

The Biopolitics of Maskless Police

India Thusi*

ABSTRACT

Despite the recent movement against police violence, police officers have been endangering their communities by engaging in a new form of violence—policing while refusing to wear facial coverings to prevent the spread of COVID-19. Many states advise people to wear masks and to socially distance when in public spaces. However, police officers have frequently failed to comply with these guidelines as they interact with the public to enforce these COVID-19 laws. Police enforcement of COVID-19 laws is problematic for two reasons: (1) it provides a method for pathologizing marginalized communities as biological threats; (2) it creates a racialized pathway for the spread of the virus.

First, these new laws allow police to exercise what Michel Foucault described as “biopower,” a form of power that allows the State to target populations relying on biological justifications. The racialized nature of the biopower and necropolitics of COVID-19 is reflected in the social and political order that allows for people of color to die from COVID-19 at a higher rate than the rate for White people. There is a real risk that relying on the police to manage the spread of COVID-19 will allow police to construct already marginalized communities as contagious threats. Second, as the racially-biased nature of policing is well-documented, enforcement of COVID-19 laws may contribute to the racialized spread of the virus by encouraging police officers to interact with marginalized communities. There are already reports of maskless police officers enforcing mask mandates in Black and Latinx communities, demonstrating the urgency of this threat. As politicians step up calls for law enforcement to become involved in enforcing COVID-19 mandates, anyone serious about protecting the health of all communities should question police involvement in this project.

I. INTRODUCTION

As the COVID-19 pandemic persists, the concurrent pandemic of police lawlessness is animating popular consciousness about racial injustice in this

* Associate Professor of Law, Delaware Law School. For generous feedback and helpful suggestions, I thank Jamelia N. Morgan and Ngozi Okidegbe. I am also grateful to Marisa Piccareto for excellent research assistance.

country.¹ Millions of Americans spent eight minutes and forty-six seconds watching Derek Chauvin casually stare into their eyes as he stood on George Floyd's neck and suffocated him to death.² This video circulated soon after the media shared accounts of police officers shooting Breonna Taylor to death after barging into her home unannounced.³ In response, a multiracial and multigenerational movement hit the streets to denounce racism. Protestors declared, "Black Lives Matter" and "Defund the Police" in protests across the globe.⁴ This public outrage reflects an increasing frustration with racist policing. Yet despite the increased scrutiny of policing, police officers have been endangering their communities by engaging in a new form of lawlessness—policing while refusing to wear facial coverings to prevent the spread of COVID-19.⁵ Thirty-four states require people to wear facial coverings or masks in public to prevent the spread of the novel coronavirus.⁶ But many police officers have failed to comply with these mandates. In fact, sightings of maskless police officers are so ubiquitous that there is a Twitter account solely devoted to sharing of reports of maskless NYPD police officers, including maskless police leaders.⁷ Although police officers often ignore mask mandates themselves, policymakers have demanded that law enforcement officers enforce COVID-19 laws.

Police enforcement of COVID-19 laws provides a pathway for the racialized spread of the virus and a mode for biological warfare against marginalized

¹ See Ezekiel Edwards, Emily Greytak, Udi Ofer, Carl Takei & Paige Fernandez, *The Other Epidemic: Fatal Police Shootings in the Time of COVID-19*, ACLU RESEARCH REPORT (2020), <https://www.aclu.org/report/other-epidemic-fatal-police-shootings-time-covid-19> [<https://perma.cc/2RJK-YXKN>].

² See Sam Blake, *Why the George Floyd Protests Feel Different—Lots and Lots of Mobile Video*, DOT.LA (June 12, 2020), <https://dot.la/george-floyd-video-2646171522.html> [<https://perma.cc/C5T5-YHZM>].

³ See Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/ZJP7-LNSV>].

⁴ See Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/RYP9-LAYU>]; John Felipe Acevedo, *Reclaiming Black Dignity*, 99 TEX. L. REV. ONLINE 1, 7 (2020) ("In order to restore the balance of dignity, there must be a transfer of dignity from the police back to targeted communities to whom it belonged in the first place.").

⁵ See Michael Wilson, *Why Are So Many N.Y.P.D. Officers Refusing to Wear Masks at Protests?*, N.Y. TIMES (June 11, 2020), <https://www.nytimes.com/2020/06/11/nyregion/nypd-face-masks-nyc-protests.html> [<https://perma.cc/VK2Y-NXSZ>]; Giulia McDonnell Nieto del Rio, *A Florida Sheriff Has Ordered His Deputies Not to Wear Masks*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/08/12/us/fl-sheriff-billy-woods-bans-masks.html> [<https://perma.cc/3CTE-G66U>].

⁶ See Andy Markowitz, *State-by-State Guide to Face Mask Requirements*, AARP (Aug. 17, 2020), <https://gtxcorp.com/aarp-com-state-by-state-guide-to-face-mask-requirements/> [<https://perma.cc/VW4A-7MZE>].

⁷ NYPD Mask Watch (@nypdmaskwatch), TWITTER, <https://twitter.com/nypdmaskwatch?lang=en> [<https://perma.cc/8BPP-LHSF>].

communities. Police enforcement may contribute to racial profiling and the racialized spread of the virus by encouraging the police to interact with the public, providing a pathway for the contagion to spread. The reports of police officers enforcing mask mandates in Black and Latinx communities while failing to wear a mask themselves indicate that this is a real threat.⁸ As social activist and movement lawyer Andrea Ritchie plainly put it, police have become “vectors of disease.” Professor Maybell Romero similarly argues that police officers are disease vectors through their COVID-19 enforcement activities.⁹

For instance, many police officers have been reluctant to wear facial coverings. At the 40th Precinct in the Mott Haven neighborhood of the South Bronx, New York, officers were seen shaking hands and not wearing masks. This was just hours after Police Commissioner Shea appeared on NY1 and spoke about officers having to wear face coverings to cut down on the spread of coronavirus.¹⁰ The Civilian Complaint Review Board said it has received at least 156 complaints about NYPD officers not wearing masks since March as of October 2020.¹¹

A maskless officer appears to have infected an arrestee falsely accused of being a suspect in a crime. On December 19, 2020, Jamar Mackey was sitting in the Lynnhaven Mall food court in Virginia Beach with his fiancé, baby, and thirteen-year-old child “trying to enjoy the holidays.”¹² As he was enjoying his meal, a maskless officer approached him and put him in handcuffs, claiming that Mackey fit the description of a suspect.¹³ This maskless officer was mistaken. Mackey tested positive for COVID-19 nearly a week after the counter.¹⁴ Mackey was racially profiled and likely exposed to COVID-19 due to this racial profiling, illustrating the risks of policing during a pandemic.¹⁵ This incident illustrates that ordinary policing

⁸ See E. J. Dickson, *Why Won't Cops Wear Masks?*, ROLLING STONE (Aug. 7, 2020, 12:32 PM), <https://www.rollingstone.com/culture/culture-news/nypd-masks-bella-hadid-1041003/> [https://perma.cc/653K-CEJG]; Alexander C. Kaufman, *Many Police Aren't Wearing Masks, Posing Yet Another Risk To Protesters in a Pandemic*, HUFFINGTON POST (June 10, 2020) https://www.huffpost.com/entry/police-masks-protesters-coronavirus_n_5edfddb6c5b61fdebfd565b [https://perma.cc/TME8-N88B].

