

85 UMKC L. Rev. 625

UMKC Law Review
Spring, 2017

Article
Professor [Scott Holmes](#)¹

Copyright © 2016 by the Curators of the University of Missouri; Professor Scott Holmes

RESISTING ARREST AND RACISM - THE CRIME OF “DISRESPECT”

Maybe all she had left

when her words ran out

was this smack of action.

Maybe her heart is a charred city,

charmed city

Her son, her last ember.

We take her footage into our

eyes and mouths, add our own

soundtrack and lean political.¹

I. INTRODUCTION - JOHN HILL

John Hill is a poor black man, his body covered in burn scars. He was riding his bicycle down Alston Avenue in Durham, North Carolina to his job at a convenience store. As he neared the intersection at North Carolina Central University Law School where I teach, he saw the light was red. Having cycled through the intersection many times on his way to work, John timed his pedaling perfectly so that the light turned green as he entered the intersection. A Durham City Police Officer, Officer Daniels, saw John and initiated a traffic stop for entering the intersection while the red light was still red. Officer Daniels was a member of Durham's High Enforcement Abatement Team (HEAT)² charged with drug enforcement and investigations. He was not a regular traffic control or patrol officer. Officer Daniels' job was "handle crime 'hot spots,'" and not issue traffic tickets.³ Officer Daniels exited his vehicle and violated protocol when he did not have the audio microphone running on the recording equipment. But, the video dash cam in his patrol vehicle captured the incident.⁴ As Officer Daniels approached John, John tried to explain that he did not run the red light. He told *626 Officer Daniels he was on his way to work, and timed the entry into the intersection as it turned green. Officer Daniels informed John that a dash cam (video recorder) in his vehicle was recording their interaction. John suggested that they look at the video as proof he did not run the red light. Officer Daniels began yelling at John to sit down. After yelling at John for 60 seconds, Officer Daniels threw John to the ground and placed him in a take-down hold. John began yelling, "I can't breathe!" Other officers arrived at the scene and piled on John. During the attack on John, officers busted his head and fractured his arm.⁵

Officer Daniels arrested John and searched his backpack, finding nothing. Then he took John to the Durham County jail where he was booked for two charges: running a red light on a bicycle and resisting, delaying, or obstructing a law enforcement officer in the performance of his duty.

At trial, the officer testified he never heard John yell he could not breathe. He also said John Hill came at him and threatened his safety, but the video clearly showed that John stood on the curb and never approached the officer. Chief District Court Judge Morey dismissed the resisting charge on the grounds Officer Daniels used excessive force saying, "I don't see that there was any reason to place hands on him. I didn't see aggression. There was much inconsistency from what we could hear and what we could see. He was 'slammed.'" The judge also found reasonable doubt and acquitted John of running the red light.⁶

This article explores how police use the charge of resisting arrest as a form of racial oppression rather than keeping communities safe. This particular practice must be understood within the larger context of racially divided communities, and the long history of defining "insiders" and "outsiders" within our society based upon wealth, privilege, and race. In our tortured racial history, the concept of race has been used as a tool to control and extract wealth from poor workers. To maintain racial and economic control over black people, our society has employed a variety of tools of social control.

For example, after the end of slavery, white communities used the practice of terror lynching to control black people.⁷ "Lynching was the white community's way of forcibly reminding blacks of their inferiority and powerlessness."⁸ A black person could be lynched for looking at a white person "in a manner regarded as disrespectful."⁹

*627 The great crusader against lynching, Ida B. Wells, identified several aspects of lynching as a form of racial control which help explain how police practices described here follow a similar pattern of violence as racial social control. In her critique of the practice of lynching, Wells showed that although white people "justified" lynchings on the grounds that the black person had "raped" a white woman, this was really a false pretext and that the black person's real "crime" was disrespecting white authority.¹⁰ The fabrication of a "crime" justified the violence against the black person in order to punish disrespect and make an example of the black victim to control the black community. White defenders of lynching wrote that having left slavery, black people had become insolent, lacking "manners," and dangerous to white people.¹¹ The white supremacists argued that if black people just showed "self-respect" and were courteous toward white authority, there would be no racial problem.¹² It was therefore appropriate according to white supremacists to burn, torture, and kill black people in order to control the whole group, even if innocent black people "must suffer for the guilty."¹³ Wells showed how institutions

RESISTING ARREST AND RACISM - THE CRIME OF..., 85 UMKC L. Rev. 625

of “religion, science, law, and political power may be employed to excuse injustice, barbarity and crime done to a people because of race and color.”¹⁴

In addition to showing how violence against black people was justified by a false pretext of criminality and was committed as a form of community control, Wells showed how this form of racial violence harmed the rule of law, there being no “punishment by law for the lawless.”¹⁵ The unwritten social law of racial lynching made a “mockery of law and justice” by disarming black men, locking them up in jails, where they could be seized by the mob.¹⁶ There was no one to protect black people from racial violence because the justice system was complicit in the racial violence. Further, even African American leaders, ministers, newspapers “counseled obedience to the law which did not protect them.”¹⁷

This article explores how police fall into a similar pattern of racial control when they use the charge of resisting arrest to punish disrespect from black people. First, the police fabricate a justification to detain or take the black person in custody as a pretext for control, using force for even the most minor offenses or when there has been no offense at all. Then when the black person protests or resists the illegitimate use of authority, the officer punishes the black *628 person with a forcible full custodial arrest. Sometimes these incidents escalate the use of force and black people are beaten, tasered, or even killed. In the most extreme recent case, a white officer shot and killed a fleeing black man in the back and planted evidence.¹⁸ And, the jury was unable to convict the officer even though the incident was caught on video.¹⁹ This was a modern day lynching. The impunity with which officers inflict violence upon black people is essential to the fear and terror necessary for racial oppression and control. Members of the black community see that they are powerless at the hands of police misconduct, and counsel their children to be obedient to police who are not protecting them.²⁰ As a result of these kinds of encounters, the rule of law is diminished as communities of color lose respect for the law which does not protect them from police misconduct. This article explores how the purpose of resisting charges is not public safety, it is a form of racial control targeting people of color who “disrespect” authority. The particular practice of punishing black people for disrespect with resisting charges is one expression the broader policy of the “war on drugs,” which has really been a war on poor communities of color. This failed “war on drugs,” has led to the mass incarceration of black people - another form of racial control.²¹

In addition to exploring the racial underpinnings of resisting charges, this article also suggests legal strategies lawyers can use to defend these charges. You will find here ideas for preparing for trial, authority for motions, and common patterns in litigating these cases. Defending these cases in court not only serves victim of racial oppression, but also helps support the broader movement to expose and remedy systemic racism in our court system. Finally, this article tries to find pathways to reimagine and reorient policing to focus on public safety and end racial disparities in policing.

The charge of “resisting, delaying, or obstructing” (RDO) is a law enforcement tool used to punish non-cooperative suspects.²² The offense is not used to protect officer safety or promote public safety, but instead officers use the *629 Resisting charge as a discretionary tool to suppress dissent and penalize vulnerable arrestees. The Resisting charge epitomizes the way that policing of poor people and people of color is more about social control than public safety.

This kind of situation happens repeatedly in my community and around the country, sometimes with deadly consequences. It deserves careful attention and understanding from multiple points of view. It is layered with psychology, history, culture, economics, politics, and the law. The fundamental values at stake are described as “respect” or “trust,” concerns of “officer safety” and “racial profiling,” “equal protection of the law.” Although people can demonstrate respect even when there is none, police can only earn real respect over time with demonstrated fair treatment and professional integrity.

Not all officers behave this way. Some of them do not stretch their authority to its limits, and then assert their power in arrogant disrespect. Unfortunately, some defenders of this police behavior minimize this symptom of systemic racialized oppression by individualizing the problem - police misconduct is a matter of “a few bad apples,” they say. These apologists forget the full aphorism, “a few bad apples spoil the barrel.”²³ This behavior is not the result of a few “bad apples,” it is police power used to control people of color, rather than keeping communities safe. Officer Daniels did not throw Mr. Hill to the ground and injure him for the sake of public safety. He did it to control Mr. Hill. Such contested police encounters offer an opportunity to not only explore and remedy some of the failures of our criminal justice system but also the persistent racial inequities in our society.

