal of this Article is not to enter the debate about whether *Jones*'

¹⁰ See also Robin M. Collin & Robert W. Collin, *Are the Poor Entitled to Privacy?*, 8 HARV. BLACKLETTER J. 181, 189–93 (1991) (asserting that “privacy is a commodity which is bought and sold,” leaving poor people to be “compelled to live in conditions where their economic condition affects their ability to satisfy their taste for privacy and may affect their ability to enforce privacy related rights against trespass and seclusion.”).

¹¹ 132 S. Ct. 945, 949 (2012).

emphasis on trespass will increase privacy protections for the urban poor, but rather to reiterate that, due to the manner in which these communities are policed, advocates should place more emphasis on extrajudicial means to improve the privacy rights of citizens.

Part I of this Article will briefly summarize the current Fourth Amendment jurisprudence, and explain how the current framework could be construed to afford less protection to impoverished urban dwellers. In particular, this part will focus on the traditional “reasonableness of expectation of privacy” analysis as articulated in *Katz v. United States*.¹² In this seminal opinion, the Court held that “the Fourth Amendment protects people, not places,” and found that the government’s attachment of an eavesdropping device to the outside of a phone booth was a search within the meaning of the Fourth Amendment.¹³ This decision represented a dramatic departure from the decision in *Olmstead v. U.S.*, in which the Court held that because no physical trespass had occurred, there was no search, and thus no Fourth Amendment violation.¹⁴ It was Justice Harlan’s concurrence in the *Katz* opinion, however, that would come to dominate the analysis that courts used to determine whether the Fourth Amendment had been implicated.¹⁵

Since the *Katz* opinion, the courts have relied on the principle that the Fourth Amendment is triggered only when the government violates a “reasonable expectation of privacy.”¹⁶ Simply stated, the *Katz* standard, as it has become known, means that if law enforcement agents can see, hear, or smell things that members of the public could see, hear, or smell, then there is no Fourth Amendment violation. It is easy to see the consequences that this doctrine may have on the most vulnerable in society. Stuntz perhaps best articulated this principle when he noted that, ironically, the Fourth Amendment protects those who already enjoy the most privacy.¹⁷

¹² 389 U.S. 347 (1967).

¹³ *Id.* at 351.

¹⁴ 277 U.S. 438, 466 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967).

¹⁵ *Katz*, 389 U.S. at 360.

¹⁶ *Id.* at 360–61.

¹⁷ Stuntz, *supra* note 2, at 1266.

Part II briefly discusses the *U.S. v. Jones* opinion and assesses whether *Jones* represents a doctrinal shift in Fourth Amendment jurisprudence that potentially could offer greater protections for the urban-dwelling poor. This section explains that while *Jones* has initiated an important conversation about privacy, the decision and its doctrinal underpinnings make it an inadequate tool to fully address the privacy inequity between the urban poor and other segments of society. Part II discusses how police tactics employed in neighborhoods experiencing concentrated poverty exacerbate the privacy inequities between these communities and other affluent communities, and therefore any solution, whether doctrinal or otherwise, must address these tactics in order to remedy the class divide in Fourth Amendment protections.

Part III explains the fundamental flaws that exist within current Fourth Amendment jurisprudence that allow these inequities in privacy distribution to occur, thus preventing the incremental improvement that *Jones* makes from adequately protecting society's most vulnerable citizens from unreasonable searches and seizures. The Court's seminal decisions in *Terry v. Ohio* and *Whren v. United States*, despite their articulation of minimal constitutional standards, continue to detrimentally impact the urban poor by allowing investigatory detentions in the absence of probable cause and allowing pre-textual stops.¹⁸ Given the nature of criminal investigations in urban areas and the tactics officers use to police these areas, the concepts in *Terry* and *Whren* have a more direct application in that context than does the *Jones* physical trespass doctrine. Unfortunately, the standards in those cases allow too much discretion and are prone to arbitrary discrimination against some of society's most disenfranchised members.¹⁹

Part IV argues that given the inadequacy of *Jones* to correct the privacy inequities that exist between the urban poor and other groups, these communities should turn to legislative policy solutions rather than relying upon Fourth Amendment jurisprudence. Community members must retain control of the criminal justice priorities in their

¹⁸ See Zeidman, *supra* note 6, at 1192 (explaining how *Terry* disproportionately affected men of color in highly policed neighborhoods); see also Stuntz, *supra* note 2, at 1271–72 (explaining the parameters of *Whren* during traffic stops).

¹⁹ Zeidman, *supra* note 6, at 1194; Stuntz, *supra* note 2, at 1293.

neighborhoods and should advocate for certain legislative changes to improve crime enforcement in these areas. This section concludes by suggesting a number of legislative solutions that might spur changes in the manner in which urban neighborhoods are policed and could therefore ameliorate some of the Fourth Amendment concerns most relevant to those areas.

I. KATZ: “THE REASONABLE EXPECTATION OF PRIVACY” STANDARD AND ITS IMPACT ON THE URBAN POOR

A. Katz v. United States

The Fourth Amendment states that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.”²⁰ Prior to 1967, the Court’s decision in *Olmstead* governed the law of search and seizure. *Olmstead* held that if the government trespassed upon one’s property, there was a “search” that triggered Fourth Amendment protection.²¹ Conversely, if there was no trespass, then there was no search, and thus no Fourth Amendment protection. Pursuant to this reasoning, the Court held in *Olmstead*, that there was no search when government agents intercepted petitioners’ conversations, because the wires they used to do so were “not part of [a] house or office, any more than are the highways along which they are stretched.”²² Based on this formulation, the Fourth Amendment only protected searches and seizures of people and tangible items. Congress quickly responded by creating legislation prohibiting the government conduct at issue in *Olmstead*.²³

²⁰ U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized.”).

²¹ *Olmstead*, 277 U.S. at 466.

²² *Id.* at 465–66.

²³ See Jennifer Arner, *Looking Forward by Looking Backward: United States v. Jones Predicts Fourth Amendment Property Rights Protections in E-Mail*, 24 GEO. MASON U. CIV. RTS. L.J. 349, 358 (2013) (“Responding to the *Katz* decision, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968,” which “prohibits the unauthorized use of surveillance techniques . . . by public and private actors, but permits law enforcement to use such techniques in controlled and well-defined circumstances.”).

Then, in 1967, the *Katz* Court explicitly overturned *Olmstead*, and held that the Fourth Amendment “protects people not places” and found that placing a listening device on top of a phone booth to intercept conversations that occurred within that phone booth constituted a search, despite the fact that there was no physical trespass.²⁴ In Justice Harlan’s concurrence, he famously proclaimed that the test for whether the Fourth Amendment was applicable required a two-part analysis to determine whether the person exhibited an actual subjective expectation of privacy and that this expectation was one that society would recognize as objectively reasonable.²⁵ It is in the concurrence that Harlan articulates the proposition that government activity that violates “the reasonable expectation of privacy” constitutes a search.²⁶

The *Katz* opinion now meant that there could be a “search” within the Fourth Amendment, even if no physical trespass occurred.

B. Critiquing Katz and its Impact on the Privacy Rights of the Urban Poor

Critics have characterized the *Katz* opinion as “poorly reasoned” for several reasons. Arnold Loewy explains that the notion that the “Fourth Amendment protects people not places” is troublesome because “the amount of protection a person receives, both prior to and after the *Katz* opinion, is “completely dependent upon ‘place.’”²⁷ For example, Loewy points out that a person’s home almost always requires probable cause and a warrant, while searches of other effects, such as a car, can be searched in the absence of a warrant or with less than probable cause.²⁸

In addition to setting forth an amorphous standard for determining whether the government activity in question implicates

²⁴ *Katz*, 389 U.S. at 353.

²⁵ *Id.* at 361.

²⁶ *Id.* at 361–62.

²⁷ Arnold H. Loewy, *United States v. Jones: Return to Trespass- Good News or Bad*, 82 *Miss. L.J.* 879, 880 (2013).