⁹ See Maybell Romero, *Law Enforcement as Disease Vector*, 2020 U. CHI. L. REV. ONLINE 35, 36 (2020) (arguing “police cause and spread illness, undermining their supposed goal of ensuring public safety”).

¹⁰ Dean Meminger, *Despite Warnings of Disciplinary Action, Some Officers Still Not Wearing Face Coverings*, SPECTRUM NEWS NY1 (Oct. 6, 2020, 8:13 PM), <https://www.ny1.com/nyc/all-boroughs/news/2020/10/06/despite-warnings-of-disciplinary-action--many-officers-still-not-wearing-face-coverings> [https://perma.cc/NLZ9-RB2Y].

¹¹ *Id.*

¹² Dan Toomey, *Black Man Wrongfully Detained by Maskless Police Officer Tests Positive for COVID-19, Financee Says*, ABC NEWS (Dec. 30, 2020, 12:55 PM), <https://abcnews.go.com/US/black-man-wrongfully-detained-maskless-police-officer-tests/story?id=74967778> [https://perma.cc/EY79-C9RA].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

already presents extraordinary risks for racially profiled communities because many police officers have resisted calls to wear a mask. Demanding that police also intervene in COVID-19 mandates will exacerbate the public health risks.

Furthermore, police enforcement of these new laws may provide police officers with a basis to pathologize marginalized communities as potential biological threats, facilitating the exercise of a form of power that Michel Foucault described as “biopower.”¹⁶ Biopower is concerned with the biological management of segments of the population to promote the health of a society.¹⁷ Police officers may target marginalized communities for spreading the virus, providing a new basis to engage in profiling that has a biological justification. Police officers can exercise their discretion to ignore the public health while exercising biopower to regulate communities as potential threats to the public health. Accordingly, the pathological reliance on police to promote social welfare is creating a racialized pathway for police to spread contagion and biologically marginalize communities. While the administration of the COVID-19 vaccines has inspired hope that we will return back to normal soon, public health officials have warned that COVID-19 is here to stay. Wearing masks is still advisable even after receiving the vaccine,¹⁸ and the issue of relying on maskless police to enforce mask requirements is likely here for the foreseeable future. As politicians step up calls for law enforcement to become involved in enforcing COVID-19 mandates, anyone serious about protecting the health of all communities should question police involvement in this project.

This Essay is novel in its substantial engagement with biopolitics as a lens for interpreting policing. Part I of this Essay describes the biopolitics of policing COVID-19. It defines Michel Foucault’s concept of biopower as a form of power that regulates populations and is concerned with promoting life. Biopolitics is how government officials set priorities as they exercise biopower, which factors in the social hierarchies within that society.¹⁹ This section of the Essay argues that police officer involvement in enforcing COVID-19 orders allows them to treat already marginalized communities like biological threats. Part II discusses racial profiling in the enforcement of COVID-19 orders. It argues that because police officers racially profile, they may contribute to the racialized spread of the virus through their interactions with profiled communities. Part III argues that COVID-19 policing is revealing the pathologies in policing and the need for a new form of governance that does not rely on the police to protect the public health.

¹⁶ See 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: THE WILL TO KNOWLEDGE* 137 (Robert Hurley trans. 1976).

¹⁷ *Id.*

¹⁸ Apoorva Mandavilli, *Here’s Why Vaccinated People Still Need to Wear a Mask*, NY TIMES (Dec. 8, 2020), <https://www.nytimes.com/2020/12/08/health/covid-vaccine-mask.html> [<https://perma.cc/9ACE-HW5P>].

¹⁹ See Jessica M. Erickson, *Making Live and Letting Die: The Biopolitical Effect of Navajo Nation v. U.S. Forest Service*, 33 SEATTLE U. L. REV. 463, 463 n.4 (2010) (“The terms ‘biopolitics’ and ‘biopower’ are used somewhat interchangeably within Foucault’s philosophies, but basically,

II. BIOPOLITICS & POLICING COVID-19

Many states have adopted public health mandates to prevent the spread of the novel coronavirus. These mandates have required people to remain at home for non-essential activities when community spread is high, wear facial covering to mask their faces when in public spaces, and comply with curfews to restrict social activity.²⁰ However, as policymakers increasingly ask police departments to enforce these mandates, these COVID-19 orders provide police officers with vast discretion to engage in a new form of public health policing.²¹ Police officers may selectively enforce public health order mandates in manners that are consistent with their own views about the social hierarchy. So, if police officers view Black, Indigenous, and people of color communities as threats to the public order, they may selectively enforce COVID-19 orders against these people.²² Judith Butler recently critiqued policymakers' willingness to expend with vulnerable populations in order to get back to business as usual and revitalize the economy.²³ Her critique highlights the differential vulnerabilities that come from choices on how to manage COVID-19.²⁴ Policing exacerbates differential vulnerabilities by forcing vulnerable communities to interact with the police.

A. Marginalized Communities as Biological Threats

Police enforcement of COVID-19 mandates runs the risk of pathologizing marginalized communities as biological threats. In general, order maintenance policing engages in what Michel Foucault has described as a disciplinary function, which communicates the norms of the communities and reinforces dominant values

biopolitics is the style of government that regulates populations through biopower—the impact of political power on all aspects of human life.”).

²⁰ See *State Actions to Mitigate the Spread of COVID-19*, KFF (Mar. 22, 2021), <https://www.kff.org/other/state-indicator/state-actions-to-mitigate-the-spread-of-covid-19/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

²¹ See Robert Gatter & Seema Mohapatra, *Covid-19 and the Conundrum of Mask Requirements*, 77 WASH. & LEE L. REV. ONLINE 17, 23 (2020) (“Numerous news outlets report racial discrimination by police related to mask-wearing during this pandemic.”).

²² See Eric J. Miller, *Role-Based Policing: Restraining Police Conduct “Outside the Legitimate Investigative Sphere,”* 94 CALIF. L. REV. 617, 686 (2006) (examining the harms of proactive policing models and arguing that the non-police officials should play the primary role in promoting positive social norms in marginalized communities).

²³ Judith Butler, *Capitalism Has its Limits*, VERSO BLOG (Mar. 30, 2020), <https://www.versobooks.com/blogs/4603-capitalism-has-its-limits> [https://perma.cc/K434-HZMM].