II. RESISTING CHARGES AS A TOOL OF RACIAL OPPRESSION AND SYSTEMIC RACISM

Others have recognized the importance of reviewing resisting charges as an indicator of poor police training and misconduct. A New York Times article on police misconduct in Greensboro, North Carolina, describes the charge of “resisting, delaying, and obstructing a public officer,” a “catch all charge.”²⁴ The data shows that since 2009 Greensboro police charged 836 blacks with *only* the charge of “resisting arrest” and 209 whites with the same charge.²⁵ “If a Black motorist ‘does anything but be completely submissive and cower, then you get the classic countercharge by the officer that there was resistance, or disorderly conduct or public intoxication,’ [said civil rights lawyer Lewis Pitts]. ‘Then they *630 end up in jail.’”²⁶ In response to this reporting, Chief Scott of the Greensboro Police asked his officers to investigate how officers issue the charge disproportionately against people of color.²⁷

The Chief of Police Medlock in Fayetteville, North Carolina, took a more action-oriented approach to addressing racial disparities in resisting charges. Chief Medlock instructed his officers to avoid resisting-an-officer charges unless some more serious offense also occurred. “I tell my folks, if that’s all you have, don’t charge somebody. Find a way to move them on down the road.”²⁸

When investigating disturbing reports of excessive force among the Harnett County Sheriff’s Department, the Raleigh News and Observer looked at disproportionate “Resisting” charges. When looking at allegations of excessive force against the “D Squad” of the Harnett County Sheriff department, the reporters found the D Squad had a “disproportionate share of resisting public officer charges.”²⁹ The News and Observer reported that of the 63 cases in which the D Squad issued Resisting charges in 2014 and 2015, “resisting a public officer” was the sole charge in 26 of those cases. Said another way, 26 people were arrested *only* for resisting arrest, with no other charge levied against them. How can you resist arrest when the only thing you’re being arrested for is - in fact - resisting arrest?

Of the 63 resisting charges from Harnett County, 37, more than half, were dismissed. After learning of the data collected by the News and Observer, the local District Attorney agreed to “proactively review all charges of resisting a public officer.”³⁰

Branny Vickory, former District Attorney in Wayne, Lenoir and Greene counties, said sheriffs, police chiefs, and prosecutors need to be on the lookout for a high volume of certain types of charges: resisting a public officer and assault on a government employee. “Those charges are filed more often by the younger officer who hasn’t lived long enough,” Vickory said. Sometimes officers handle a situation by saying, “You don’t do what I say, I’ll charge you and see you in court.” A good officer will charge that less. Deputies are there to defuse, not escalate.

The prevalence of resisting arrest charges is a red flag and indicator of police misconduct within police departments. When reviewing police misconduct in Ferguson, Missouri and Newark, New Jersey, the Department of Justice (DOJ) investigated situations where police charged people with resisting. “[T]here is *631 reasonable cause to believe the NPD [Newark Police Department] has engaged in a pattern or practice of unconstitutional arrests for behavior perceived as insubordinate or disrespectful to officers--often charged as obstruction of justice, resisting, or disorderly conduct.”³¹ In Ferguson, the DOJ Reported,

Officers frequently make enforcement decisions based on what subjects say, or how they say it. Just as officers reflexively resort to arrest immediately upon noncompliance with their orders, whether lawful or not, they are quick to overreact to challenges and verbal slights. These incidents--sometimes called ‘contempt of cop’ cases--are propelled by officers’ belief that arrest is an appropriate response to disrespect. These arrests are typically charged as a Failure to Comply, Disorderly Conduct, Interference with Officer, or Resisting Arrest.³²

This is more evidence of a systemic practice of social control. In many cases across the country, officers issue the charge of resisting a public officer to punish people who do not comply with commands or whom the officer perceives is showing disrespect which suggests these charges are intended for social control rather than public safety.³³

III. A STUDY OF RESISTING CHARGES

Examining Resisting charges raises many questions. Why did the officer target John Hill in the first place? Why didn't he just let him go? Duke University Students bicycling across town would not have received the attack *632 John received. How do we change that? Why does the officer react to John with fearful authority instead of careful respect? Is there something about the culture and mission of police that encourages these encounters? How does a lawyer defend against these charges in a way that changes the system? How do new models of police training teach officers to combat their implicit bias,³⁴ recognize structural racism,³⁵ and engage people with procedural fairness? What does a review of the racial disparities in the issuance of these charges teach us about implicit bias and systemic racism in police departments?

I have focused my own exploration of these questions by looking at resisting cases brought by law enforcement officers in my community, Durham, North Carolina. Students in my criminal procedure class collected and reviewed court documents from Durham County.³⁶ We reviewed court files documenting charges of "resisting, delaying, obstructing an officer" in Durham County North Carolina from August 2014 until April 2016. Using the clerk's computer system operated by the North Carolina Administrative Office of the Courts, we reviewed one hundred ninety-six (196) court files. We pulled all, the cases where officers charged a person with the single charge of resisting or issued the resisting charge in connection with a minor offense like trespassing. 90% of the people charged with resisting were people of color. And of the 196 cases, only 23% were convicted. The data shows that in addition to racially disproportionate issuance, these resisting charges are usually meritless.

When reviewing the court files of resisting cases, there were a number that exemplified other related expressions systemic racism in our criminal justice system: criminalization of childhood and the school to prison pipeline, criminalization of poverty, criminalization of mental illness, and the use of the court system to control the behavior and movement of poor people of color. These resisting cases offer examples and opportunities to explore racially contested police interactions in my community.

IV. HISTORY OF POLICING IN DURHAM, NORTH CAROLINA

The history of policing in the South demonstrates that some forms of policing are more about social control over people of color than about public *633 safety. During slavery, Slave owners commissioned poor white people to conduct "slave patrols," to catch and return escaped slaves.³⁷ The predominant plantation in Durham was the Stagville plantation, and slaves were also held on smaller farms.³⁸ This form of policing insured social control over black flesh in chains to preserve the system and institution of slavery. Once slavery was abolished, authorities used "vagrancy" laws to arrest unemployed Black people.³⁹ Once arrested and convicted, police "leased" the black individuals to farm owners who forced their labor for profit. The convict leasing program was incredibly dangerous to black men and women caught in this form of racial social control because the white farmer had no economic interest in protecting the wellbeing of the black worker. White farmers could mistreat and injure leased convicts without harming their own economic wealth interest. Further, the law enforcement leasing agency lost no money if the black worker was harmed. Jim Crow supplemented convict leasing, encoding racial separation and control into the law. Jim Crow promoted the arrest of black people who crossed racial lines and violated racial mores, or competed directly with white residents.

The privileged white class also controlled black people with terror lynching. This occurred when a black person transgressed some social code or cultural norm, or directly competed economically with a white person. White authorities accused a black person with a crime and then handed him over to a mob that tortured, disfigured, and then hanged him at a public celebration until he was dead.⁴⁰ In 1898 a black man was lynched in Durham and left hanging on a road between Durham and Chapel Hill after it was rumored he was living with a white woman.⁴¹ In 1907, a twenty-five year old, Freeman Jones, was hanged *634 outside Durham County after he "confessed" to attempting to rape a sixty-year old white woman.⁴²

RESISTING ARREST AND RACISM - THE CRIME OF..., 85 UMKC L. Rev. 625

In July 1944, a white bus driver, Herman Council, shot and killed a black soldier, Booker T. Spicely, when Spicely refused to move to the back of the bus and insulted the driver by implying he was not fit for military service.⁴³ A riot broke out across Durham and four large warehouses and several private homes went up in smoke.⁴⁴ An all-white jury acquitted Council of murder in twenty-eight minutes in September 1944.⁴⁵ Northern black commentators noted, “[t]he quick exoneration of this bus-driver is an encouragement to other ‘crackers’ to declare ‘open season’ on Negro soldiers.”⁴⁶