²⁸ *Id.* (citing *Colorado v. Bertine*, 479 U.S. 367 (1987) (upholding a warrantless inventory search of a vehicle as reasonable under the Fourth Amendment)).

the Fourth Amendment, critics have expressed concerns that the “reasonable expectation of privacy” standard, could detrimentally impact the rights of poor or economically disadvantaged groups.²⁹ The argument that the reasonable expectation of privacy standard detrimentally impacts the poor stems from the current jurisprudence and the primacy it affords the home under the Fourth Amendment. In recent years, prior to *Jones*, the Court had reiterated the special prominence the home receives under the Fourth Amendment.³⁰ The home enjoys the greatest constitutional protection because government surveillance is not constitutionally authorized without a judicially approved warrant or an exception to the warrant requirement.³¹

The curtilage, or area outside the home which is associated with intimate home-like activities, also enjoys constitutional

²⁹ Gilman, *supra* note 3, at 1392–93 (asserting that “people who live in crowded, urban neighborhoods and who cannot afford ‘a freestanding home, fences, [and] lawns,’ have a lowered expectation of privacy and are thus more likely to suffer warrantless searches by government agents” (quoting Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 401–05 (2003))). See also Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 155 (2013) (purporting that “while wealthy persons are able to protect their privacy with ‘the aid of electric gates, tall fences, security booths, remote cameras, motions sensors and roving patrols,’ . . . those who are not able to afford such protections will be subject to police searches on their property” (citing *United States v. Pineda-Moreno*, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, J., dissenting))).

³⁰ The primacy of the home can be illustrated by examining two similar cases: in *U.S. v. Knotts*, which involved the use of a device by police to electronically track the movements of a suspect along public roads, the Court held that monitoring the suspect’s movements did not constitute a search because these movements occurred in public, and therefore did not implicate the Fourth Amendment. 460 U.S. 276, 281–82 (1983). However, in *U.S. v. Karo*, which involved government tracking of the movement of chemical drums, the Court held that while tracking drums on the street did not constitute a search, the Fourth Amendment was implicated once the drums were tracked inside the house. 468 U.S. 705, 715–16 (1984).

³¹ See *Kentucky v. King*, 131 S. Ct. 1849, 1865 (2011) (Ginsburg, J., dissenting). The dissent argued that “searches and seizures inside a home without a warrant are presumptively unreasonable.” *Id.* (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). This is because “home intrusions . . . are indeed ‘the chief evil against which . . . the Fourth Amendment is directed.’” *Id.* (quoting *Payton v. New York*, 445 U.S. 573, 585, 1379 (1980)). See also Stuntz, *supra* note 2, at 1269 (noting that “Fourth Amendment law regulates house searches more than anything else” and that “homes are almost the only place where the warrant requirement remains meaningful.”).

protection.³² Recently, in *Florida v. Jardines*, the Court held that conducting an investigation on a homeowner's front porch by use of a drug-sniffing dog constitutes a "search" within the meaning of the Fourth Amendment.³³ The Court reasoned that a man's right to be free from unreasonable government intrusion in his own home is enumerated and at the very core of the Fourth Amendment.³⁴ The front porch of a home has long been held to be within the "curtilage" of that home and therefore, equally safe from the government's physical intrusion upon "persons, houses, papers, or effects."³⁵ The curtilage, or area around a home, is "intimately linked to the home, both physically and psychologically," and lends itself to the most heightened privacy expectations.³⁶ As per our daily experience, the "activity of home life extends" to the front porch, making it the "classic exemplar" of curtilage.³⁷ Because the officers' investigation took place on Jardines' front porch, the constitutionally protected curtilage of his home, the investigation constituted a "search."³⁸ This search would only be constitutional if the officers' conduct during the search was a licensed physical intrusion.³⁹

Thus, it is clear that activity that takes place within a home is subject to less scrutiny than activity that takes place outside the confines of this constitutionally sacred space. Logically, at one end of the spectrum, those who are homeless are forced to expose much of their behavior and belonging in public spaces in which they do not have a reasonable expectation of privacy, and thus no Fourth Amendment protection.⁴⁰ As one scholar noted, the "homeless are essentially unprotected by government surveillance" under the "reasonable expectation of privacy" standard because of the following

³² *Florida v. Jardines*, 133 S. Ct. 1409, 1414–15 (2013).

³³ *Id.* at 1415.

³⁴ *Id.* at 1414.

³⁵ *Id.* (quoting *United States v. Jones*, 132 S. Ct. 945, 950–51, n.3 (2012)).

³⁶ *Id.* at 1415 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).

³⁷ *Id.* (quoting *Oliver v. United States*, 466 U.S. 170, 182, n.12 (1984)).

³⁸ *Id.*

³⁹ *Id.* at 1415–16.

⁴⁰ See David Reinbach, *The Home Not the Homeless: What the Fourth Amendment has Historically Protected and Where the Law is Going After Jones*, 47 U.S.F.L. REV. 377, 381–85 (2012) (arguing that the reasonable expectation of privacy standard does not adequately protect the homeless because of the prominence the home is given under Fourth Amendment jurisprudence).

four reasons: their activities are, by necessity, conducted in public; they typically make their “home” on property that they are not entitled to be on; their belongings and activities are on “open fields” which common passersby can easily see; and they are almost perpetually voluntarily exposing themselves to the public.⁴¹

Yet, one need not be homeless, in order to experience diminished privacy under this view of the Fourth Amendment, as even the working poor experience obvious differentials in privacy.⁴² Low-wage workers and the poor generally enjoy reduced privacy expectations because of the structures where they reside or their requirement.⁴³ Those living in crowded apartment complexes in close proximity to others experience less privacy than others in single-family detached houses. Similarly, those living in poorly constructed structures that do not adequately conceal noises or activities within the home also experience a diminished expectation of privacy that could ultimately foreclose Fourth Amendment protection. For example, several scholars have noted that this conception of the Fourth Amendment protects the privacy of only those wealthy enough to afford certain tangible privacy enhancements such as a secluded neighborhood, a spacious yard, fences, or soundproof walls, for example.⁴⁴ Because “privacy follows space” those who have the ability to purchase more space, have more privacy.⁴⁵

Christopher Slobogin has argued that a number of Supreme Court cases “seriously undermine the Fourth Amendment as applied to

⁴¹ *Id.* at 377–88.

⁴² See generally Gilman, *supra* note 3, at 1390 (explaining data collection and various privacy invasions of the poor in the realm of low-wage workplace and welfare-receipt).

⁴³ *Id.* at 1398–99 (detailing numerous ways in which low-wage workers and those on public assistance experience invasions of privacy such as having public benefits recipients “fingerprinted, and photographed, usually through biometric imaging.”).

⁴⁴ See Ronald J. Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WAS. L. REV. 529, 541–42 (1978) (explaining that the Fourth Amendment’s privacy protections exist primarily for “those wealthy enough to live exclusively in private places”); Slobogin, *supra* note 29, at 401 (noting that the Fourth Amendment protection varies according to whether one has access to “a freestanding home, fences, lawns, heavy curtains, and vision and sound-proof doors and walls”).

⁴⁵ Stuntz, *supra* note 2, at 1270.

poorer people.”⁴⁶ Slobogin catalogues a number of Supreme Court cases, including those discussing warrantless searches of the homes of welfare recipients, the Court’s “container jurisprudence” which has been interpreted to mean that any container outside a building may be search without a warrant, as well as cases involving Fourth Amendment seizures, can be construed to create a “poverty exception” to the Fourth Amendment.⁴⁷ Slobogin concludes that people who live in public spaces, and “people who have difficulty hiding or distancing their living space from casual observers (for instance those who live in tenements and other crowded areas) are much more likely to experience unregulated government intrusions.”⁴⁸

Furthermore, even though the home has always received elevated treatment under the Fourth Amendment, the *Katz* reasonable expectation of privacy standard allows low-income individuals to experience a reduced rate of privacy even *within* the sanctity of the home.⁴⁹ The poor are often required to divulge information to the state in order to obtain government assistance and in 2006, in *Sanchez v. San Diego*, the Court upheld a home visit against a Fourth Amendment challenge, stating that “a person’s relationship with the state can reduce that person’s expectation of privacy, even within the sanctity of the home.”⁵⁰

Outside the context of the home, there are other areas in which the poor have unequal access to privacy rights. One such instance is the transportation context. In urban settings, many people walk from place to place and the Fourth Amendment is not generous to pedestrians.⁵¹ In the street, law enforcement officers need not have any justification to approach citizens and ask them questions, and this conduct falls outside the purview of the Fourth Amendment as long as the encounter remains consensual.⁵² While cars are afforded less

⁴⁶ Slobogin, *supra* note 29, at 392.