²⁴ *Id.*

within it.²⁵ So, stopping people with disabilities for disorderly conduct communicates that they are subject to surveillance and that failure to comply with expected community norms about orderly conduct will expose them to police intervention, or discipline.²⁶ Discipline reinforces the social hierarchy and dominant social norms. The enforcement of public health orders is different from other forms of order maintenance because police are doing more than just disciplining the community members and reinforcing dominant norms as individuals. Police officers are also regulating their bodies as part of a population that presents a particular biological threat to society. In other words, police officers are not just concerned with an individual's compliance with dominant social norms and rules (discipline); they are interested in preventing the biological threats that segments of the population present to the public health and society at large. Police officers are engaging in what Foucault has described as biopower.²⁷ Foucault has described biopower as a "power that exerts a positive influence on life, that endeavors to administer, optimize, and multiply it, subjecting it to precise controls and comprehensive regulations."²⁸

Unlike the juridical power of discipline, biopower pertains to the State's positive power to foster life rather than the disciplinary power of coercion and control.²⁹ Discipline is concerned with the body as a subject, while biopower is concerned with the body as:

imbued with the mechanics of life and serving as the basis of the biological processes: propagation, births and mortality, the level of health, life expectancy and longevity, with all the conditions that can cause these to vary. Their supervision was effected through an entire series of interventions and regulatory controls: a biopolitics of the population.³⁰

For example, state racism is an expression of biopower. It is a "battle that has to be waged not between races, but by a race that is portrayed as the one true race, the race that holds power and is entitled to define the norm, and against those who deviate

²⁵ See generally MICHEL FOUCAULT, *DISCIPLINE & PUNISH* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975) (examining the development of discipline as a form of social control and normalization in Western society).

²⁶ See Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 4–5 (forthcoming 2021) (on file with author) ("the policing of disorderly conduct, like the common law regime before it, continues to target, or risks targeting, enforcement against historically marginalized groups. In this way, disorderly conduct laws continue to enforce norms for behavior that are discriminatory and in doing so reinforce social hierarchies based on race, gender, sexual orientation, and disability.").

²⁷ See 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: THE WILL TO KNOWLEDGE* 137 (Robert Hurley trans. 1976).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 139.

from that norm, against those who pose a threat to the biological heritage.”³¹ Foucault reflected on how racism contributes to the internal sorting of populations within a society: “a racism that society will direct against itself, against its own elements and its own products . . . the internal racism of permanent purification, and it will become one of the basic dimensions of social normalization.”³² Thus, racism is a core feature of the biopolitical state. And where discipline “tries to rule a multiplicity of men to the extent their multiplicity can be dissolved into individual bodies . . . [to be] kept under surveillance, trained, used, and if need be punished;” biopower is concerned with the multiplicity of people as a “global mass that is affected by overall processes characteristic of birth, death, production, [and] illness.”³³

Police enforcement of COVID-19 mandates allows police officers to control marginalized communities as biological threats while police officers attempt to promote a healthy society. As Foucault recognized, while racism is a socially constructed concept, it relies on biological explanations and justifications to facilitate internal divisions and hierarchies within a society.³⁴ For instance, Derek Chauvin appeared nonchalant as he squeezed the life out of George Floyd’s neck with his foot, and he was doing so in a society that places Blacks at the bottom of the social hierarchy. The added layer of a disease regulation of racialized populations seems bound to compound already-existing discriminatory practices within policing. This form of police enforcement may contribute to new forms of subordination that are yet to be fully understood. Biopower may prompt physical interventions as the body itself is the community threat. Dean Spade states biopower:

emerged out of and been focused on [the] creation and management of racial and gender categories to establish the nation itself through gendered-racialized property regimes. Racializing and gendering are nation-making activities carried out through the creation of population-level interventions, including administrative systems and norms, that preserve and cultivate the lives of some and expose other to premature death.³⁵ Biopolitics refers to how different priorities and political arrangements inform the exercise biopower. It relates to whose bodies are prioritized and whose are disposable. It reflects social hierarchies.

³¹ See MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED” LECTURES AT THE COLLÈGE DE FRANCE, 1975–76, at 61 (Arnold I. Davidson ed., David Macey trans., 2003).

³² *Id.* at 62.

³³ *Id.* at 24243.

³⁴ *Id.*

³⁵ See DEAN SPADE, *NORMAL LIFE* 78 (2011).

B. *The Criminalization of HIV As an Example of Biopolitics*

The criminalization of HIV provides some relevant insights about how biopower contributes to discourses that pathologize entire populations.³⁶ During the early years of the HIV epidemic, many jurisdictions in the United States adopted laws criminalizing the spread of the virus.³⁷ HIV criminalization laws provided and continue to provide a biological justification for criminalizing entire populations.³⁸ These laws have been selectively enforced against LGBTQ people, sex workers, and people of color.³⁹ Policymakers and political leaders have labelled segments of these communities as biological threats to the social welfare.⁴⁰ The HIV Justice Worldwide Steering Committee, a global network of HIV advocacy organizations, released the following statement about the criminalization of COVID-19:

We also warn law- and policymakers against the temptation to use the criminal law or other unjustified and disproportionate repressive measures in relation to COVID-19. These measures can be expected to have a devastating impact on the most vulnerable in society Criminalisation disproportionately impacts the most marginalised, stigmatised and the already criminalised people and communities in society. Criminalisation is not an evidence-based response to public health issues. In fact, the use

³⁶ See Naomi K. Seiler et al., *The Risks of Criminalizing COVID-19 Exposure: Lessons from HIV*, 24 HUM. RTS. BRIEF 5, 7 (2020) (“[D]rawing on lessons from HIV criminalization in the United States . . . a response that too broadly criminalizes COVID-19 would likely impose inequitable infringements of individual rights, particularly among those most socially and economically vulnerable.”); Chad Flanders et al., *“Terroristic Threats” and COVID-19: A Guide for the Perplexed*, 169 U. PA. L. REV. ONLINE 63, 74 -80 (2020) (examining the use of terroristic threat statutes in the COVID-19 and HIV contexts); Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1469 (2009) (examining the racial implications of HIV criminalization statutes and the media narrative of Black men who are on the “DL”).

³⁷ *When Considering the Criminalisation of COVID-19, Lessons from HIV Should be Retained*, HIV JUST. NETWORK (June 17, 2020), <https://www.hivjustice.net/news-from-other-sources/when-considering-the-criminalisation-of-covid-19-lessons-from-hiv-should-be-retained/> [<https://perma.cc/G63V-7D46>]; see Terry Skolnik, *Criminal Law During (and After) COVID-19*, 43 MANITOBA L. J. 145 (2020).

³⁸ *Id.*

³⁹ See Angela Perone, *From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization that Departs from Penalizing Marginalized Communities*, 24 HASTINGS WOMEN'S L.J. 363, 396 (2013) (detailing the discriminatory enforcement of HIV criminalization laws against communities of color, sex workers, and LGBTQ people); Amira Hasenbush et al., *HIV Criminalization and Sex Work in California*, 2017 THE WILLIAMS INST. UCLA SCH. OF L. 3-4, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-Sex-Work-CA-Oct-2017.pdf> (finding that Black sex workers were overrepresented in prosecutions for solicitation while HIV-positive).