On April 13, 1947, police arrested legendary Quaker Civil Rights Activist, Bayard Rustin in Chapel Hill, North Carolina for refusing to move to the back of a bus traveling interstate.⁴⁷ The United States Supreme Court had just declared Jim Crow segregation laws unconstitutional in the context of interstate travel, concluding these laws posed an “undue burden on interstate commerce.”⁴⁸ Upholding local state police, the Supreme Court reached this conclusion after balancing the exercise of the local police power and the need for national uniformity in the regulations for interstate travel.⁴⁹

Working for the Fellowship for Reconciliation (“FOR”) and American Friends Service Committee (“AFSC,” a Quaker service organization), Rustin travelled by bus for two weeks in the South with sixteen people, eight white and eight black.⁵⁰ When Rustin and others refused to move, they were charged with disorderly conduct, refusing to obey the bus driver, and resisting arrest.⁵¹ They were released on a \$50 bond.⁵² At trial, the white judge convicted Rustin and sentenced him to thirty days of hard labor.⁵³ Rustin reported to serve his sentence March 21, 1949.⁵⁴ While shoveling dirt, Rustin came too close to a guard who put a gun to his head and threatened to “shoot the goddamned life out of you.”⁵⁵ *635 While he was being forced to work at gunpoint and in chains, Rustin noticed an older black man who had been beaten in the head with blackjacks by Durham Police for “resisting arrest” after he had become intoxicated.⁵⁶ He could not work, and so he was hung on the bars for seventy-two hours.⁵⁷

Rustin described how the man was tortured in the camp for his inability to work: “When a man is hung on the bars he is stood up facing his cell, with his arms chained to the vertical bars, until he is released (except for being unchained periodically to go to the toilet). After a few hours, his feet and often the glands in his groin begin to swell. If he attempts to sleep, his head falls back with a snap, or falls forward into the bars, cutting and bruising his face.”⁵⁸

Though the explicitly racist laws of Jim Crow were eventually ruled unconstitutional, architects of a new policy of racial control took a more discrete and coded approach through the “War on Drugs.” The relatively recent fall of Jim Crow prompted leaders aiming at continuing racial control to declare a “war on drugs” which led to the mass incarceration and further disenfranchisement of poor black people.⁵⁹

A main focus of the criminal justice has become criminalizing behaviors associated with poverty. The “War on Drugs” targeted poor black communities and did not target for surveillance and prosecution comparable drug use in the privileged white community. Despite studies showing rates of drug use were the same across the races, those prosecuting the “War on Drugs” focused their resources on poor communities of color, prosecuting and sentencing black people at higher rates and with more severe punishment. Police and prosecutors who targeted black communities for greater surveillance and criminal prosecution resulted in mass human caging of black people, with associated collateral consequences of conviction which bar voting, housing, food, and other benefits.⁶⁰

Failure to invest and protect in communities of color, racial redlining in real estate, employment discrimination, racial segregation and suspensions in education compounded, reinforced and caused racial disparities and inequality.

I encountered the war on drugs as an Assistant Public Defender on February 15 and 16, 2002, when Durham City Police, County Sheriffs, Special Agents of State Bureau of Investigation, and the National Guard surrounded a low income housing community on Cheek Road, Durham. In an operation called “The Aggressive Police Strategy,” (TAPS), police raided all one hundred and eleven units and conducted searches with only seven search warrants in search of crack cocaine.⁶¹ The law enforcement organizations developed a policy to search *636 the low income black community for drugs. National Guard helicopters, “flash bombs,” strip searches, investigatory searches of all vehicles punctuated this two-day invasion. The police used military force to lay siege to this poor black community. One thirteen-year-old boy was searched at gunpoint after running from police. I argued that the charges arising from this invasion should be dismissed because of the flagrant violation

RESISTING ARREST AND RACISM - THE CRIME OF..., 85 UMKC L. Rev. 625

of the Fourth Amendment. As a result, all thirty-five arrests and sixty-five citations were dismissed by the prosecutor. Chief Superior Court Judge Orlando Hudson stated that it was unconstitutional to “seize an entire neighborhood.”⁶²

This raid on Cheek Road illustrates the way the “War on Drugs” inflicts the extreme violence upon poor communities of color and leads to unnecessary mass human caging of black men and women. This incident illustrates the willingness of police to terrorize an entire community with military style force just to look for drugs. The “War on Drugs” and the resulting mass incarceration of poor people of color have continued the pattern of using the power of the criminal justice system to target and control poor people of color with increasingly militarized police who limit mobility, demand submission, and “serve and protect” affluent people by keeping poor Black people in segregated neighborhoods or in jail.⁶³

This brief review of history shows that a central purpose of the police has been to control and restrict the freedom of people of color, and maintain the subordinate status institutionalized by law, history, and culture. How we interpret these racially contested police encounters now depends on our racial lens and our understanding of the purpose of the police. What is the purpose of the police? We often hear the slogan, “to serve and protect.” But who are the police serving? Who are they protecting? And what are they protecting people from?

V. RACIALIZED SOCIAL CONTROL OR PUBLIC SAFETY

Over the course of eighteen months, ninety percent of the one hundred ninety-six (196) resisting charges in Durham County were issued to people of color. Only nineteen (19) of the Resisting charges were issued to people identified in the court files as “white.” This constituted 10% of the charges. Police issued the remaining one hundred seventy-seven (177) Resisting charges to people identified as “black,” (one hundred sixty-four), “Hispanic” (twelve) or “Other,” (one), constituting 90% of the Resisting charges. Again, only twenty-three percent (23%) of the one hundred ninety-six (196) Resisting charges resulted in a conviction. The vast majority of Resisting charges issued to people of color were meritless.

*637 The United States Census Bureau estimates that 300,952 people live in Durham County as of July 2015.⁶⁴ The Census Bureau estimates that 53.1% of these people are white, 38.4% are black, 13.4% are Hispanic or Latino.⁶⁵ The racial disparity of resisting charges is startling and should prompt discussion and thought. Litigating these cases in court is a way to collect more information and learn more about specific incidents of Resisting cases. Each individual Resisting case is an opportunity to understanding the dynamics of these interactions between police and residents. They are an opportunity to think more deeply about how implicit bias and structural racism operate in my community.⁶⁶

The idea of “racism” is used in a variety of ways that often confuses discussions of racism. *Explicit racial bias* occurs when people openly and directly declare their intention to treat people differently because of race. Traditional Jim Crow racial segregation, and present white supremacists illustrate this kind of bias.⁶⁷ Political language that equates immigrants with violent criminals also constitutes explicit racial bias. *Implicit racial bias* occurs when people unconsciously draw conclusions and act on assumptions that are based in racial stereotypes.⁶⁸ *Structural racism* occurs when the cumulative history of racial disparities are continued and perpetuated by race neutral policies and practices which reproduce racial disparities.⁶⁹ One example of structural racism includes using local property taxes to fund schools. The long history of racial disinvestment in communities of color results in racial disparities in property values which then result in racial disparities in school funding. The “War on Drugs” which was framed as a race neutral public safety measure suffers from structural racism because racial profiling and over policing of poor black *638 communities creates racial disparities in drug enforcement and prison populations.⁷⁰ For example, policy makers set the punishment for possession of “crack” (most often found in poor black communities) at a rate of 100 to 1 as compared to powder cocaine (most often found in affluent white communities) despite the fact that these substances are chemically identical.⁷¹

It is hard to say how these different kinds of racism operate within the decision to charge someone with resisting, but the data showing 90% of the Resisting charges are issued to people of color demonstrates a combination of different kinds of racism are at work in the way black Durham residents are treated.