⁴⁷ *See generally id.* at 400–406.

⁴⁸ *Id.* at 401.

⁴⁹ *Katz v. United States*, 389 U.S. 347, 361 (1967).

⁵⁰ *Sanchez v. San Diego*, 464 F.3d 916, 927 (9th Cir. 2006). *See also Wyman v. James*, 400 U.S. 309, 315–316 (1971).

⁵¹ Stuntz, *supra* note 2, at 1271.

⁵² *See, e.g., Florida v. Bostick*, 501 U.S. 429 (1991), 439–440 (finding that brief questioning on a bus does not constitute a seizure); *California v. Hodari D.*, 499 U.S. 621, 629 (1991) (holding that a police chase of a fleeing suspect was not a seizure

privacy than homes, many low-income people, particularly those in urban settings, rely on public transportation such as buses and subways, and the Fourth Amendment treats passengers in these public modes of transportation much like pedestrians.⁵³

As Stuntz so eloquently noted, “Fourth Amendment law makes wealthier suspects better off than they otherwise would be and may make poorer suspects worse off.”⁵⁴ Stuntz goes on to explain that while the impact of the lack of privacy protections for the poor and for African-Americans is unknowable, it perhaps “contributed to the creation of a prison population increasingly dominated by blacks punished for crack offenses.”⁵⁵ The prominence of the reasonable expectation of privacy standard combined with the reality that many urban poor live in areas that subject them to a reduced level of privacy has prompted much debate about how to ameliorate the class divide that has developed over the last several decades.⁵⁶ What if anything can be done to solve this poverty/privacy dilemma?

II. *U.S. v. JONES* AND ITS (NON) IMPACT ON THE PRIVACY RIGHTS OF THE URBAN POOR

A. *The Narrow Application of the Physical Trespass Doctrine Will Not Augment the Privacy Rights of the Urban Poor*

The Supreme Court’s decision in *Jones* represents a significant shift in defining what constitutes a search under the Fourth

within the Fourth Amendment); *INS v. Delgado*, 466 U.S. 210, 216 (1984) (finding that brief questioning in the absence of physical restraint does not constitute a seizure).

⁵³ Stuntz, *supra* note 2, at 1271.

⁵⁴ *Id.* at 1266.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1289 (suggesting the “Fourth Amendment protects the wrong people because it protects the wrong interest” and noting that less constitutional protection for everyone, including middle class homeowners could correct the inequity. Stuntz intimates that shifting from privacy to freedom from police violence or discrimination would be more effective.). See also Carol S. Steiker, *How Much Justice Can You Afford – A Response to Stuntz*, 67 GEO. WASH. L. REV. 1290, 1294 (1999) (arguing that doctrinal changes such as requiring officers to inform suspects that they have a right to refuse consent searches and changing the Fourth Amendment to offer a remedy for pretextual stops based on race or ethnicity would lead to greater equality).

Amendment, and this analysis seeks to explore what, if any, impact this shift will have on the urban poor. In *Jones*, the government suspected that the defendant was trafficking in drugs.⁵⁷ While the defendant's car was parked in a public parking lot, government agents attached a GPS tracking device on the defendant's vehicle and tracked the vehicle's movements.⁵⁸ Jones alleged that placing the device on his car and tracking the car's movements violated his Fourth Amendment right against illegal search.⁵⁹ The *Jones* Court announced a unanimous decision determining that attaching the device indeed constituted a search.⁶⁰ Writing for the majority, Justice Scalia focused on the physical trespass of placing the device on Jones' car and noted that, "[b]y attaching the device to the Jeep, [the] officer encroached on a protected area."⁶¹

So what is the import of the *Jones* decision and how does it affect privacy rights? It makes clear that the *Katz* reasonable expectation of privacy standard did not abandon the physical trespass doctrine, but instead added to it.⁶² In the *Jones* opinion, Justice Scalia clearly stated "the *Katz* reasonable-expectation of privacy test has been added to, not substituted for, the common-law trespassory test."⁶³ The majority opinion in *Jones* elucidates the independent nature of the trespass test and the reasonable expectation of privacy test.⁶⁴ The Court will first ask whether there was a physical trespass to property.⁶⁵ If so, then a search has occurred.⁶⁶ If there has been no physical trespass, the inquiry then moves to whether the individual had a reasonable expectation of privacy in the property.⁶⁷

⁵⁷ *Jones*, 132 S. Ct. at 948.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 949.

⁶¹ *Id.* at 952. *But see id.* at 955 (Sotomayor, J., concurring) (discussing the reasonable expectation of privacy standard which "augmented, but did not displace or diminish, the common law trespassory test that preceded it"); *id.* (Alito, J., concurring) (arguing the property-based analysis is problematic and that the reasonable expectations of privacy standard is the sole determining factor as to whether government actions implicate the Fourth Amendment).

⁶² *Id.* at 952.

⁶³ *Id.*

⁶⁴ *Id.* at 950–53.

⁶⁵ *Id.* at 955.

⁶⁶ *Id.*

⁶⁷ *Id.*

Although the *Jones* opinion does seem to open the door, albeit it slightly, for more privacy protections for impoverished individuals including the homeless or urban poor, the opinion is hardly a revolutionary tool for protecting the privacy rights of the urban poor. In fact, as one scholar noted, “*Jones* is unlikely to have significant precedential value” because the majority opinion only reiterates that physical trespass implicates the Fourth Amendment, which is not a novel concept.⁶⁸

Since *Jones* relies on the physical trespass theory, it is only applicable in a narrow set of circumstances. Ironically, the government is not necessarily required to physically trespass on one’s property, as they did in *Jones*, to monitor them using GPS or other electronic modes of surveillance. As Justice Sotomayor explained in her concurring opinion in *Jones*, “in cases of electronic or other novel modes of surveillance that do not depend upon physical invasion of property,” the *Katz* analysis is still determinative.⁶⁹ Furthermore, even though the reinvigoration of the physical trespass doctrine may, in the view of some, have the overall effect of strengthening Fourth Amendment protections, this can hardly be true for the urban poor. This is primarily so because of the ways in which urban street crimes are investigated do not rely on physical trespass in the first place, and searches of an individual’s person can be justified on other grounds.⁷⁰

B. Aggressive Policing Tactics Disproportionately Impact the Privacy Rights of the Urban Poor

The *Jones* opinion very well may represent an augmentation of privacy rights in general. At the very least, the decision does remind us that there are indeed two separate inquiries to determine whether the government has invaded these rights (has there been a trespass, or alternatively, has there been a violation of a reasonable expectation of

⁶⁸ Thomas K. Clancy, *United States v. Jones: Fourth Amendment Applicability in the 21st Century*, 10 OHIO ST. J. CRIM. L. 303, 303 (2012).

⁶⁹ *Jones*, 132 S. Ct. at 955.

⁷⁰ Stuntz, *supra* note 2, at 1271 (“Police can approach anyone and ask questions with no justification at all; as long as the encounter is no more coercive than any police-citizen encounter must be....”).

privacy).⁷¹ Nevertheless, *Jones* is not the antidote for the serious affliction that the lack of Fourth Amendment protection visits upon the urban poor. The aggressive and sometimes violent manner in which law enforcement officers investigate crimes in these communities represents the largest barrier to Fourth Amendment protection. The physical trespass at issue in *Jones* (a GPS device unknowingly placed on his car) pales in comparison to the face-to-face law enforcement interactions that many residents of poor, urban neighborhoods face on a daily basis.