⁴⁰ India G. Thusi, *Policing Sex: The Colonial, Apartheid, and New Democracy Policing of Sex Work in South Africa*, 38 FORDHAM INT'L L.J. 205, 206-07 (2015) (“[S]ex work has a long history of being framed within public health discourses, and sex workers have often been treated as possible sites of contagion.”).

of the criminal law most often undermines public health by creating barriers to prevention, testing, care, and treatment—for example, people may not disclose their status or access treatment for fear of being criminalised This can also lead to the spread of infections and communicable diseases in prisons⁴¹

There is a real risk that relying on the police to manage the spread of COVID-19 will allow police to construct already marginalized communities as contagious threats. Marginalized communities are more likely to suffer from fatalities from the disease and are more likely to be essential workers that are exposed to the novel coronavirus.⁴² Police already appear to be targeting these communities. In New York City, nearly all of NYPD'S COVID-19-related arrests were of Black or Latinx people.⁴³ In Chicago, police concentrated COVID-19 orders enforcement in Black and Latinx neighborhoods.⁴⁴ If officials continue to rely on police enforcement to govern, we can expect marginalized communities to encounter hostile police forces that treat them as potential biological threats that warrant new forms of surveillance.⁴⁵ The biopolitics of COVID-19 enforcement is troubling considering the history of racialized manipulation of public health matters in the United States.⁴⁶

⁴¹ Lesego Tlhwale, *Statement on COVID-19 Criminalisation*, GNP+ (Mar. 26, 2020), <https://gnpplus.twelvetrains.nl/2020/03/26/statement-on-covid-19-criminalisation/>.

⁴² Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the Most Essential Workers in America*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html>.

⁴³ See Ashley Southall, *Scrutiny of Social-Distance Policing as 35 of 40 Arrested are Black*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/05/07/nyregion/nypd-social-distancing-race-coronavirus.html>; Janell Ross, *Pattern of Uneven Social Distancing Enforcement Coming into View, Civil Rights Experts Say*, NBC NEWS (May 28, 2020, 1:05 PM), <https://www.nbcnews.com/news/nbcblk/pattern-uneven-social-distancing-enforcement-coming-viewcivil-rights-experts-n1216506>.

⁴⁴ Maxwell Evans & Kelly Bauer, *Chicago Police Only Arrested People for Social Distancing Violations on the South and West Sides, Data Shows*, BLOCK CLUB CHI. (May 26, 2020, 3:20 PM), <https://blockclubchicago.org/2020/05/26/chicago-police-only-arrested-people-for-social-distancing-on-the-south-and-west-sides-data-shows/>. See also Martin Kaste, *Police Back Off from Social Distancing Enforcement*, NPR (May 15, 2020, 4:58 PM), <https://www.npr.org/2020/05/15/857144397/police-back-off-from-social-distancing-enforcement>.

⁴⁵ J.J. Sylvia IV, *The Biopolitics of Social Distancing*, SOC. MEDIA + SOC'Y 1, 3 (2020) (“The COVID-19 pandemic lays bare the biopolitics of the current moment. On one hand, governments have increased measures of surveillance and control for population management. On the other hand, this occurs within the larger context of the racial disparities woven into biopower as individuals are increasingly asked to take responsibility for making life and death decisions themselves, especially in the United States.”).

⁴⁶ For example, European military officials deliberately contaminated blankets that they shared with Indigenous communities with smallpox, contributing to the extermination of the Indigenous population. See Rose Weston, *Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States*, 18 ARIZ. J. INT'L & COMP. L. 1017, 1045 (2001) (European settlers employed the tactic of “collecting blankets and handkerchiefs

BIPOC communities are justified in being fearful that the police will continue the legacy of problematic medical regulation of them.

C. Necropolitics and Disposability During COVID-19

In fact, the evolution of the COVID-19 pandemic is already revealing a biopolitics of disposability that reinforces existing racial hierarchies. This form of governance focuses on the management of people as biological specimens and facilitates what Professor Achille Mbembe describes as “necropolitics,” which builds upon Foucault’s theory of biopower.⁴⁷ Necropolitics refers to the State’s willingness to manage death and to allow a population to live under precarious conditions, be exploited for capitalist utility, and then naturally expended.⁴⁸ Mbembe explains he uses the:

notion of necropolitics and necropower to account for the various ways in which, in our contemporary world, weapons are deployed in the interest of maximum destruction of persons and the creation of death-worlds, new and unique forms of social existence in which vast populations are subjected to conditions of life conferring upon them the status of living dead.⁴⁹

While biopower is primarily concerned with the management of life (through COVID-19 mandates, for example), necropolitics is concerned with the management of death (facilitating the spread of disease through policing).⁵⁰ Mbembe developed the concept of necropolitics to describe the conditions of marginalized people in the postcolonial context in death-worlds.⁵¹ Necropolitics frames marginalized people as the “living dead,” which is especially poignant considering how BIPOC people in the United States have been deemed essential during the COVID-19 pandemic but left to die as they perform essential functions.⁵²

from small pox hospitals and distributing them as gifts among Native Americans. This early policy of extermination is summed up in the statement by Captain Ecuyer that ‘out of our regard for [the Indians] we gave them two blankets and a handkerchief out of the smallpox hospital [in the] hope it will have the desired effect.’”); Sheldon M. Novick, *Racial Images of the “Criminal”: A Cognitive Disorder*, 22 VT. L. REV. 383, 389 (1997) (“Another example cited during the conference is Lord Jeffrey Amherst, commander of British forces in North America during the French and Indian War, who conceived the military tactic of distributing small-pox-contaminated blankets to Native Americans.”)

⁴⁷ Achille Mbembé, *Necropolitics*, 15 PUB. CULTURE 11, 40 (Libby Meintjes trans. 2003).

⁴⁸ *Id.*

⁴⁹ *Id.* (emphasis omitted)

⁵⁰ *Id.* at 39–40 (“[T]he notion of biopower is insufficient to account for contemporary forms of subjugation of life to the power of death.”).

⁵¹ *Id.* at 40.

⁵² *Id.*

The media has already been laying the foundation for a necropolitics that reinforces Black people as the “living dead.” Since the announcement of a COVID-19 vaccine, there has been excessive media coverage about the reasons why Black people might not get the vaccine.⁵³ While these stories portend to be benevolent and steeped in liberal concern about the Black condition, they also presume facts that do not exist. These stories reveal a tendency to pathologize Black people as doing something against their own interests.⁵⁴ Meanwhile, there does not appear to be many stories speculating about whether the maskless White people who have been storming national and state capitols will be taking the vaccine. There is very little coverage speculating about whether the maskless police officers, who have died from COVID-19 more than any other cause, will be taking the vaccine. The media’s concern for Black people masks a tendency to presume that Black people will continue to exist in sub-optimal conditions and remain this country’s living dead.

The racialized nature of the biopower and necropolitics of COVID-19 is further reflected in the social and political order that allows for people of color to die from COVID-19 at a higher rate than the rate for White people.⁵⁵ As sociology of health expert Professor Whitney N. Laster argues, “Racial capitalism is a fundamental cause of the racial and socioeconomic inequities within the novel coronavirus pandemic (COVID-19) in the United States.”⁵⁶ Society recognizes the racial discrimination (structural or otherwise) that leads to these disparities while acknowledging that many people of color are essential workers and more likely to be exposed to the virus. Yet, there has been very little done to address that they are more likely to die from the disease. One in one thousand Black people in the United States has died from COVID-19.⁵⁷ Indigenous, Latinx, and Filipino people have a similarly high rate of death from COVID-19.⁵⁸ Government officials have ensured

⁵³ See, e.g., Dezimey Kum, *Fueled by a History of Mistreatment, Black Americans Distrust the New COVID-19 Vaccines*, TIME (Dec. 28, 2020, 8:30 AM), <https://time.com/5925074/black-americans-covid-19-vaccine-distrust/>.