The Department of Justice discovered a similar racial disproportion in charges in Ferguson, Missouri.⁷² Data on charges issued by Ferguson Police Department (FPD) from 2011-2013 show that, for numerous municipal offenses for which FPD officers have a high degree of discretion in charging, African Americans are disproportionately represented relative to their overall portion of Ferguson's population. While African Americans make up 67% of Ferguson's population, they make up 95% of Manner of Walking in Roadway charges; 94% of Failure to Comply charges; 92% of Resisting Arrest charges; 92% of Peace Disturbance charges; and 89% of Failure to Obey charges. Because these non-traffic offenses are more likely to be brought against persons who actually live in Ferguson, rather than are vehicle stops, census data here does provide a useful benchmark for whether a pattern of racially disparate policing appears to exist. These disparities mean that African Americans in Ferguson bear the overwhelming burden of FPD's pattern of unlawful stops, searches, and arrests with respect to these highly discretionary ordinances.⁷³

VI. RESISTING ARREST: THE OFFENSE AND THE CHARGE

"If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor."⁷⁴ This charge is often referred to "Resist, Delay, or Obstruct" or an "RDO."⁷⁵ It is important to note that, standing alone, a resisting charge is a non-violent offense. There is a separate charge for *639 assaulting a law enforcement officer,⁷⁶ or communicating a threat.⁷⁷ Sometimes a person is charged with resisting for speech alone, sometimes conduct alone, and sometimes a combination for speech and conduct.⁷⁸ This is a charge issued in the complete discretion of a police officer. An officer has the choice of issuing a citation or conducting a full custodial arrest when an officer charges someone with resisting, delaying, or obstructing the officer.⁷⁹

A. The Elements of Resisting in North Carolina

N.C. GEN. STAT. § 14-223 criminalizes behavior the resists, delays, or obstructs an officer in the performance of official duties. At trial in North Carolina, the Judge will instruct the jury on the law of resisting arrest by identifying five elements of the offense.⁸⁰

First, that the victim was a public officer

Second, that the defendant knew or had reasonable grounds to believe that the victim was a public officer

Third, that the victim was discharging or attempting to discharge a duty of his office"

Fourth, that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge this duty.

And Fifth, that the defendant acted willfully and unlawfully, that is, intentionally and without justification or excuse.⁸¹

*640 B. Exploration of Resisting Cases in Durham

To understand resisting charges as an implementing tool of systemic racism, it is useful to examine the individuals and

groups charged with resisting. Thus, we return to the 196 court files in Durham County, North Carolina for all charges of resisting a public officer between August 2014 and April 2016.

1. Children and Teenagers

Though chronologically and legally children in North Carolina, sixteen and seventeen-year-old children are adults in the criminal justice system.⁸² Children who are sixteen and seventeen years old have not fully developed and cannot measure the consequences of their actions in manner that would justify adult punishment.⁸³ In addition, criminal punishment and the collateral consequences of having a criminal history increases the odds children will fail to complete school and end up in the rotating door of the prison system.⁸⁴ Targeting children of color with the resisting charges does not serve public safety, and demonstrates the use of the justice system to control people of color by branding children as criminals for non-violent, discretionary charges.⁸⁵ However, the *641 social cost of criminalizing the failure of children to follow commands outweighs any benefit to punishing them criminally for resisting.

In Durham, from August 2014 to April 2015, police charged seventeen (17) children under the age of eighteen with resisting, or 9% of all the cases reviewed.⁸⁶ Police charged forty-eight (48) teenagers under the age of twenty-one. The police charged one hundred twenty-four (124) people under the age of thirty. Approximately one quarter of the people charged with resisting were under the age of twenty-one, and more than half were under the age of thirty.

Exploring individual resisting charges issued against children of color helps show how this charge is used to control these children, permanently impairing their upward mobility and marginalizing them for life as a collateral consequence of the criminal charge. As may be expected, the failure to follow officer instructions seemed particularly prevalent among children and young people. The following are examples of situations where police charged children with resisting. Durham Police Officer S.T. Odom arrested a Hispanic sixteen year old for shoplifting and charged him with resisting for giving a false name and address when arrested.⁸⁷ Sheriff Deputy J. Potts arrested a black sixteen year old for “disorderly conduct” at school for “attempting to fight, yelling and cursing.”⁸⁸ Deputy Potts also charged a girl with Resisting by “failing to heed verbal commands and attempting to flee.”⁸⁹ Deputy Potts also charged another black sixteen year with resisting for “running and fleeing” while the officer was “checking the welfare of students and investigating a trespassing.”⁹⁰ Police charged multiple black children for resisting by “running away.”⁹¹ Repeatedly, children and young adults run away when the police arrive and are charged with resisting for fleeing, regardless of whether they had a legal obligation to comply with the officer’s command to stay or not.

Durham City Police Officer M. Bouleris charged a nineteen-year-old black teenager with resisting “by fleeing.”⁹² The citation failed to allege the duty the officer was performing when the officer encountered the teenager. This suggests that the officer lacked reasonable suspicion to detain or probable cause *642 to arrest the child. When this charge came to court, the prosecutor dismissed the case because “the State does not wish to proceed.”⁹³

Police also charged black children for refusing to leave. Deputy G.N. Middleton arrested a sixteen-year old black teenager for “refusing to leave the immediate area where an arrest of another person was being effected.”⁹⁴ In the warrant, Deputy Middleton alleged that the child committed the crime of resisting a public officer by stating “I ain’t goin’ nowhere til you take those cuffs off my man,” and “get your fucking hands off me, y’all ain’t doin shit.”⁹⁵ From the allegations in the warrant, it appears that the child was arrested for resisting by talking about a friend who was being placed under arrest by police for allegedly assaulting an officer.⁹⁶

Captain M.B. Jobe of the Durham County Sheriffs department cited a sixteen-year-old black girl with resisting for “being disorderly and refusing to leave Mr. Carter’s office. I struggled with her while trying to detain her for pulling away with arms, failing to follow a lawful order.”⁹⁷ A Hispanic seventeen-year-old was charged with resisting when he “refused to leave guidance counselor [sic] office.”⁹⁸

Being in the wrong place at the wrong time and refusing officer commands are recurring themes when reviewing the

RESISTING ARREST AND RACISM - THE CRIME OF..., 85 UMKC L. Rev. 625

Resisting charges against children and teenagers. Durham City Officer P.O. Clark charged an eighteen-year-old black male with resisting for “riding his bicycle on the sidewalk when told [not] to.”⁹⁹ Durham City Officer J.K. Conser charged an eighteen-year-old female for “standing up when told to sit down.”¹⁰⁰ This charge was dismissed by the prosecutor because “the State cannot meet burden.”¹⁰¹

The officers use resisting charges to control the movement of people in their community. Whether it is refusing to leave an area where the person feels they have a right to stay, or running away when the person feels they have the right to leave, officers charge black people with resisting to control their movement. Resisting charges punish people for contradicting officer instruction on moving, leaving, or staying. Once directed at children, these resisting charges will affect the course of their lives and mark them for life as marginalized through their criminal record. The result is racialized marginalization and social control, and not the advancement of public safety.

*643 2. Mental Illness and Poverty

The failure of our mental health system means that people with untreated mental illness become “criminals” and are incarcerated because of their sickness and not because of their intent to commit crime.¹⁰² In addition, criminalizing behavior associated with being poor¹⁰³ increases poverty and disinvestment in struggling communities.¹⁰⁴ People marked by a criminal record are less likely to get jobs, and communities marked by increased arrests are less likely to attract business. Charges of trespass, disorderly conduct, sleeping in public, urinating in public, panhandling, solicitation, misdemeanor larceny of food, are examples of criminalizing poverty. Resisting charges are also used as social control in cases where police are controlling poor people suffering from mental illness. As is true in the context of race, the use of the resisting charge in this form of mental illness and poverty more is more about social control than public safety.