One recent example of a law-enforcement strategy that is employed almost exclusively against the urban poor or minorities is “Stop and Frisk.” This practice, as it has been implemented in New York City, has long been controversial. Pursuant to this policy, officers stop individuals on the street and search them for weapons. There is a wealth of statistical information to support the notion that the New York City Police Department has implemented Stop and Frisk in a racially discriminatory manner.⁷²

In *Floyd v. United States*, plaintiffs filed a class action suit arguing that stop and frisk is implemented in an unconstitutional manner.⁷³ According to findings in the case, between January 2004 and June 2012, the NYPD made 4.4 million stops. Over 80% of those stopped were African-American or Latino.⁷⁴ The Court also found that the racial composition of a precinct or census tract predicts the stop rate *above and beyond* the crime rate.⁷⁵

From 2004 through 2009, when any law enforcement action was taken following a stop, African-Americans were 30% more likely to be arrested (as opposed to receiving a summons) than Whites, for the same suspected crime. From 2004 through 2009, African-Americans who were stopped were about 14% more likely – and Latinos 9% more likely – than Whites to be subjected to the use of

⁷¹ *Jones*, 132 S. Ct. at 955.

⁷² See Matthew Bloch, Ford Fessenden & Janet Roberts, *Stop, Question and Frisk in New York Neighborhoods*, N.Y. TIMES (July 11, 2010), http://www.nytimes.com/interactive/2010/07/11/nyregion/20100711-stop-and-frisk.html?ref=nyregion&_r=0.

⁷³ *Floyd v. New York*, 283 F.R.D. 153, 159 (S.D.N.Y. 2012).

⁷⁴ *Id.*

⁷⁵ *Id.* at 168.

force. In 2009 alone, African-Americans and Latinos represented 84% of the people stopped, although African-Americans only comprise 26% of the population of New York City and Latinos only 27%.⁷⁶ The New York Civil Liberties Union also reports similar racial disparities. In 2012, the New York Civil Liberties Union reported that of those stopped, 55% were African-American, 32% were Latino, and 10% were White.⁷⁷ Grassroots organizations and class action lawsuits have brought increased attention to the practice, and recently elected Mayor Bill de Blasio has vowed to end the practice.⁷⁸

Several independent commissions examining police behavior have found that an “unnecessarily aggressive” policing style exists within many police departments, which unsurprisingly lead to tension and sometimes to violent contacts between police and citizens.⁷⁹

The Mollen Commission’s investigation of the New York City Police Department in the early 1990s, revealed that while most officers disapproved of police brutality, many officers willingly tolerated violence toward suspects.⁸⁰ In the late 1990s, New York City’s quality of life policing initiatives, which encouraged custodial arrests for misdemeanor offenses, resulted in increased citizen complaints against the police.⁸¹

⁷⁶ *NYPD Stop-and-Frisk Statistics*, CTR. FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/files/CCR-Stop-and-Frisk-Fact-Sheet-2010.pdf> (last visited Oct. 7, 2014).

⁷⁷ *Stop-and-Frisk Data*, N.Y. CIVIL LIBERTIES UNION, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited Sept. 25, 2014).

⁷⁸ See *Stop-And-Frisk-Appeal Dropped By Mayor Bill de Blasio*, HUFFINGTON POST (Jan. 30, 2014), http://www.huffingtonpost.com/2014/01/30/stop-and-frisk-appeal-dropped-mayor-de-blasio_n_4695930.html (discussing lawsuits regarding New York’s stop and frisk policy and explaining that de Blasio “made settling the stop-and-frisk issue a major component of his campaign”).

⁷⁹ Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 495 (2004); See also *id.* at 495–501 (detailing findings of the Christopher Commission, the Kolts Commission, and the Mollen Commission, all of which indicated that police brutality is a systemic problem).

⁸⁰ CITY OF N.Y. COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T, COMMISSION REPORT 49 (1994) (“As important as the possible extent of brutality, is the extent of brutality tolerance we found throughout the department.”).

⁸¹ Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 378 (1998) (noting the sharp

The Christopher Commission, which examined the policies and practices of the Los Angeles Police Department (LAPD) in the wake of the Rodney King beating, reported that the LAPD rewarded “hard-nosed” tactics, and focused on crime control rather than crime prevention.⁸² The LAPD also implemented a flawed evaluation system that evaluated officers based on used statistical measures including the number of arrests made and the number of calls to which they responded.⁸³ Simultaneously, the LAPD trained officers to engage in aggressive crime prevention techniques that resulted in a high rate of street encounters.⁸⁴ The Christopher Commission concluded that the combination of these strategies resulted in a “siege (‘we/they’) mentality” between officers and citizens.⁸⁵

These aggressive tactics are typically reserved for traditionally disadvantaged or marginalized members of society, and there is an overwhelming consensus that minorities experience a greater rate of police brutality and misconduct.⁸⁶ As I. Bennett Capers explains,

increase in citizen complaints against the police upon the initiation of order maintenance policing).

⁸² INDEP. COMM’N ON THE L.A. POLICE DEP’T, REPORT OF THE INDEPENDENT COMMISSION OF THE LOS ANGELES POLICE DEPARTMENT XIV (1991) (“Witness after witness testified to unnecessarily aggressive confrontations between LAPD officers and citizens, particularly members of minority communities.”).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *See, e.g.*, CHARLES J. OGLETREE, JR. ET AL., CRIMINAL JUSTICE INST. AT HARVARD LAW SCHOOL FOR THE NAT’L ASS’N FOR THE ADVANCEMENT OF COLORED PEOPLE, BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES 293 (1995) (explaining how racism contributes to the way in which police “perform their law enforcement functions”); RONALD WEITZER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA: CONFLICT AND REFORM 71 (2006); HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 2 (1998) [hereinafter *Shielded from Justice*], available at <http://www.hrw.org/reports/pdfs/u/us/uspol986.pdf> (“Race continues to play a central role in police brutality in the United States.”); Craig B. Futterman et al., *The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department’s Broken System*, 1 DEPAUL J. FOR SOC. JUST. 251, 267–68, 289–91 (2008) (detailing particular events and patterns of police brutality and misconduct and how it disproportionately impacts minorities); Clifford L. Broman et al., *The Experience and Consequences of Perceived Racial Discrimination: A Study of African Americans*, 26 J. BLACK PSYCHOL. 165, 175–76 (2000) (detailing the impact of perceived discrimination on African Americans as a people); Tracey Maclin, *Race and the Fourth Amendment*,

“police are more likely to engage in force when dealing with members of outgroups (those who are poor or minority or gender non-conforming) than when dealing with members of ingroups.”⁸⁷ For example, in a 1998 report, Human Rights Watch examined police departments in 14 major United States cities and found that “race continues to play a central role in police brutality in the United States.”⁸⁸ In a 1996 Bureau of Justice Statistics report, data showed that while African-American and Hispanics represented only 20% of the population, they made up half of the documented cases of police brutality across the country.⁸⁹ Similarly, a 1996 Amnesty International Report reviewing police misconduct in New York City found that nearly all of the victims who died while in police custody were racial minorities.⁹⁰

C. The Privacy/Poverty Dilemma Causes Tangible and Intangible Harms to Affected Communities

Racial minorities, such as African-Americans and Latinos, are disproportionately represented in the poor urban communities that are the focus of this Article.⁹¹ The racial and class distinctions are

51 VAND. L. REV. 333, 388–89 (1998) (explaining that police brutality and misconduct remains a problem for minorities).

⁸⁷ I. Bennet Capers, *Crime, Surveillance, and Communities*, 40 FORDHAM URB. L.J. 959, 982 (2013); *see also, id.* at 982, n.135 (statistical data shows “significant disparities in the use of deadly force based on the race of the shooting victim/subject and that virtually all of this disparity occurs as a result of the Memphis policy that allows officers to exercise their discretion to shoot fleeing property crime suspects.” (citing Brief for Appellee–Respondent at 23–26, *Tennessee v. Garner*, 471 U.S. 1 (1985) (Nos. 83–1035, 83–1070))).

⁸⁸ SHIELDED FROM JUSTICE, *supra* note 86.

⁸⁹ Roberto Suro, *Study Says Cops Used Force v. 500,000*, CHICAGO SUN-TIMES, Nov. 24, 1997, at 21.

⁹⁰ AMNESTY INT’L, UNITED STATES OF AMERICA: POLICE BRUTALITY AND EXCESSIVE FORCE IN THE NEW YORK CITY POLICE DEPARTMENT 11 (1996), available at <http://www.amnesty.org/en/library/asset/AMR51/036/1996/en/7b6bf842-eb05-11dd-aad1-ed57e7e5470b/amr510361996en.pdf>.