⁵⁴ But see Debra Furr-Holden, *What’s Not Being Said About Why African Americans Need to Take the COVID-19 Vaccine*, THE CONVERSATION (Dec. 23, 2020, 8:55 AM), <https://theconversation.com/whats-not-being-said-about-why-african-americans-need-to-take-the-covid-19-vaccine-152323> (acknowledging that the sudden concern for Black public health is really a concern about reaching herd immunity through vaccinations).

⁵⁵ Whitney N. Laster Pirtle, *Racial Capitalism: A Fundamental Cause of Novel Coronavirus (COVID-19) Pandemic Inequities in the United States*, 47 HEALTH EDUC. & BEHAV. 504, 504 (2020).

⁵⁶ *Id.*

⁵⁷ See Dylan Scott & Christina Animashaun, *Covid-19’s Stunningly Unequal Death Toll in America*, in *One Chart*, VOX (Oct. 2, 2020, 7:30 AM), <https://www.vox.com/coronavirus-covid19/2020/10/2/21496884/us-covid-19-deaths-by-race-black-white-americans>.

⁵⁸ Lisa A. Cooper & David R. Williams, *Excess Deaths from COVID-19, Community Bereavement, and Restorative Justice for Communities of Color*, 324 JAMA 1491, 1491 (2020); Randall Akee, *How COVID-19 is Impacting Indigenous Peoples in the U.S.*, PBS NEWSHOUR (May 13, 2020, 6:14 PM), <https://www.pbs.org/newshour/nation/how-covid-19-is-impacting-indigenous-peoples-in-the-u-s>.

that these workers have been able to work throughout the pandemic to provide services to society but have done very little to protect their lives.

Following the violent insurrection at Capitol Hill, the necropolitics of COVID-19 were on full display as images of Black essential workers cleaning the mess of the riots near maskless Capitol Hill officers circulated on social media.⁵⁹ These workers were risking their lives as they cleaned the mess of white insurrectionists.⁶⁰ The media discussed the contradiction of having Black workers clean up after white insurrectionists.⁶¹ However, in the same photo that sparked the outrage, there was a maskless Capitol Hill police officer near these black essential workers.⁶² This Capitol Hill officer exacerbated the cleaners' risks by failing to wear a mask. This photo illustrates how these workers are both essential and disposable. They are essential for cleaning the messes of White people. But little care is taken to provide them with safe environments in which their coworkers (the Capitol Hill police) wear the required personal protective equipment to reduce these essential workers' exposure to the virus. Police officers now have a biological justification for reinforcing these workers' disposability and appear to do so even when these workers are their coworkers. The complacency with the natural disappearance of essential workers reveals a necropolitics that accepts these workers' disposability. Their jobs have been deemed essential, but their lives have not.

III. RACIALIZED SPREAD THROUGH POLICING

The policing of COVID-19 orders provides a racially-constructed pathway for the contagion to spread. As the police racially profile people of color and selectively enforce public health orders, they may spread the disease during these interactions. Data on the policing of public health orders likely underreports the frequency of biased policing because many of police interactions do not result in arrests or Terry stops. Contact with the police also occurs during the brief, but unwanted, interactions with the police that people in marginalized communities may experience on a daily basis.⁶³ The everyday indignities of policing are often undercounted or completely ignored because they do not amount to arrests or Terry stops, or they occur in jurisdictions where police do not accurately report these data. Community groups

⁵⁹ Daniella Diaz (@DaniellaMicaela), TWITTER (Jan. 6, 2021, 8:22 PM), <https://twitter.com/DaniellaMicaela/status/1346990597786247169>.

⁶⁰ *Id.*

⁶¹ See Emma Nolan, *Video of Black Capitol Workers Cleaning Up After Mob Mayhem Goes Viral*, NEWSWEEK (Jan. 7, 2021, 9:08 AM), <https://www.newsweek.com/video-black-capitol-workers-cleaning-capitol-riots-trump-supporters-1559674>.

⁶² *Id.*

⁶³ David S. Abrams found that police stops decreased in several cities, but the percentage of Black people stopped increased in Philadelphia. See David S. Abrams, *COVID and Crime: An Early Empirical Look*, PENN L.: LEGAL SCHOLARSHIP REPOSITORY 1 (2020).

have already complained that their communities are experiencing heightened policing relating to COVID-19 orders.⁶⁴

A. A New Basis for Profiling & Community Spread

Police enforcement of COVID-19 may exacerbate economic inequality and police profiling of marginalized communities. The New York Metro Transit Authority (MTA) recently decided to crackdown on maskless subway riders.⁶⁵ In September 2020, the MTA announced that it would be fining subway riders \$50 for failure to comply with mask mandates.⁶⁶ The MTA reported that there was 90% compliance with the requirement to wear a mask, but it was seeking 100% compliance and worried that anti-maskers would discourage people from using public transit.⁶⁷ Sarah Feinberg, the Interim NYC Transit President, stated, “Transit is key in people coming back to the city and coming back to work, and so even if it’s just one or two people in the system, they don’t have the right to endanger anyone else, and frankly, they don’t have the right to scare anyone away from the system . . .”⁶⁸ Community members and journalists questioned Feinberg about how the fines would be enforced, raising concerns that police would engage in racial profiling.⁶⁹ MTA spokesperson Abbey Collins stated, “All MTA rules and regulations are enforced by MTAPD and NYPD and they always have been. It has been state law since April 17 that masks are absolutely required in the system. By adding a rule to our code of conduct police now also have the option to write fines for refusal to wear masks.”⁷⁰ This crackdown on mask wearing was ordered despite footage of police officers pinning twenty-two-year-old mother Kaleemah Rozier to the dirty MTA subway floor. Six officers restrained her because they claimed she was wearing her mask improperly.⁷¹ Another officer held her son to the side as her son watched the

⁶⁴ See Pascal Emmer et al., *Unmasked: Impacts of Pandemic Policing*, in COMMUNITY RESOURCE HUB FOR SAFETY & ACCOUNTABILITY 6 (2020), <https://communityresourcehub.org/resources/unmasked-impacts-of-pandemic-policing/> (report by a coalition of community groups describing discriminatory policing connected to COVID-19).

⁶⁵ See Sydney Pereira, *MTA Will Issue \$50 Fines to Riders Who Don't Comply with Mask-Wearing Rules*, GOTHAMIST (Sept. 10, 2020, 4:23 PM), <https://gothamist.com/news/mta-will-issue-50-fines-riders-who-dont-comply-mask-wearing-rules>; Trace Miller, *Going Maskless on MTA Transit Now Costs \$50*, WASH. SQUARE NEWS (Sept. 17, 2020), <https://nyunews.com/news/2020/09/17/mta-announces-fifty-dollar-fine-for-no-mask/>.