For example, Officer Ugolick arrested a black woman for failing to provide identification and put her hands behind her back “during a Terry frisk” in a “detention” at a Waffle House where police were “investigating a trespasser.”¹⁰⁵ She was not charged with trespassing. Her only crime was not cooperating with the trespassing investigation. These allegations raise a number of potential issues, which may or may not have been present in this case but are worthy of discussion. Trespassing is often a crime of poverty, which is focused on controlling where poor people can appear in public. First, it is concerning that police use “trespassing” to control where people are allowed to go. Second, police have authority to detain people even when there is not enough evidence to arrest them. This is confusing and terrifying to most people, and the fact that police often do not explain how they are using that authority escalates the confusion to distrust and fear. Police who are committed to procedural fairness *644 take the extra time to explain what they are doing and the basis of their authority.¹⁰⁶

Police have the authority to temporarily detain people when they have reasonable articulable suspicion to believe that person is committing a crime.¹⁰⁷ In the above example, if officers had reasonable suspicion to believe this black woman was the trespasser they could temporarily detain her. If she was not the suspected trespasser, then they had no authority to detain her. Also, if officers have separate grounds to believe the person is armed and dangerous, then they have the authority to conduct a “Terry Frisk” and pat down the person’s outer layer of clothing to determine whether she has any weapons.¹⁰⁸ It is questionable whether the police had reasonable, articulable suspicion that she had committed any crime. Also, unless they had additional information about her background, there would be no reason to believe she was armed and dangerous to justify the “Terry frisk.” Finally, it is unlikely the police took the time to explain all of this to her. If they were legitimately exercising their authority, they could have explained it to her in a way that may have made her more compliant. She was not trespassing, and yet, she was detained in a trespassing investigation. So, she was likely confused as to why she was being detained. As a result, she was arrested for “resisting placing her hands behind her back during a Terry frisk.”

The prosecutor dismissed this case when it came to court “IOJ [in the interest of justice] - capacity.”¹⁰⁹ This suggests that the woman suffered from mental impairment and lacked the capacity to proceed in Court which requires that she must not be able to understand the charges against her or assist in her defense.¹¹⁰ That her charges were dismissed because she lacked capacity suggests that the officer simply arrested her and then punished her for not understanding her arrest which she had no capacity to understand.

***645 3. Social Space - Controlling “Outsiders”**

At a more fundamental level, policing as a means of social control is illustrated by criminal charges used to remove “outsiders” or undesirable people from spaces of affluence. Racial inequality often coincides with economic inequality, given the role race has played in our history to exploit and oppression people of color. Policing operates in this context as a mechanism enforcing economic inequality and keeping poor people out of predominantly white areas of comfort, privilege, and affluence. This economic inequality is accompanied by a wide range of harmful consequences which generally increase conflict and the risk of violence. The use of police to control social space and help protect the status of wealthy insiders from poor outsiders is the kind of racial economic inequality built into the function of law enforcement, which generates more conflict and risk of violence. This purpose of law enforcement makes us less safe.

For example, Duke University is located in Durham, North Carolina. It is an affluent and overwhelmingly white private university open to the public. A few of the Resisting charges indicate that Duke Campus police use the resisting charge and trespass charges to keep Durham residents away from Duke who may not “belong.” Duke Campus Police Officer Cantrell charged a black man with resisting a public officer for lying about his name and date of birth, “and could not get a confirmation of actual story of how he got to Duke.”¹¹¹ He was charged with resisting because he “lied about being on Duke property.”¹¹² Nothing in this court file suggested the person was detained for reasonable suspicion of committing a crime.

On another occasion, Officer Cantrell arrested another black male for “giving a false name,” while “investigating a suspicious person on private property.”¹¹³ Duke campus police officer A. Munck arrested a black male for “attempting to flee on foot while being placed under arrest,” while the officer was “investigating a panhandler matching” his description.¹¹⁴

These kinds of resisting cases raise the following questions: who is an insider and who is an outsider? Who belongs to what community? How are communities sorted, separated, and segregated by poverty and race? What is the role of police in maintaining that separation and segregation? Our history of racial segregation and racialized media stereotypes plays a role here.

A white person suffering implicit bias may see a black male standing on a street corner and make irrational assumptions based upon race, these assumptions induce fear.¹¹⁵ This irrational fear is based upon the pattern in our *646 racial history of vilifying black people in order to justify violence and control. These false stereotypes are culturally reproduced in families, communities, and nationally by a variety of media and channels of learning. When that now fearful person calls the police to report the black male in the neighborhood, the white caller experiences the arrival of the police as comforting. “To serve and protect,” for this white resident really means “to serve and protect me from black people.” Police officers who respond to these calls often find that this black male lives in the neighborhood, or is visiting a friend. There is no crime here. The black male resident will experience the police interaction as intrusive, unnecessary, and insulting. This interaction will serve as confirmation of the unequal protection of the law, of racial profiling, of police officers working for social control and not public safety.

4. Failure to Identify When No Identification Was Required

One way to control where poor people of color can go is requiring them to produce an identification and then arresting them for failure to identify themselves when there is no legal obligation to do so. The Supreme Court has held that a person approached by a police officer “need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.”¹¹⁶ For this reason, the Court has held that an officer cannot require a person to identify herself unless the officer first has reasonable suspicion to initiate the stop.¹¹⁷ In North Carolina, a person is only legally obligated to present identification to an officer when driving a motor vehicle to show lawful operation.¹¹⁸ In cases reviewed from Durham County, people were apparently charged with resisting for failure to present identification in non-traffic situations where they had no legal obligation to provide identification.¹¹⁹ In its review of unconstitutional practices in the Ferguson Police

RESISTING ARREST AND RACISM - THE CRIME OF..., 85 UMKC L. Rev. 625

Department, the Federal Department of Justice found that their officers “routinely arrest individuals under Section 29-16(2) for failure to identify themselves, despite lacking reasonable suspicion to stop them in the first place.”¹²⁰

*647 Similarly, in Durham an officer charged a person with resisting for “refusing to produce any identification” while the officer was “investigating a disorderly conduct incident at the bus terminal.”¹²¹ Durham City officer R.E. Young charged a person with resisting for “walking away and not giving name” while the officer was investigating “trespassing.”¹²² Durham City Officer J.R. Hitchings charged a black female for “refusing to produce any identifying information” while the officer was “investigating suspicious activity at the back of a closed business.”¹²³

Deputy Bradford arrested a black male for giving a false name after he was “seen in the area of a store break in.”¹²⁴ Officer Haynes was working security at the public library and arrested a twenty-one-year-old black female for disorderly conduct: “making a rude noise” in the “Durham County Library.” She was also charged with resisting for giving the false name of “Nickie” when her name was “Nicole.”¹²⁵ These charges are likely examples of unconstitutional detention and unlawful police orders to identify oneself.

5. Handcuffing

Another common example of how the Resisting charge is used for social control is when the charge follows from an officer’s difficulty putting on handcuffs.¹²⁶ North Carolina Highway patrol trooper Jones cited young Hispanic man for “pulling his arm away while being handcuffed and physically pulling away.”¹²⁷ This citation was fatally defective because the officer did not allege the duty the officer was engaging in when the arrested person. Officer Coleman arrested a young man for urinating in public, having a folding knife on campus, and “pulling away, refusing to place hands behind his back, and attempting to get away.”¹²⁸

One scenario occurs when officers believe they have reasonable suspicion to detain a person during an investigation, and seek to place the person in “investigatory detention” with handcuffs. In this situation, although there is not enough evidence to conduct a full custodial arrest of the person and charge them with a crime, there may be enough suspicion to detain him for questioning, and there may be reasonable grounds to temporarily place someone in handcuffs during this investigatory detention. For example, if police have a description of *648 someone involved in a bar fight and see a person in the vicinity who matches that description, they have authority to detain and question that person to determine whether they are the suspect - even though they do not have sufficient evidence to make an arrest.

A person who is being detained under these circumstances will likely not understand why he is being handcuffed. He will think he is being arrested for no reason, and he may resist the act of being handcuffed. The escalation of the situation and the resulting charge of resisting arrest could have been avoided if the officer had explained the temporary purpose of the detention.

For example, Officer Harris arrested a black male for “refusing to comply with direct orders to stop, place hands behind back and remain still” while the officer was “investigating a disturbance with a knife.”¹²⁹ Officer Judy arrested a young black woman for “refusing to put her hands behind her back, walking away after being told she was detained, pulling her arms away, and refusing to comply with commands” while an officer was “investigating a disturbance.”¹³⁰ Officer Horner charged a nineteen year old black male with “resisting arrest and physically pulling away when attempting to place in investigative detention.”¹³¹ Another person was cited for resisting for “pulling arms to the front” when they were being handcuffed and placed in “investigative detention while the officer was responding to a disturbance.”¹³² Officer Gabbard cited a twenty two year old black man for “pulling away from the officer during a frisk and refusing to give the office his hands at the time of the detainment” while the officer was investigating “trespassing loiterers and investigating reported gang activity in front of building 400.”¹³³ Deputy Hogan arrested a black man for “struggling and attempting to escape while the officer was placing defendants in handcuffs,” while the officer was “investigating a disturbance.”