⁹¹ *See* Jane W. Gibson-Carpenter & James E. Carpenter, *Race, Poverty, and Justice: Looking Where the Streetlight Shines*, 3 KAN. J.L. & PUB. POL’Y 99, 99 (1994).

inherently intertwined. Thus, it is not surprising that racial minorities tend to distrust law enforcement officials.⁹²

This unfair targeting and mistreatment of the urban poor and minorities and the perceptions of bias reduce the legitimacy of law enforcement in these communities. Reduced legitimacy in these communities causes other harms, or at least prevents the community from experiencing the benefits of legitimacy.⁹³ It is well established that individuals are more likely to comply with the law and cooperate in police investigations if they believe that their law enforcement institutions are legitimate.⁹⁴

D. The Harms of a Failing Fourth Amendment

There is no doubt that as a society, we are all subject to government surveillance. When walking through any major city street in the United States, street cameras capture the likenesses of millions of residents, and many jurisdictions have the capability to aggregate data from multiple locations and to share information among various agencies.⁹⁵ Many metropolitan areas have thousands of cameras that allow police to monitor citizen activities on public streets.⁹⁶ Such surveillance has been deemed constitutional under the *Katz* reasonable expectation of privacy standard and would undoubtedly meet the

⁹² See I. Bennet Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 877–78 (2008) (explaining that people in poor and minority communities “distrust the police and question the fairness of the criminal justice system”).

⁹³ See generally *id.* at 837 (detailing a study done by scholar Tom Tyler which showed that the perceived legitimacy of law enforcement influences compliance). See also Tom R. Tyler & Jeffery Fagan, *Legitimacy and Cooperation: Why do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 267 (2008) (“Cooperation increases not only when the public views the police as effective in controlling crime and maintaining social order, but also when citizens see the police as legitimate authorities who are entitled to be obeyed.”).

⁹⁴ See generally *id.*

⁹⁵ See Capers, *supra* note 87, at 960–63 (describing the use of surveillance systems in major metropolitan areas and even small towns).

⁹⁶ For example, in 2006 New York had almost 4,200 public and private surveillance cameras, and in 2009, Washington D.C. was estimated to have more than 5,200 cameras owned by city agencies. *Id.* at 961–62.

physical trespass standard recently reinvigorated in the *Jones* decision.⁹⁷

Despite the fact that many Americans are subject to surveillance and suffer some unknown deprivations of privacy, it is also true however, that “police undoubtedly are fixated on the urban poor.”⁹⁸ Ironically, however, police may be reserving less intrusive forms of surveillance, such as cameras, for more affluent neighborhoods while reserving more intrusive interactions, such as stop and frisk initiatives, for the urban poor. For example, in New York, cameras “appear least where they are desired most: in some of the city’s most crime-ridden neighborhoods, among residents of public housing who have been experiencing mounting violence and all of its attendant psychological disruption.”⁹⁹

There is a wealth of research and commentary devoted to determining *why* police officers reserve aggressive tactics for poor communities. Scholars have posited that perhaps the framers of the Constitution were concerned only with protecting middle-class values (although it is difficult to imagine that they could have envisioned the structural and cultural landscape that contributes to the class divide in privacy law).¹⁰⁰

One possible explanation for the inequity is that it is easier and less costly for police to investigate low-level drug crimes in inner-city neighborhoods than to investigate these offenses in other markets.¹⁰¹ Others offer the more disconcerting view that “a court interested in crime control might want Fourth Amendment rules that make it relatively easy to search and seize the class of people most likely to commit crime – the poor.”¹⁰² Of course, the premise that the poor

⁹⁷ See *United States v. Knotts*, 460 U.S. 276, 281 (1983) (“A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”); see also, *Jones*, 132 S. Ct. 945; *Katz*, 389 U.S. 347.

⁹⁸ Slobogin, *supra* note 29, at 408.

⁹⁹ Capers, *supra* note 87, at 989, n.178 (quoting Gina Bellafante, *The Watchmen’s Misdirected Gaze*, N.Y. TIMES, Aug. 19, 2012, at B1).

¹⁰⁰ Slobogin, *supra* note 29, at 406.

¹⁰¹ See Stuntz, *supra* note 2, at 1282 (noting that it is “cheap” for law enforcement to police street markets).

¹⁰² Slobogin, *supra* note 29, at 406.

commit more crime is spurious, given that the poor are disproportionately targeted by law enforcement.¹⁰³ Overt racism and implicit stereotyping on the part of police officers, exacerbated by the lack of political power poor urban residents wield, also presents a plausible explanation for the continued use of aggressive law enforcement strategies.¹⁰⁴ Aggressive tactics such as raids, sweeps and stop and frisks frequently occur in areas already experiencing concentrated poverty.¹⁰⁵

In addition to determining the causes of the divide, it is also important to explore the resulting harms of this class divide regarding privacy rights. Generally, in the privacy context, if the government infringes upon one's privacy there may be a serious question as to the relative harm such an infringement imposes.¹⁰⁶ For many Americans, the additional surveillance or advances in technology, while arguably diminishing their privacy, may have no appreciable effect on their daily lives. For example, it is difficult to discern whether and to what extent one experiences harm if the government tracks the whereabouts

¹⁰³ See Gibson-Carpenter & Carpenter, *supra* note 91, at 100–01 (arguing that the common notion that the poor commit disproportionately more crime in the United States is flawed because of the community's and the police's "focus on street crimes [which] hides suite crimes and diverts our attention from such laws which protect the harms, many of which are indeed violent, committed by those with wealth and power").

¹⁰⁴ See Liyah Kaprice Brown, *Officer or Overseer?: Why Police Desegregation Fails as an Adequate Solution to Racist, Oppressive, and Violent Policing in Black Communities*, 29 N.Y.U. REV. L. & SOC. CHANGE 757, 761–62 (2005) ("Police racism and misconduct frequently are attributed to the over-enforcement of laws in Black communities," which "gives rise to an adversarial model of policing in which racial profiling, pretextual stops, unlawful searches and arrests, botched raids, excessive force, murder, and corruption abound."); see also Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 835–36 (1999) (arguing that aggressive policing tactics, such as order-maintenance policing, "reinforces stereotypes that portray Blacks as lawless and legitimate police harassment in Black communities").

¹⁰⁵ Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 56–57 (2003) (arguing that unfair treatment in the criminal justice system, like overly-aggressive policing tactics, falls "largely on the poor, the minorities, and the disenfranchised, ensuring continued public support for crime control measures").

¹⁰⁶ See Laurent Sacharoff, *The Relational Nature of Privacy*, 16 LEWIS & CLARK L. REV. 1249, 1275–80 (2012) (discussing the "harms" associated with governmental intrusion of privacy).

of their vehicle but never uses the information.¹⁰⁷ The harms associated with reduced privacy rights for residents of inner-city impoverished areas are readily discernible because they are implemented in a more intrusive manner.¹⁰⁸ Furthermore, when bias is infused into this inquiry, the harm of that bias itself has its own implications.¹⁰⁹

This loss of trust and refusal to cooperate with police has dangerous implications for communities, especially those communities that could benefit from partnerships between citizens and police to prevent and investigate crime.¹¹⁰ As Bret Asbury notes,

“[c]itizens are more disposed to cooperate with police when institutions enjoy a high level of legitimacy. The perceived legitimacy of an institution, it has been shown, depends largely on whether citizens perceive that they are receiving fair and respectful treatment by police and other decision makers. In effect, citizens reciprocate respectful treatment with cooperation and

¹⁰⁷ See Steve Vladeck, *The Clapper Fix: Congress and Standing to Challenge Secret Surveillance*, LAWFARE (June 20, 2013, 12:48 PM), <http://www.lawfareblog.com/2013/06/the-clapper-fix-congress-and-standing-to-challenge-secret-surveillance/> (discussing the inherent issues in the *Clapper v. Amnesty International* holding, that plaintiffs lack standing if they cannot “prove that interception of their communications under section 702 [is] ‘certainly impending,’ and therefore [can] not satisfy the ‘injury-in-fact’ prong of the Supreme Court’s test for Article III standing”); see also Liz Clark Rinehart, *Clapper v. Amnesty International USA: Allowing the FISA Amendments Act of 2008 to Turn “Incidentally” Into “Certainly,”* 73 MD. L. REV. 1018, 1039 (2014) (arguing the inherent “catch-22” in the Supreme Court’s standing requirement for plaintiffs, in that plaintiffs “must show they have been or will certainly be the targets of surveillance,” but “will be unable to show the requisite actual injury since they will be unable [to] show specific knowledge of the surveillance...if they are not permitted discovery,” due to the government’s ability to invoke the state secrets doctrine).