⁶⁶ Pereira, *supra* note 65.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Coronavirus News: Mom Arrested After Subway Confrontation Over Mask Wants Justice*, EYEWITNESS NEWS ABC 7 (May 19, 2020), <https://abc7ny.com/viral-video-violent-arrest-kaleema-rozier-nypd/6196707/> (“‘What the cops did to me was wrong,’ Rozier said. ‘It’s very hurtful

officers throw his mother to the floor. The officers separated her from her son and charged her with disorderly conduct and resisting arrest.⁷² This incident was captured on video. There are undoubtedly many others that were not.

The underlying logic of police enforcement of COVID-19 orders seems to be that the deterrence threat of fines and potential arrest might encourage compliance with mask mandates. However, it presumes that non-compliance with mask mandates is intentional; that enforcement would be an effective deterrent; and that police would enforce the regulations based on non-compliance rather than other factors. The use of fines to punish non-compliance also presents an uncomfortable profit motivation for the MTA, which is currently coping with a severe budget deficit.⁷³ While many people are struggling financially because of the ongoing pandemic, MTA is threatening to fine passengers, many of whom are low-income essential workers, for non-compliance with mask requirements. Politicians and public officials are calling upon the police to enforce public health orders. The stated goal is to protect the public health and welfare.⁷⁴ The maskless or masked police officers, who as a group have died of COVID-19 more than any other cause this year,⁷⁵ interact with the public and facilitate the spread of the disease through enforcement activities. People arrested for failure to comply with public health

for me, because it was in front of my son, my 5 year-old son . . . like he was crying, I don't understand how they could do that in front of my son."); *Woman Arrested in Front of 5-Year-Old Son at Brooklyn Subway Station Plans to Sue City*, CBS NEW YORK (June 18, 2020, 7:25 AM), <https://newyork.cbslocal.com/2020/06/18/woman-arrested-in-front-of-son-to-sue/>.

⁷² *Id.*

⁷³ Department of Justice's report about Ferguson, MO's use fees and fines to tax its low-income population examines the risks associated with using fines and fees to cushion the budget of flailing government entities. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015).

⁷⁴ Berkeley Lovelace Jr., *New York Gov. Cuomo Says the NYPD Needs to 'Step Up' in Enforcing Social Distancing Rules*, CNBC (Aug. 10, 2020, 11:56 AM), <https://www.cnn.com/2020/08/10/coronavirus-ny-gov-cuomo-says-the-nypd-needs-to-step-up-in-enforcing-social-distancing-rules.html> (the New York governor called on police to "step up" their enforcement of COVID-19 mandates); *Illinois Governor Orders Police Patrols Amid COVID-19 Spikes*, NBC CHICAGO (Oct. 22, 2020, 7:28 PM), <https://www.nbcchicago.com/news/local/illinois-governor-orders-police-patrols-amid-covid-19-spikes/2357957/> (Illinois governor ordered police to patrol bars and restaurants to enforce public health mandates); T.J. Wilham, *Gov. Lujan Grisham to Use More Than State Police to Enforce COVID Restrictions*, KOAT ACTION 7 NEWS (Oct. 16, 2020, 6:21 PM), <https://www.koat.com/article/gov-to-use-more-than-state-police-to-enforce-covid-restrictions/34401095#> (New Mexico governor indicated that police would enforce COVID-19 orders); Les Zaitz, *Governor Calls for Tougher Enforcement of Oregon Mandates—or New Restrictions Are Coming*, SALEM REPORTER (Aug. 22, 2020, 6:15 AM), <https://www.salemreporter.com/posts/2843/governor-calls-for-tougher-enforcement-of-oregon-mandates-or-new-restrictions-are-coming> (Oregon governors called for tougher police enforcement).

⁷⁵ Christine Lehmann, *COVID Biggest Cause of Police Deaths This Year*, WEBMD (Oct. 12, 2020), <https://www.webmd.com/lung/news/20201012/police-at-high-risk-for-covid-19-race-to-adapt>; Harmeet Kaur, *Covid-19 Has Killed More Law Enforcement Officers This Year Than All Other Causes Combined*, CNN (Sept. 3, 2020, 2:13 PM), <https://www.cnn.com/2020/09/03/us/covid-19-police-officers-deaths-trnd/index.html>.

mandates are then caged in small quarters that facilitate the further spread of the virus.⁷⁶ As police officers engage in this public health policing, they are one of the populations most likely to contract COVID-19.⁷⁷ These police interactions provide additional pathways to spread the virus that the MTA and other officials aim to curtail.

Ironically, police officers have also been enforcing laws that directly undermine public health mandates. Police officers have been enforcing anti-mask laws that are intended to prevent Ku Klux Klan activity against Black people.⁷⁸ Strangely, they have been enforcing these laws, which were intended to protect Black people against racist Ku Klux Klan activities, against Black people who were wearing masks to comply with COVID-19 mandates. In Illinois, police officers followed two Black men in a Walmart store because they were wearing masks consistent with Centers for Diseases Control recommendation to wear facial coverings while in public spaces.⁷⁹ The police officers decided to enforce this law intended to deter Ku Klux Klan members against these Black men, who covered their faces to protect themselves during a pandemic. The officers followed them as they shopped in Walmart. The men described the experience as “‘terrifying’ and said they felt like they were ‘prey’ being stalked by the officer who approached them and said a Wood River city ordinance prohibits people from wearing masks in businesses.”⁸⁰ Wearing a mask rendered these men vulnerable to a “terrifying” police interaction that may have exposed these men to the coronavirus. This incident illustrates how equipping police with yet another basis to surveil marginalized communities leads to perverse scenarios.

⁷⁶ See Lee Kovarsky, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. ONLINE 71, 75 (2020) (“[T]here is moral value in substantial prisoner discharge during the COVID pandemic [because incarceration presents ‘systemic risks’]. Before COVID, political debates over the wisdom of mass incarceration raged, even if the pertinent empirical work rather lopsidedly demonstrated its senselessness.”); see Jenny E. Carroll, *Pretrial Detention in the Time of Covid-19*, 115 NW. U. L. REV. ONLINE 59, 62 (2020).

The overcrowding in jails that makes the spread of COVID-19 so likely highlights how many are held in jails not because they present a true risk but because they are poor, targeted by discriminatory laws and policing practices, unable to make bail, pay for a condition of release, or simply have nowhere else to go.

⁷⁷ Christopher Ingraham, *Covid-19 Has Killed More Police Officers This Year Than All Other Causes Combined, Data Shows*, WASH. POST (Sept. 2, 2020, 1:29 PM), <https://www.washingtonpost.com/business/2020/09/02/coronavirus-deaths-police-officers-2020/>.

⁷⁸ See Caroline V. Lawrence, *Masking Up: A COVID-19 Face-Off Between Anti-Mask Laws and Mandatory Mask Orders for Black Americans*, 11 CAL. L. REV. ONLINE 479, 485–488, 495 (2020) (describing the history of anti-mask laws intended to protect Black people from the Ku Klux Klan and the enforcement of anti-mask ordinances against Black people).