It is not common knowledge that officers have the authority to temporarily place persons in handcuffs without actually

arresting them. Instead of explaining this authority or using it selectively, some officers turn the resistance into an excuse to convert the stop to a full custodial arrest - for the sole charge of resisting. It would be very easy to explain what is happening to the detained. When officers exercise their authority in a way that feels arbitrary and without explanation they are bating people into resisting and then punishing them for it. This pattern further illustrates the use of this charge was a form of social control.

***649 VII. DEFENDING RESISTING CASES**

This discussion of specific cases aims to show (1) how to defend resisting cases in court, and (2) how the information collected in defending these cases can be used to advocate for changes in police policy and practice. The information developed during the course of litigation can help advocates demonstrate the need for changes in police behavior, and this information can help police officers learn more about procedural fairness, de-escalation, implicit bias, and structural racism.

There are a number of defenses to the charge of resisting, including the right to resist an unlawful arrest. Sometimes there is no constitutional ground for the officer to detain the person, no probable cause or reasonable suspicion of criminal activity. If this is the case, even if the officer is “discharging an office of their duty” the charge is subject to dismissal because they are acting unconstitutionally.

Other times, the person’s behavior is simply speech or being with other people in what police view is the “wrong” place. This, too, can be protected by Constitutional guarantees of the freedom of speech and right to assemble. In such case the person may not actually be delaying an officer. And, even if the behavior delays the officer, it is justified on Constitutional grounds.

A. Pretrial Investigation and Filings

Prior to trial it is important to thoroughly interview your client, interview other potential witnesses, and look for recordings of the incident on cell phones. It is also important to make a public records request to the police department for any recordings or reports about the incident. Once the officer’s name is identified, a request for all prior complaints against the officer is also helpful. The public database of charges for each county offers a way to generate a list of all the officer’s charges. This data can demonstrate a pattern of behavior and any racial disparities in that officer’s stops. It is also important to file a pretrial discovery motion, with a *Brady* request for any information, which would support a defense of an unconstitutional stop, detention, or arrest - including videos.¹³⁴

***650 B. Fatal Defects in the Charging Documents**

A proper charging document for resisting a public officer must allege each essential element of the offense, including the behavior that constituted the act of resisting or delaying, and the duty the officer was exercising at the time of his act.¹³⁵

For example, if the citation alleged how the person resisted the officer, but did not allege the “specific official duty the officer was discharging,” the case should be dismissed.¹³⁶ Without a valid charging document, the court has no jurisdiction, and so the case can be dismissed at any time with or without a request from the defense.¹³⁷

If there is a fatal defect in the charging document omitting an essential element, it may be strategic to save that argument for the final motion to dismiss at the close of all evidence. Because this argument goes to the jurisdiction of the court it can be made at any time, and is not waived. If the court dismisses the case for lack of jurisdiction, the prosecutor is free to reinstate the charges with a new charging document.¹³⁸ With the reinstated charge, the defendant is not placed in double jeopardy of conviction because there was no jeopardy in the first prosecution because the Court lacked jurisdiction. However, prosecutors often elect not to re-charge the person after they have conducted the trial and learned how the officer behaved. These cases

RESISTING ARREST AND RACISM - THE CRIME OF..., 85 UMKC L. Rev. 625

arise in the context of a district court busy with misdemeanors. Prosecutors feel tremendous pressure to keep *651 cases moving. Prosecutors and sometimes judges view trials as a necessary delay and inconvenience. Prosecutors have little, if any time, to prepare for the misdemeanor trial, and often find out about the facts for the first time while the officer is on the stand. Once they have heard the story of “resisting,” prosecutors often decide not to re-prosecute a case dismissed by the judge for a fatal defect.

Examples of defective charges dismissed prior to trial appeared in the review of Durham cases. Durham City Police Officer M. Bouluris charged a nineteen-year-old black teenager with resisting “by fleeing.”¹³⁹ The citation failed to allege the duty the officer was performing when the officer encountered the teenager. When this charge came to court, the prosecutor dismissed the case because “the State does not wish to proceed.”¹⁴⁰ Similarly, a Durham Deputy charged a person with “resist, delay, obstruct willfully and unlawfully did resist delay or obstruct in attempting to discharge the duty of his office.”¹⁴¹ The Assistant District Attorney dismissed this case when it came to court because of a “defective warrant.”¹⁴² The charging document did not identify the duty of the officer or the behavior that constituted the crime. The failure of officers to properly charge the crime of resisting supports the contention that these meritless charges are about social control and not public safety.

C. Insufficient Evidence of at Trial

Even if the officer alleges a duty in the charging document, the State may not offer sufficient evidence of the officer’s duty - the grounds justifying the detention of the defendant - to support a conviction.¹⁴³ The evidence at trial of the duty of the officer must support the specific allegation in the charging document. For example, when the indictment alleged that the officer was exercising the duty of taking the defendant “into custody after arrest for the crime of burglary,” and the evidence at trial showed the defendant ran from the officer while the officer was still investigating the crime, the court dismissed the case for insufficient evidence.¹⁴⁴

D. No Reasonable Suspicion to Detain - Consensual Encounters

Sometimes officers will arrive at a scene to “investigate a disturbance.” Maybe they received a call from a neighbor who heard “an argument.” When officers arrive, there is a person in the vicinity. The officer approaches and asks to talk. The person tries to walk away. The officer tackles the person and charges *652 him with resisting, delaying, and obstructing an officer for walking away. To detain the person who walked off, it is possible the officer uses force, tackling the person, punching them, hitting them with a baton, or tasing them. The problem here is that the officer had no reasonable suspicion to detain the person in the first place.

A consensual encounter with a police officer does not trigger Fourth Amendment protections.¹⁴⁵ Thus, a police officer may approach an individual in public to ask him or her questions and even request consent to search his or her belongings. This is a consensual encounter “so long as a reasonable person would understand that he or she could refuse to cooperate.”¹⁴⁶ Neither reasonable suspicion nor probable cause is required for a police officer to engage in a consensual encounter with an individual,¹⁴⁷ and the individual is at liberty “to disregard the police and go about his business [.]”¹⁴⁸

A “seizure” entitling an individual to the protections of the Fourth Amendment may be either a “stop” or an “arrest.”¹⁴⁹ An investigatory “stop” is “[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information [.]”¹⁵⁰ An “investigatory stop must be justified by ‘a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.’”¹⁵¹ To determine whether reasonable suspicion exists, a court “must consider ‘the totality of the circumstances-the whole picture.’”¹⁵² The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an “unparticularized suspicion or hunch.”¹⁵³ “When a law enforcement officer, by word or actions, indicates that an individual must remain in the officer’s presence ... the person is for all practical purposes under arrest if there is a

RESISTING ARREST AND RACISM - THE CRIME OF..., 85 UMKC L. Rev. 625

substantial imposition of the officer's will over the person's liberty."¹⁵⁴ An officer must have probable cause to effectuate a warrantless arrest.¹⁵⁵ "Probable cause exists where 'the facts and circumstances *653 within [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."¹⁵⁶

In *State v. Sinclair*, a police officer and another plain-clothes law enforcement agent observed Sinclair sitting in a chair "among six to ten other people" outside a bowling alley, which was "a local hangout" and a "known drug activity area."¹⁵⁷ The officer approached Sinclair and said, "[L]et me talk to you."¹⁵⁸ "[Sinclair] stood up out of his chair, took two steps toward [the officer], and said, 'Oh, you want to search me again, huh?' [Sinclair] did not sound irritated or agitated, '[j]ust normal.'" The officer replied, "Yes, sir," and continued walking toward Sinclair.¹⁵⁹ Sinclair "stopped ten or twelve feet from [the officer], 'quickly shoved both of his hands in his front pockets and then removed them,' ... made his hands into fists and took a defensive stance."¹⁶⁰ As the officer got closer, Sinclair said, "Nope. Got to go," and "took off running" across an adjacent vacant lot.¹⁶¹ The officers chased Sinclair and soon after took him into custody.¹⁶² The North Carolina Court of Appeals concluded that, "considering all the circumstances surrounding the encounter prior to [Sinclair's] flight, a reasonable person would have felt at liberty to ignore [the officer's] presence and go about his business[,] and that "[Sinclair's] flight from a consensual encounter cannot be used as evidence that [Sinclair] was resisting, delaying, or obstructing [the officer] in the performance of his duties."¹⁶³ Accordingly, there was no evidence that Sinclair acted "unlawfully, that is ... without justification or excuse[.]"¹⁶⁴ and this Court concluded that the trial court erred in denying Sinclair's motion to dismiss the charge of resisting a public officer.¹⁶⁵ This Court further determined that "even if [the officer] was attempting to effectuate an investigatory stop, there are insufficient 'specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant[ed] [the] intrusion."¹⁶⁶