¹⁰⁸ Stuntz, *supra* note 2, at 1285 (“Street stops and sweeps can be very intrusive indeed, but the *privacy* intrusion is not as great as in house searches....”).

¹⁰⁹ *Id.* (discussing the “racial tilt” associated with Fourth Amendment privacy rights).

¹¹⁰ See Capers, *supra* note 92, at 842 (explaining that perceived illegitimacy of law enforcement leads to a lack of compliance and increased crime).

obedience and disrespectful treatment with
resistance....”¹¹¹

Furthermore, “[c]orruption and brutality undermine the legitimacy of governmental authority and reduce the willingness of citizens to comply with the law. Left unchecked, police misconduct often triggers racial tension because “[p]oor people of color bear the brunt of police abuse.”¹¹² The failure to create these partnerships because of violent encounters ironically may result in perpetuating more crime within these vulnerable communities.

Whatever the cause of this fixation on the urban poor or the tangible or intangible harms that result from this fixation, it is inconsistent with our notions of liberty and democracy that a person’s economic status should determine the extent of her constitutional rights.

III. THE URBAN POOR AND THE ELUSIVE PROTECTIONS OF THE FOURTH AMENDMENT

Communities are increasingly becoming distrustful of law-enforcement and civil unrest in poor urban neighborhoods often stems from negative interactions between citizens and police.¹¹³ Thus, the tangible and intangible harms resulting from the class divide in privacy protections under the Fourth Amendment require immediate solutions.

Unfortunately, the Fourth Amendment standards articulated by the Supreme Court have allowed these aggressive policing tactics to go unchecked, and therefore may be partially to blame for the growing sense of discontent in many of these communities. In addition to the fact that the *Katz* analysis is still likely to apply to activities of the

¹¹¹ Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513, 1525 (2002).

¹¹² Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How it Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 2 (2009); see also Richard R. Johnson, *Citizen Expectations of Police Traffic Stop Behavior*, 27 POLICING: AN INT’L J. OF POLICE STRATEGIES & MGMT. 487, 488 (2004) (noting that studies have shown that people are more likely to “defer to the law and refrain from illegal behavior” when police treat them fairly).

¹¹³ See Capers, *supra* note 92, at 877–78.

urban poor, embedded within Fourth Amendment jurisprudence are other fundamental impediments to robust Fourth Amendment rights for this frequently marginalized group.

A. Lax Constitutional Standards Permit Reduced Fourth Amendment Protections

First, *Terry v. Ohio*, one of the most important criminal procedure cases of the twentieth century, allowed police officers to stop suspects on less than probable cause.¹¹⁴ The Court's opinion in *Terry* allowed officers to perform a pat-down of a suspect's outer clothing if the officer had a reasonable articulable suspicion that the suspect was armed.¹¹⁵ This was the first time the Court had approved a search of a person based on a standard less than probable cause.¹¹⁶ The Court mused that if the standard for such searches remained too high, officers would nevertheless conduct such searches, resulting in the dilution of the probable cause standard.¹¹⁷

Second, the Court's current jurisprudence offers no protection against pre-textual stop.¹¹⁸ The Court's decision in *Whren* approved pre-textual stops, which allows law enforcement officers to stop individuals if they have reasonable suspicion or probable cause for one violation, even if the underlying reason for a stop was based on a suspected violation for which the officer did not have reasonable articulable suspicion to justify a stop.¹¹⁹ Experts have fiercely criticized the *Whren* decision as an open invitation for police officers to abuse their discretion and stop citizens in an arbitrary and discriminatory fashion.¹²⁰

¹¹⁴ 392 U.S. 1, 27 (1968).

¹¹⁵ *Id.* at 26–27.

¹¹⁶ *Id.* at 21 (setting forth the standard of reasonable suspicion where an “officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion”).

¹¹⁷ *Id.* at 14 (explaining that the exclusionary rule “is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal”).

¹¹⁸ *Whren*, 517 U.S. at 812–13.

¹¹⁹ *Id.*

¹²⁰ Jennifer R. Walters, *United States v. Whren: The U.S. Supreme Court Determines the Constitutional Reasonableness of Pretextual Traffic Stops and Tips the Scales in Favor of Law Enforcement*, 19 T. JEFFERSON L. REV. 247, 275–76 (1997) (“police

Lax constitutional standards have allowed over-policing and aggressive police tactics to go unchecked.¹²¹ Perhaps these practices would have failed to flourish if stricter constitutional standards prohibited them. Heightened constitutional standards, such as prohibiting pre-textual stops and requiring officers to have more than mere reasonable suspicion of criminal activity, would strengthen the Fourth Amendment rights for the urban poor. Thus, protecting the Fourth Amendment rights for residents of inner-city neighborhoods will necessarily include fundamental changes in the doctrine that are not forthcoming. A lack of stricter constitutional standards has tolerated, if not blatantly encouraged, the use of aggressive police tactics in many communities.¹²² Put simply, poor urban communities are policed in a completely different manner than wealthy communities.¹²³ Wealthy communities may be policed by private

are essentially given unfettered discretion in making traffic stops to test their suspicions, thereby subjecting motorists to arbitrary traffic stops,” a power that “has been used disproportionately against African-Americans and Hispanics, due to police readiness to view minorities in general as potential offenders.”); *see also* Craig M. Glantz, “*Could This Be the End of Fourth Amendment Protections for Motorists?*,” 87 J. CRIM. L. & CRIMINOLOGY 864, 864 (1997) (asserting that the *Whren* Court’s “purely objective approach to police traffic stops...actually facilitates arbitrary searches and seizures...[and] protects the use of impermissible bases by police officers to effect traffic stops....”); David O. Markus, *Whren v. United States: A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER L.J. 91, 97 (1998) (arguing that “[w]here an officer is using a traffic violation as a pretext for pulling one over for drugs, gender, or race, that unconstitutional reason is the motivation behind the stop,” and due to the prevalence of minor offenses, every man is subject to the whims of every officer, which is “precisely the kind of arbitrary authority which gave rise to the Fourth Amendment.”).

¹²¹ *See* Walters, *supra* note 120, at 275–76 (“Conversely, some police officers believe it is their responsibility to enforce all laws and the *Whren* decision merely gives them discretion to do so.”).

¹²² *Id.* at 277 (explaining that because of lax constitutional standards, “the intrusion into the privacy of ordinary citizens will increase by aggressive police tactics targeted at identifying criminals....”).

¹²³ David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1820 (2005) (“The rich will be increasingly policed preventatively by commercial security while the poor will be policed reactively by enforcement-oriented public police,” with both the private and public sector working to “protect the affluent from the poor – the one by barricading and excluding, the other by repressing and imprisoning.” (quoting David H. Bayley & Clifford D. Shearing, *The Future of Policing*, 30 LAW & SOC’Y REV. 585, 594, 602 (1996))); Taslitz, *supra* note 105, at 56 (“Consent searches and quality of life policing are used disproportionately against

security forces to “protect” them while law enforcement officers employ reactionary tactics in poor communities.¹²⁴ Practices such as stop and frisk are used to investigate and deter crime in certain areas, and would not be tolerated in communities with the political capital to stop these policies.¹²⁵ This differential treatment is not accidental and “[p]olice are exquisitely sensitive to political considerations and understand that the use of aggressive tactics in middle class White neighborhoods would evoke widespread outrage.”¹²⁶

Thus, as a whole, Fourth Amendment jurisprudence has gaping holes that allow officers unfettered discretion with the possibility of abuse. These policies disproportionately impact individuals, often urban-dwelling members of minority groups with lower socioeconomic status. While *Jones*’ focus on physical trespass may be seen as a positive development in Fourth Amendment jurisprudence, it is hardly the antidote for inequalities that exist in privacy distribution.