⁷⁹ See Jeanie Stephens, *Video: Wood River Officer Made Men Leave Walmart Because They Wore Masks*, THE TELEGRAPH (Apr. 7, 2020, 7:24 PM), <https://www.thetelegraph.com/news/article/Video-Wood-River-officer-has-men-leave-Walmart-15154393.php>.

⁸⁰ *Id.*

Unfortunately, sex workers, LGBTQ people, gender non-conforming people, and BIPOC communities will likely experience intensified policing if policymakers continue to rely on the police to enforce COVID-19 mandates.⁸¹ A recent study by the COVID-19 Tracking Project, a coalition of progressive organizations tracking the enforcement of COVID-19 orders, found that BIPOC people “were 2.5 times more likely to be policed and punished for violat[ing] COVID-19 orders than White people.”⁸² Black people in particular “were 4.5 times more likely to be policed and punished for violat[ing] COVID-19 orders.”⁸³ The findings from the report indicate a pattern of racially discriminatory enforcement throughout the country:

- “According to NYPD data, 81% of the 374 summonses for social distancing between March 16th and May 5th were issued to Black and Latinx residents of New York City.
- In Brooklyn, 35 of the 40 people arrested for social distancing violations were Black.
- In Ohio, Black people accounted for 61% of the 107 people charged with violations of COVID-related orders in Cincinnati, 78% of the 23 people charged in Toledo, and 57% of the 129 arrests in Franklin county.
- In San Diego, CA, Black residents make up only 6.5% percent of the city’s population but 24% of all people charged with COVID-related infractions.”⁸⁴
- Black women were 5 times more likely than white women to be policed and punished for violations of COVID-19 orders, while Black men were 3.7 times more likely than white men to be policed and punished for such violations.”⁸⁵

Unsurprisingly, policing in the pandemic is reflecting the same troubling racial disparities that are embedded in policing. One study found that as it relates to mask usage during the COVID-19 pandemic, Black respondents are most concerned about the harms of racial profiling:

Black respondents who responded to this question listed police interaction or racial profiling as the greatest harm that could come to them from

⁸¹ See Richard Delgado & Jean Stefancic, *Love in the Time of Cholera*, 68 UCLA L. REV. DISCOURSE 176, 179–80 (2020) (“Black men report that they are being stopped and questioned even more frequently than usual, particularly if they are wearing face masks to guard against the disease. For the police officer carrying out the stop, the Black youth is a potential predator, not an innocent teenager out for an evening stroll.”).

⁸² Emmer, *supra* note 64, at 30.

⁸³ *Id.*

⁸⁴ *Id.* at 32.

⁸⁵ *Id.* at 35.

wearing a mask (43.3%), over discomfort (23.3%), health concerns such as aggravated asthma or increased facial touching (20%), being attacked by conservatives for complying with mask requirements (10%), or others concealing their identity to facilitate crimes (.03%).⁸⁶

As these data suggest, these public health orders may easily lead to a “state of exception,” a moment when the usual rules are suspended, where aggressive policing tactics are embraced in the name of the public welfare.

In addition to enforcing COVID-19 orders in a discriminatory manner, police officers have been responding to protests about racist policing maskless, further contributing to community spread. This is a dangerous act of defiance. Flouting mask mandates while responding to calls for police accountability and defunding the police sends a message about police masculinity and ambivalence toward the law and the health of the protestors. It reflects a masculinity rooted in norms about the invincibility of the police. Professor Frank Rudy Cooper has examined how performances of masculinity affects policing.⁸⁷ Ignoring mask mandates reflects a masculinity rooted in the perceived invincibility of the police. It places police officers above the mandates of the law and the guidelines of public health officials. To ignore mask mandates might reflect the anti-masker’s libertarian concerns about being required to respect public health requirements. It might also reflect a belief that wearing masks is a sign of weakness. In this respect, ignoring mask mandates may be a masculinity performance that reflects bravado and indicates that the anti-masker is strong—so strong that they are above wearing a mask.⁸⁸

Responding to protests that call for racial justice or the defunding of the police without a mask is also a political act. The police are communicating their own message when they arrive to a masked crowd maskless, ready to engage in violent

⁸⁶ Lawrence, *supra* note 78, at 502; Devon W. Carbado, *Stop-and-Strip Violence: The Doctrinal Migrations of Reasonable Suspicion*, 55 HARV. C.R.-C.L. L. REV. 467, 486 (2020) (reasonable suspicion allows police to “search and seize individuals—on the streets, in their homes, in their cars, in schools, at work, and at the border—on the thinnest of justifications,” allowing “racialized state violence”).

⁸⁷ See, e.g., Frank Rudy Cooper, “*Who’s the Man?*”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 674 (2009) (applying “the masculinities studies literature to the field of criminal procedure and asks the following question: *How does masculinity affect policing?*”).

⁸⁸ Alisha Haridasani Gupta, *How an Aversion to Masks Stems From ‘Toxic Masculinity’*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/10/22/us/masks-toxic-masculinity-covid-men-gender.html>; Olivia Petter, ‘*Real Men Don’t Wear Masks*’: *The Link Between Masculinity and Face Coverings*, INDEPENDENT (Oct. 22, 2020, 3:28 PM), <https://www.independent.co.uk/life-style/face-masks-men-masculinity-coronavirus-lockdown-boris-johnson-b1077119.html>; Paul J. Fleming et al., “*Real Men Don’t*”: *Constructions of Masculinity and Inadvertent Harm in Public Health Interventions*, 104 AM. J. PUB. HEALTH 1029 (2014); Anna North, *What Trump’s Refusal to Wear a Mask Says About Masculinity in America*, VOX (May 12, 2020, 2:00 PM), <https://www.vox.com/2020/5/12/21252476/masks-for-coronavirus-trump-pence-honeywell-covid-19>.

suppression of the protests.⁸⁹ They are communicating their disdain for the protestors because they can spread COVID-19 to the protestors while suppressing their protests.⁹⁰ This response is unsurprising, as I have previously argued that police officers have responded to calls for accountability with hostility and symbolic gestures that communicate their superiority.⁹¹ Police officers are experts at developing well-orchestrated campaigns that flip the scripts for accountability and in portraying themselves as victims of injustice.⁹²

B. *Going Beyond the Governance of Policing*

The use of enforcement to urge compliance demonstrates Americans' pesky reliance on punishment and policing to improve the social welfare. Politicians are relying on get tough policing to save people's lives. But when policing facilitates the spread of contagion, perhaps it's time to reimagine how governance should occur. Jonathan Simon describes how American society has been governing through crime, which has "distorted American institutional priorities" and led to "real social costs."⁹³ The governance of policing is the reliance on negative enforcement by the police to promote social welfare. The governance of policing appears to be bad governance when addressing a public health crisis.⁹⁴

In this moment, advocates have been demanding that municipalities defund and abolish police because of the harms that the police institution has inflicted on

⁸⁹ Michael Wilson, *Why Are So Many N.Y.P.D. Officers Refusing to Wear Masks at Protests?*, N.Y. TIMES (June 11, 2020), <https://www.nytimes.com/2020/06/11/nyregion/nypd-face-masks-nyc-protests.html>.