The cases reviewed in Durham suggest that similar unlawful detentions have occurred in the context of resisting charges. Durham City Officer Eason arrested a young black man for "entering a vehicle due to officer[']s presence, refusing to put hands out of the vehicle and refusing to exit the vehicle," while *654 the officers were "investigating a shooting that had just occurred in the area."¹⁶⁷ When the case came to court, the Assistant District Attorney dismissed the case, stating in the dismissal "[a]fter review of the case, there is reasonable doubt as to the stop of the defendant, therefore the State cannot prove the case beyond a reasonable doubt."¹⁶⁸ Durham City Officer Lewis charged a young black man with providing a false name while the officer was investigating the crime of trespassing.¹⁶⁹ Prosecutors dismissed the case in Court because the person was "not trespassed at the time of the event."¹⁷⁰ A Durham City officer cited a young Hispanic man for "refus[ing] to comply with commands to leave or walk away."¹⁷¹ Prosecutors dismissed this case because the "State does not wish to proceed."¹⁷² Officer Thomas cited a black man for resisting for "refusing to put his hands behind his back after being told several times to do so."¹⁷³ The prosecutor dismissed this case when it came to court because "no report or reason for arrest was given."¹⁷⁴

When officers stop someone without cause, violating their Fourth Amendment rights, and the person protests the officer abuses their authority when they charge the person with resisting. I tried a case in 2008 for Reginald Woods when Durham City Officer Raul Garcia stopped him without reasonable suspicion. Reggie drove away from his mother's house on July 22, 2008, and Officer Garcia stopped him around the corner at the Exxon station because he "drove suspiciously." The officer testified at trial he "had an inclination that he was a driving while impaired or driving with a revoked license." In the parking lot of an Exxon convenient store, Reggie got out of his vehicle, and Officer Garcia ordered him back in his vehicle. Officer Garcia later testified that when he gave the order he had no evidence that Reggie had violated any criminal code, statute, or ordinance. Once back inside his vehicle, Reggie tried again to light a cigarette. Officer Garcia told Reggie not to light the cigarette and to produce license and registration. Reggie asked if there was any law against smoking, and tried to light the cigarette. Officer Garcia grabbed Reggie's arm, and pulled it out the window. With his free hand, Reggie reached for a pen and asked for the officer's badge number. Officer Garcia then shot Reggie with a TASER as he sat in his vehicle. A taser is an electroshock weapon that shoots darts into a person and electrocutes them, causing extreme pain and over-stimulation of sensory nerves and motor nerves and resulting in strong involuntary muscle contractions. With electricity coursing through his body, Reggie fell over shaking and urinated *655 on himself. Officer Garcia arrested Reggie and took him to jail for resisting, delaying, and obstructing an officer. In Court, Durham District Court Judge Hill dismissed the case because the officer lacked reasonable suspicion to detain Reggie.¹⁷⁵ An internal affairs investigation conducted by the Durham Police concluded Officer Garcia violated Reggie's rights. As a result of this incident, Reggie Woods was permanently disabled and

can no longer work.

Officer Garcia is now a Corporal in the Durham Police Department. On November 14, 2016, I tried another case with Officer Garcia where he arrived at the scene of a reported argument and detained Heath Allen. Corporal Garcia admitted that despite having no information that Heath had committed any crime he tackled him as he tried to walk away, breaking his glasses. Once again the case was dismissed because there was no reasonable suspicion to detain Mr. Allen. The use of force against Reggie and Heath for refusing to cooperate with the investigation illustrates the way the charge of resisting allows officers to punish people for refusing commands and control their behavior.

E. Resisting Excessive Force

Heath and Reggie's cases also raise how the use of excessive force in violates the Fourth Amendment. The Fourth Amendment bars police officers from using excessive force to effectuate a seizure.¹⁷⁶ Courts evaluate a claim of excessive force based on an "objective reasonableness" standard.¹⁷⁷ The subjective intent or motivation of an officer is irrelevant at this step.¹⁷⁸ Courts are to carefully balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."¹⁷⁹ In doing so, courts focus on the facts and circumstances of each case, taking into account "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."¹⁸⁰ Our inquiry into the reasonableness of the force also requires us to "consider the facts at the moment that the challenged force was employed" "with an eye toward the proportionality of the force in light of all the circumstances."¹⁸¹

*656 In *Yates v. Terry*, the Fourth Circuit Court of Appeals recently ruled that the use of a taser to enforce compliance with officer commands in the context of a non-violent traffic stop constitutes excessive force within the meaning of the Fourth Amendment.¹⁸²

Terry was ordered out of his car and subsequently tased three times over not having his driver's license. We have explained that "[d]eploying a taser is a serious use of force," that is designed to "inflict[] a painful and frightening blow."¹⁸³ For these reasons, it "may only be deployed when a police officer is confronted with an exigency that creates an immediate safety risk and that is reasonably likely to be cured by using the taser." *Id.* at 909. As held in *Estate of Armstrong*, "[t]he subject of a seizure does not create such a risk simply because he is doing something that can be characterized as resistance-even when that resistance includes physically preventing an officer's manipulations of his body." The objective facts, when viewed in the light most favorable to Yates, as we must do at this point in the proceedings, show that he was neither a dangerous felon, a flight risk, nor an immediate threat to Terry or anyone else. Yates has thus established that Terry's use of his taser constituted excessive force in violation of Yates' Fourth Amendment rights.¹⁸⁴

Within this legal framework, Officer Garcia violated Reggie's Fourth Amendment rights not only by the unlawful seizure without reasonable suspicion, but also by the use of excessive force.

F. Common Law Right to Resist Arrest

In North Carolina, if the detention or arrest is unlawful the person has a common law right to resist it.¹⁸⁵ If an officer unlawfully arrests a person in North Carolina, that person has the same right of self-defense as would exist in the context of an attack by a private person.

In *State v. Mobley*, the North Carolina Supreme Court said, "[t]he offense of resisting arrest, both at common law and under the statute, G.S. s 14-223, presupposes a lawful arrest. It is axiomatic that every person has the right to resist an unlawful arrest. In such case the person attempting the arrest stands in the position of a wrongdoer and may be resisted by the use of force, as in self-defense."¹⁸⁶

RESISTING ARREST AND RACISM - THE CRIME OF..., 85 UMKC L. Rev. 625

*657 Also if an officer uses more force than is reasonable necessary to effectuate an arrest, a person may use a reasonable amount of self-defense.¹⁸⁷ In these situations, the jury will be instructed as follows:

The defendant's resistance, delay, or obstruction, if any, is excused if it was in response to excessive force by an officer, because any such resistance, delay or obstruction in that event would not be unlawful.