IV. REFOCUSING THE DEBATE FROM PRIVACY TO POLICING

A. *Possible Solutions to the Privacy/Poverty Dilemma*

Jones’ emphasis on physical trespass will not remedy the fatal flaws in current Fourth Amendment jurisprudence. Thus, those

African Americans.”); Gibson-Carpenter & Carpenter, *supra* note 91, at 101 (explaining that “[i]nner-city schools are more likely than those in wealthier areas to call upon police” for a formal handling when children get in trouble, whereas children from wealthier areas are more likely to be referred to their parents).

¹²⁴ Sklansky, *supra* note 123, at 1820.

¹²⁵ See David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 687 (1994) (arguing that “stop and frisk” tactics have a “disproportionate impact on the poor, and on racial and ethnic minorities.”). In fact, it was political activism and widespread and prolonged protest in New York City that has been credited with efforts to halt stop and frisk as it was practiced in New York. Carol S. Steiker, *Terry Unbound*, 82 MISS. L.J. 329, 330 (2013) (discussing the class action filed by the Center for Constitutional Rights against the City of New York in 1999 “alleging unconstitutional racial profiling in the Department’s stop-and-frisk program,” which resulted in a consent decree four years later “to implement a number of remedial measures intended to reduce racial disparities in stops and frisks”). The city has had ongoing lawsuits and protests, one of those protests occurring in the summer of 2012, where thousands of people marched to end the “stop-and-frisk” policies of the New York Police Department. *Id.* at 329.

¹²⁶ Taslitz, *supra* note 105, at 56.

seeking to reform this flaw in the criminal justice system should refocus the debate about privacy and poverty under the Fourth Amendment to other legislative efforts to ensure greater equality for members of poor urban communities.

First, the federal government and local communities should implement rules that require police departments to keep detailed and accurate records regarding who is stopped and for what reasons. It is notoriously difficult to provide the requisite proof to substantiate a racial profiling claim.¹²⁷ However, recordkeeping is the first step in transparency, and knowing that they will be held accountable for those they stop may deter police officers from violating citizens' rights.

Representative John Conyers and others in Congress have repeatedly tried to pass federal legislation that would address racial profiling. Conyers first proposed the Traffic Stops Statistics Act in 1997, but efforts to pass this legislation failed.¹²⁸ Then in 2001, Conyers introduced a more comprehensive End Racial Profiling Act of 2001.¹²⁹ Despite bi-partisan support, this Act also failed to pass but was reintroduced in 2004, 2005, 2007, 2009, 2010, 2011 and 2013.¹³⁰ The End Racial Profiling Act would prohibit and attempt to eliminate racial profiling by federal, state, local, and tribal law enforcement agencies and would allow the federal government or private plaintiffs to sue for declaratory or injunctive relief.¹³¹ Furthermore, the law

¹²⁷ J. Michael McGuinness, *State and Federal Standards Require Proof of Discriminatory Intent in Ethnic Profiling Claims*, 75 N.Y. St. B.J. 29, 33 (2003) ("Ethnic Profiling claims are generally difficult to establish because of the ill-defined intent-based discrimination standard.").

¹²⁸ See Traffic Stops Statistics Act of 1997, H.R. 118, 105th Cong. (1997) (requiring data to be collected during all traffic stops for trend analysis); see also Traffic Stops Statistics Study Act of 1999, S. 821, 106th Cong. (1999) (requiring the Attorney General to collect data of traffic stops by law enforcement officers for subsequent trend analysis).

¹²⁹ See End Racial Profiling Act of 2001, H.R. 2074, 107th Cong. (2001) (expanding the aim of Congressman Conyers' proposed legislation).

¹³⁰ End Racial Profiling Act of 2004, H.R. 3847, 108th Cong. (2004); End Racial Profiling Act of 2005, S. 2138, 109th Cong. (2005); End Racial Profiling Act of 2007, H.R. 4611, 110th Cong. (2007); End Racial Profiling Act of 2010, H.R. 5748, 111th Cong. (2010); End Racial Profiling Act of 2011, H.R. 3618, 112th Cong. (2011); End Racial Profiling Act of 2013, H.R. 2851 113th Cong. (2013).

¹³¹ See End Racial Profiling Act of 2010, H.R. 5748, 112th Cong. (2010) (refining a definition of racial profiling). The proposed legislation states:

would authorize the United States Department of Justice (“DOJ”) to provide grants for “the development and implementation of best policing practices, such as, early warning tracking systems, technology integration, and other management protocols that discourage profiling.”¹³²

Many civil right groups, including the National Association for the Advancement of Colored People and the American Civil Liberties Union, have supported the passage of this legislation that would specifically prohibit racial profiling, yet Congress has repeatedly failed to pass the End Racial Profiling Act.¹³³ Despite the failure to pass such legislation at the federal level, many states have passed their own legislation aimed at addressing racial profiling.¹³⁴ More than half of the nation’s states have enacted legislation either prohibiting racial profiling or requiring jurisdictions within the state to collect data on law enforcement stops and searches.¹³⁵ Several states that do not statutorily prohibit racial profiling have voluntarily agreed to collect information related to race and criminal stops.¹³⁶ Efforts to pass state and local legislation requiring police departments to collect and analyze data should continue.

[T]he practice of a law enforcement agent or agency relying, to any degree, on race, ethnicity, national origin, or religion in selecting which individual to subject to routine or spontaneous investigatory activities or in deciding upon the scope and substance of law enforcement activity following the initial investigatory procedure, except when there is trustworthy information, relevant to the locality and timeframe, that links a person of a particular race, ethnicity, national origin, or religion to an identified criminal incident or scheme. *Id.*

¹³² 156 CONG. REC. E1341–02 (daily ed. Jul. 15, 2010) (Statement of Rep. John Conyers).

¹³³ Press Release, ACLU, Forum Calls on Congress and Administration to End Racial Profiling: ACLU Hosts Event to Stop Discrimination (Oct. 27, 2011), available at http://www.aclu.org/files/assets/three_faces_merged_document.pdf; Press Release, NAACP, NAACP-Supported *End Racial Profiling Act* Introduced in the U.S. Senate (Oct. 6, 2011), available at <http://www.naacp.org/action-alerts/entry/naacp-supported-end-racial-profiling-act-introduced-in-the-u.s.-senate>.

¹³⁴ *Legislation and Litigation*, DATA COLLECTION RESOURCE CTR. AT NORTHEASTERN UNIV., <http://www.racialprofilinganalysis.neu.edu/> (accessed through archive-edu.com) (last visited Oct. 15, 2014) (describing legislation passed by different states to end racial profiling).

¹³⁵ *Id.*

¹³⁶ *Id.*

Second, communities should focus on redistributing police resources to areas where they are most needed, but with a focus on creating police-citizen partnerships. Redistribution of resources means redistribution not only of monetary resources, but redistributing personnel from over-policed areas and investigating serious violent crimes rather than drug offenses.

Alongside this redistribution should come increased funding for specialized training that will ensure that police officers are better equipped to address crime in underserved communities. Every year, the COPS (Community Oriented Policing) program distributes millions of dollars to local communities.¹³⁷ This funding could be used to incentivize local communities not only to strengthen community partnerships – which it does – but programs could be developed to allow residents of underserved communities greater autonomy in setting priorities for their law-enforcement needs.¹³⁸ Communities might witness changes in how their communities are policed, perhaps with police departments shifting from drug enforcement to focusing primarily on preventing and investigating violent offenses.