⁹⁰ Isaac Scher, *Unmasked Police Officers Could Accelerate the Spread of Coronavirus Through Protests, Epidemiologist Says*, BUS. INSIDER (June 15, 2020, 2:39 PM), <https://www.businessinsider.com/george-floyd-unmasked-police-officers-protesters-spread-coronavirus-2020-6>.

⁹¹ I. India Thusi, *Blue Lives & The Permanence of Racism*, 105 CORNELL L. REV. ONLINE 14 (2020).

⁹² *Id.*

⁹³ JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 10 (2009).

⁹⁴ Julian Laufs & Zoha Waseem, *Policing in Pandemics: A Systematic Review and Best Practices for Police Response to COVID-19*, 51 INT'L J. DISASTER RISK REDUCTION 1, 4 (2020) (systematically reviewing data on policing during pandemics to evaluate best practices) ("The analysis suggests that civilian distress and grievances after disasters may disproportionately affect socio-economically disadvantaged communities, leading to violent confrontations between police and communities. This is especially the case for contexts that have seen the militarisation of policing . . ."); Catherine Cheney, *Policing in a Pandemic: Law Matters in the COVID-19 Response*, DEVEX (July 23, 2020), <https://www.devex.com/news/policing-in-a-pandemic-law-matters-in-the-covid-19-response-97691> ("Mass arrests and detention in situations that make it impossible or difficult to maintain physical distancing or other preventive measures will undermine rather than advance the public health measures . . .").

society.⁹⁵ However, enforcement by policing is a central part of governance, so much so that officials expect police to participate in functions that would undermine the aims of the governmental policy in question. Having police officers pass out tickets to people not wearing masks is unwise, but police enforcement is a natural escalation for most forms of government regulation. Consequently, abolition of the police is not just about the political project of diverting policing power and resources. The obviousness of refraining from the use of maskless police to interact with the public during a global pandemic after protests demanding the abolition of the police illustrates that abolition of the police is also a cultural project. Police appear to be a natural response because we are in a cultural environment that expects them to enforce all laws, even when such enforcement is counterproductive. Government officials, the various publics in American society, and the media need a framework for thinking about governing that goes beyond enforcing and punishing people into compliance. For example, the MTA could have instead focused on peer education, public and social media campaigns, and targeted workshops to get to 100% compliance of mask mandate. Instead, it is hoping to police people into compliance.

Some commentators might suggest that we should provide police with resources to do a better job at policing the pandemic. Maybe we should train the police to be better pandemic police officers? However, the police are doing exactly what they were designed to do in this country—maintain white supremacy. It does not matter whether the officer is Black or White.⁹⁶ Policing is merely the violent enforcement of social hierarchies and norms.⁹⁷ COVID-19 policing is not exceptional; it is merely another example of discriminatory policing. Focusing on the quantitative amounts of policing—under or over—obscures that qualitatively policing is generally always the same for marginalized communities—bad. Policing during a pandemic with punitive public health orders means that marginalized communities not only represent distinct threats as potential criminals; these communities are now public health threats as populations that might spread the contagion.⁹⁸ The police do not need Black and marginalized communities to view them as a legitimate in order for them to successfully complete this task. They need only engage in this work in a manner that is not so offensive as to awaken elites from

⁹⁵ Mary Zerkel, *6 Reasons Why It's Time to Defund the Police*, AM. FRIENDS SERV. COMMITTEE BLOG (Oct. 15, 2020), <https://www.afsc.org/blogs/news-and-commentary/6-reasons-why-its-time-to-defund-police>; I. India Thusi, *Beyond Policing*, OPPORTUNITY AGENDA (2020), <https://www.opportunityagenda.org/sites/default/files/2020-09/2020.09.03%20DefundThePolice%20FINAL.pdf>.

⁹⁶ I. India Thusi, *South Africa Shows That Diversity is Not the Answer to Police Violence*, THE HILL (Sept. 10, 2020, 11:00 AM), <https://thehill.com/opinion/civil-rights/515750-south-africa-shows-that-diversity-is-not-the-answer-to-police-violence>.

⁹⁷ *Id.*

⁹⁸ José Sepulveda & Lindsey Jacobson, *Here's Why Coronavirus is Being Classified as a Biological Agent*, CNBC (Apr. 29, 2020, 11:12 AM), <https://www.cnbc.com/2020/04/29/law-enforcement-officials-characterize-covid-19-as-biological-agent.html>.

their general complacency with sustainable levels of racial injustice in this country.⁹⁹ The public health orders are troubling, and politicians have provided police officers with another tool to police marginalized communities by encouraging punitive enforcement of public health orders.¹⁰⁰ This new tool allows police to regulate these communities as potential biohazards to the society at large.¹⁰¹ So, we may very well observe more videos of police violence during this new season as many communities are financially, emotionally, and physically stressed during this pandemic.

V. CONCLUSION

In conclusion, policing is ill-suited for the management of a pandemic. COVID-19 orders have provided police with a tool to treat marginalized communities like biological threats to society and for police to spread the virus in a discriminatory manner. Nevertheless, policing has become the State's default mode for governing and social welfare, even when by its very nature it contradicts the goals of the governmental policy.¹⁰² Instead of calling on the police to enforce mask mandates and other public health orders, it is time to eliminate this mode of police governance, which directly undermines the aims of containing the pandemic. Claims that police officers are "vectors of disease" recognize that they have been especially affected by the spread of COVID-19 and may be effective vectors for its continuing spread. If this is so, then it is time to take a form break from governing through policing and to instead provide communities—all communities—resources and power to prevent the spread of COVID-19.¹⁰³

⁹⁹ DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (2018).

¹⁰⁰ Sheryl Gay Stolberg et al., *The Surging Coronavirus Finds a Federal Leadership Vacuum*, N.Y. TIMES (Nov. 11, 2020), <https://perma.cc/RE3K-V2L8>; Dayna Bowen Matthew, *Structural Inequality: The Real COVID-19 Threat to America's Health and How Strengthening the Affordable Care Act Can Help*, 108 GEO. L.J. 1679, 1703 (2020) ("The public health impact on black communities of disparate criminal law enforcement is significant. Incarceration affects the mental and physical health of communities left behind. Family members experience increased incidence of mental illness such as depression and anxiety disorders, as well as an increased risk of poverty and homelessness.").

¹⁰¹ See FOUCAULT, *supra* note 28.

¹⁰² See SIMON, *supra* note 93.

¹⁰³ See generally Bernard E. Harcourt, *For Coöperation and the Abolition of Capital, Or, How to Get Beyond Our Extractive Punitive Society and Achieve a Just Society*, 2020 COLUM. PUB. L. RES. PAPER NO. 44-672 (contemplating a society rooted in social cooperation and mutual aid rather than the punitive modes of capitalism); see also Robert Gatter & Seema Mohapatra, *COVID-19 and the Conundrum of Mask Requirements*, 77 WASH. & LEE L. REV. ONLINE 17, 30 (2020) ("[I]t may be tempting to encourage mask use via mandatory orders with fines for noncompliance. However, given the discriminatory ways such rules are likely to be enforced, it is important to proceed with caution.").