Third, there should be greater regulation of police tactics and stricter accountability mechanisms in place for police officers. The federal government’s “pattern or practice” authority offers one model for infusing greater equality into the criminal justice system.¹³⁹ In 1994, Congress enacted 42 U.S.C. § 14141, a statute that seeks to address the policies and practices of a police agency, and has shown great promise in spurring institutional reforms in several local law enforcement agencies.¹⁴⁰ Pursuant to its “pattern or practice” authority under 42 U.S.C. § 14141, the DOJ has required several police departments nationwide, including the Los Angeles Police Department

¹³⁷ U.S. DEP’T OF JUSTICE, COPS OFFICE FY2014 APPLICATION GUIDE: COMMUNITY POLICING DEVELOPMENT (CPD) 1 (2014), *available at* <http://www.cops.usdoj.gov/pdf/2014AwardDocs/CPD/2014-CPD-AppGuide26.pdf>.

¹³⁸ *Id.* at 2.

¹³⁹ *Addressing Police Misconduct Laws Enforced by the Department of Justice*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/crt/about/spl/documents/polmis.php> (last visited Oct. 23, 2014).

¹⁴⁰ *See* 42 U.S.C. § 14141 (2006) (authorizing the Attorney General to conduct investigations and, if warranted, file civil litigation to eliminate a “pattern or practice of conduct by law enforcement officers...that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States”).

and the District of Columbia Metropolitan Police Department, to reform their policies and practices.¹⁴¹ Section 14141 grants the federal government the authority to sue for injunctive relief to change policies within a local police department where DOJ has found a pattern or practice of constitutional violations.¹⁴²

Generally, the resulting consent decrees or agreements have included reforms of both substantive and procedural policies to create more transparency and ensure accountability.¹⁴³ One reform includes modifying use of force policies to provide guidelines regarding what type of force is appropriate in apprehending a suspect and defining or limiting circumstances when certain uses of force are appropriate.¹⁴⁴

¹⁴¹ Press Release, U.S. Dep't of Justice, Justice Department Reaches Agreement to Resolve Police Misconduct Case Against Columbus Police Department (Sept. 4, 2002), http://www.justice.gov/archive/opa/pr/2002/September/02_crt_503.htm ("Today's agreement is the eighth settlement under the 1994 Crime Bill."). "Other settlements entered during the Bush Administration include the Cincinnati Police Department, the District of Columbia Metropolitan Police Department and the Highland Park, Illinois Police Department." *Id.* Additionally, "[t]he Justice Department continues to monitor settlements covering the Los Angeles Police Department, the New Jersey State Police, the Steubenville, Ohio Police Department and the Pittsburgh Bureau of Police." *Id.*

¹⁴² See 42 U.S.C. § 14141(b) (2006) ("[T]he Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the practice.").

¹⁴³ See Memorandum of Agreement Between the United States and the City of Mt. Prospect, Illinois 3 (Jan. 22, 2003) [hereinafter *Memorandum of Agreement*], http://www.justice.gov/crt/about/spl/documents/mtprospect_moa.pdf (last visited Nov. 8, 2011) (listing the different procedures the police department was required to implement pursuant to the written policy).

¹⁴⁴ Letter from Shanetta Y. Cutlar, Chief, Special Litigation Section, U.S. Dep't of Justice, to Subodh Chandra, Director, Dep't of Law, City of Cleveland 1 (Feb. 9, 2004), *available at* http://www.justice.gov/crt/about/spl/documents/cleveland_uof_final.pdf (agreement required the modification of the use of force policy, including prohibiting officers from "intentionally firing at moving vehicles unless there is imminent danger of death or serious injury, and other means are not available to avert or eliminate the threat, and, where feasible, some warning has been given"); Press Release, U.S. Dep't of Justice, Justice Department Reaches Agreement with Buffalo Police Department to Resolve Police Misconduct Investigation (Sep. 19, 2002), http://www.justice.gov/archive/opa/pr/2002/September/02_crt_535.htm (agreement required the modification of the use of force policy specifically for the use of chemical sprays by implementing a new policy, but also required the police department to revise general use of force policies and procedures for reporting all uses of force); Memorandum of Agreement, United States Department of Justice and the District of Columbia and the District of Columbia Metropolitan Police Department (Jun. 13, 2001),

DOJ has also required the implementation of an early warning tracking system to help supervisors identify officers who might need to be re-trained or disciplined.¹⁴⁵ Collecting this type of information and using it to make training and personnel decisions may deter the intentional wrongdoing of individual officers.

Another DOJ reform entailed the implementation of fair and comprehensive complaint processes for citizens who wish to report alleged misconduct.¹⁴⁶ Many citizens, especially minorities, are reluctant to file complaints against police officers because they simply believe that their complaints will not be fairly processed.¹⁴⁷ To ensure fairness and reduce the possibility for retaliation, officers assigned to investigate citizen complaints should be sufficiently independent from the officers they are investigating. DOJ has also required several

<http://www.justice.gov/crt/about/spl/documents/dcmoa.php> (the agreement required the police department to implement general use of force policy modifications that emphasized de-escalation procedures, such as advisements, warnings, and verbal persuasion, as well as specific modifications regarding the use of firearms, canines and Oleoresin Capsicum Spray).

¹⁴⁵ See *United States v. City of Los Angeles*, No. CV 00-11769 GAF (RCx) (C.D. Cal.) (Order Re: Transition Agreement), at 5–7,

http://www.justice.gov/crt/about/spl/documents/US_v_LosAngeles_TA-Order_071709.pdf (mandating the continued use of a Training, Evaluation, and Management System (“TEAMS II”) “in the manner in which it was intended – an early warning or risk management system”); Memorandum of Agreement Between the United States Department of Justice and the City of Buffalo, New York and the Buffalo Police Department, the Police Benevolent Association, Inc., and the American Federation of State, County, and Municipal Employees Local 264, 5–6, ¶¶ 20–23 (Sep. 19, 2002), <http://www.clearinghouse.net/chDocs/public/PN-NY-0004-0001.pdf> (requiring the creation of a management and supervision system for tracking excessive use of force incidents and complaints and using them to correct police officer conduct through evaluation and training, akin to an “early warning system”); Memorandum of Agreement, United States Department of Justice and the District of Columbia and the District of Columbia Metropolitan Police Department, Section I(A)(2) (Jun. 13, 2001),

<http://www.justice.gov/crt/about/spl/documents/dcmoa.php> (“[T]he Department of Justice has provided MPD with on-going technical assistance recommendations regarding its use of force policies and procedures, training, investigations, complaint handling, canine program and early warning tracking system. Based upon these recommendations, MPD has begun to implement necessary reforms in the manner in which it investigates, monitors, and manages use of force issues.”).

¹⁴⁶ See *Memorandum of Agreement*, *supra* note 143, at 7 (describing the complaint process available to members of the public).

¹⁴⁷ *Police Brutality: Only a Minority*, *ECONOMIST* (Aug. 21, 1997), available at <http://www.economist.com/node/154487>.

jurisdictions to compile information related to racial profiling.¹⁴⁸ Compiling and publishing information related to race and stops and searches may help jurisdictions determine whether officers are disproportionately stopping racial minorities. With vigorous enforcement, DOJ's pattern or practice authority could lead to reforms that will ultimately address many of the systemic issues contributing to the inequities in policing.

Finally, communities must insist that police departments implement less antagonistic models of policing. As the Boston Police Commissioner recently imparted to recruits at the police academy, "[officers] shouldn't come out of the academy now thinking of [them]selves as soldiers ready for battle, but as problem-solvers in this city's neighborhoods."¹⁴⁹ And the community may even be willing to support *more* surveillance in the form of less intrusive methods such as strategically placed cameras that might capture crimes committed by citizens and Fourth Amendment violations committed by the police.¹⁵⁰

Serious conversations about the poor and police surveillance should be refocused on the legislative efforts and public policies that change the manner in which police officers prevent and investigate criminal activity in impoverished neighborhoods. In conclusion, the focus must be upon solutions that do not rely upon a shift in the Court's jurisprudence, but solutions for which local communities could advocate and implement.

¹⁴⁸ See *Memorandum of Agreement*, *supra* note 143, at 7 (describing the complaint process available to members of the public).

¹⁴⁹ Peter Gelzinis, *Hub's New Top Cop Has Persevered*, BOSTON HERALD, Jan. 21, 2014.

¹⁵⁰ See Capers, *supra* note 87, at 977–89 (advocating for more surveillance in the form of video cameras as a way to increase safety and encourage more egalitarian and race-neutral policing).