In "attempting to make a lawful arrest," an officer may use whatever force is apparently necessary to him and reasonable for that purpose. However, if an officer uses more force than is apparently necessary to him or more force than is reasonable under all the circumstances, such force is excessive and unlawful. If the officer used more force than was apparently necessary to him or reasonable under all the circumstances, and if the defendant's resistance, delay, or obstruction was to the excessive force used by the officer, then the defendant is not guilty of this offense.¹⁸⁸

So a person who resists arrest and is faced with excessive force can avail themselves of both Constitutional and common law defenses. The common law defense to unlawful arrest has been abrogated by statute or court rulings in many states.¹⁸⁹

G. Constitutionally Protected Speech and Conduct

Sometimes resisting charges are used as form of social control against people who are exercising their right to free speech by criticizing officers. It is no crime to argue with an officer, even if the argument "delays" the officer. There are situations where a person is arrested for resisting a public officer because of speech or conduct which is lawful. Under these circumstances a court could find the person is innocent of resisting or that the conduct was justified and protected constitutional behavior. "An individual who disagrees with or criticizes a police *658 officer, but who does not intend to resist, obstruct, or delay the officer's performance of his duty cannot be convicted.¹⁹⁰ "Communications intended merely to assert rights, clarify a misunderstanding, or gain information in a peaceable and orderly manner, however, are not chilled."¹⁹¹

In *State v. Allen*, the Court held that Allen did not resist officer by arguing with them about the seizure of his liquor. His arrest was therefore unlawful and he had the right to defend himself from the unlawful arrest by grabbing the officer's shirt.¹⁹² "Walter Allen was merely arguing with the officer and protesting the confiscation of his liquor. He had committed no offense and the officer had no authority to arrest him."¹⁹³

The First Amendment creates an area of protected speech and association that resisting charges brought under [N.C. Gen. Stat. § 14-223](#) cannot criminalize. In *Chaplinsky v. New Hampshire*, the United States Supreme Court reviewed whether a New Hampshire statute that proscribed the use of "offensive, derisive or annoying word[s]" violated the First and Fourteenth Amendment.¹⁹⁴ The Court noted that "certain well-defined and narrowly limited classes of speech" exist whose "prevention and punishment ... have never been thought to raise any constitutional problem."¹⁹⁵ These categories "include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words-- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."¹⁹⁶ Because the New Hampshire Supreme Court had previously interpreted the statute at issue to prohibit only "fighting words," the Court held that it did not violate the First or Fourteenth Amendments either on its face or as applied.¹⁹⁷

In *Gooding v. Wilson*, the Supreme Court reviewed again the restriction of controlled speech to "fighting words."¹⁹⁸ A facial challenge to the constitutionality of the Georgia statute outlawing "opprobrious words or abusive language, tending to cause a breach of the peace."¹⁹⁹ The Court considered whether the statute unconstitutionally outlawed a broader and protected range of *659 speech.²⁰⁰ Analyzing the Georgia case law interpreting "opprobrious and abusive," the Court held that the statute "applies ... to utterances where there was no likelihood that the person addressed would make an immediate violent response," and was therefore unconstitutional on its face.²⁰¹ After *Gooding*, it was clear that offensive or indecent speech is not constitutionally limited unless the words used are likely to incite imminent violence.²⁰²

The fighting words exception developed in *Chaplinsky* and *Gooding* was first applied to speech directed at a police officer in *Lewis v. City of New Orleans*.²⁰³ In *Lewis*, the Court struck down a New Orleans ordinance that made it unlawful "wantonly to

curse or revile or to use obscene or opprobrious language” toward a police officer on duty.²⁰⁴ Relying on its view on the grounds set forth in *Gooding* the Supreme Court invalidated the ordinance.²⁰⁵ The Court next addressed this area of First Amendment jurisprudence in *City of Houston v. Hill*, where it invalidated a Houston ordinance that made it “unlawful for any person to assault, strike, or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty.”²⁰⁶ Since a Texas statute already punished assaults on officers, “the enforceable portion of the ordinance ma[de] it ‘unlawful for any person to ... in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty,’ and thereby prohibit[ed] verbal interruptions of police officers.”²⁰⁷ The Court first noted that “the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.”²⁰⁸ The Court then observed that the language of the ordinance in *Hill* was “much more sweeping than the municipal ordinance struck down in *Lewis*.”²⁰⁹ Rather than penalize “fighting words,” which the city could constitutionally accomplish, or even require some form of “obscene or opprobrious” language, which was held invalid in *Lewis* and *Gooding*, the ordinance in *Hill* prohibited “speech that ‘in any manner ... interrupt[s] an officer.’”²¹⁰ Because the ordinance “criminalize[d] a substantial amount of constitutionally protected speech, and accord[ed] the police unconstitutional discretion in enforcement,” it was held to be substantially overbroad and invalidated on its face.²¹¹

***660** A federal court in the Eastern District of North Carolina evaluated the North Carolina resisting statute, summarizing the cases above and applying them to the North Carolina Statute criminalizing “resisting a public officer.”²¹² The Court noted “the common thread underlying *Hill*, *Lewis*, and *Gooding* is that citizens may not be punished for vulgar or offensive speech unless they use words that “by their very utterance inflict injury or tend to incite an immediate breach of the peace.”²¹³ Both *Lewis* and *Hill* extend this limitation to speech directed at police officers, which must be more than “obscene or opprobrious,” and which must do more than “interrupt ... any policeman in the execution of his duty” to be constitutionally sanctionable.²¹⁴ Despite these federal holdings, North Carolina State Courts interpret *N.C. Gen. Stat. § 14-223* to punish speech directed at a police officer unless conveyed in an “orderly and peaceable manner.”²¹⁵ The Court concluded “[t]his interpretation is contrary to *Chaplinsky* because it punishes more than fighting words, i.e., words that cause an imminent breach of the peace. It is also contrary to *Lewis*, which protects even ‘opprobrious,’ language directed at police officers so long as fighting words are not used, and to *Hill*, which annulled an ordinance that was ‘not narrowly tailored to prohibit only ... fighting words.’”²¹⁶ As the Court stated in *Hill*, “the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.”²¹⁷ “Because an officer could consider speech that was not fighting words as disorderly or not peaceable, § 14-223 impermissibly criminalizes protected speech.”²¹⁸

There are instances in the review of Durham cases where people were unlawfully charged with resisting for exercising free speech. For example, Officer Jeffries arrested a person for “failing to disperse from the area when told to do so and refusing to place his hands behind his back after being told several times,” while the officer was “investigating complaint of protesting in the middle of Swift avenue.”²¹⁹ This was one of forty people I represented who were arrested in connection with the “Black Lives Matter” movement.²²⁰ Some of their charges were dismissed when they completed community service, others were dismissed by the Court when they went to trial.

***661** In addition to political protest, a review of the data showed police arrested people for using profanity. Our experience litigating these cases indicates that using profanity against an officer can provoke an officer to issue the resisting charge in situations where the officer may have otherwise let it go absent the profanity. One eighteen-year-old black female was charged with resisting and inciting a riot for “yelling ‘fuck the police ... fuck your badge,’ and other similar words.”²²¹ Another black male was arrested for yelling “fuck you, you fucking cracker” while he was intoxicated and failing to immediately comply with commands to be handcuffed.²²²

Officers used the charge of resisting in another protest connected to the “Occupy Raleigh movement.”²²³ In that case, Margaret Schucker refused to leave the sidewalk where she was protesting and was charged with resisting an officer. Margaret was seated in a chair because she was unable to stand for a long period of time. Despite her disability, officers insisted that she remove her chair from the sidewalk. When she refused, officers attempted to arrest her. A group of other protesters formed a circle around her and were charged with resisting officers for obstructing Margaret’s arrest. We argued that Margaret’s arrest was unlawful because she was on a public sidewalk, and that the other protesters had the right to

RESISTING ARREST AND RACISM - THE CRIME OF..., 85 UMKC L. Rev. 625

defend her from unlawful arrest. Ultimately all charges were dismissed either by the court or the prosecutor.

A person who questions an officer's authority to detain another is vulnerable to resisting charges. For example, Officer Schooley charged a twenty-three year old black man for "intervening in our investigation after he refused to go inside and after being told several times."²²⁴ When that case came to Court, the Assistant District Attorney dismissed it stating "the State does not wish to proceed."²²⁵

Deputy Middleton arrested a sixteen-year-old black male for "refusing to leave the immediate area where an arrest of another person was being effected."²²⁶ The child was arrested for yelling "I ain't going nowhere til you take those cuffs off my man," and "get your fucking hands off me, y'all ain't doin shit."²²⁷

Durham City Officer R.A. Ingram arrested Kevin Love for talking to a driver who was detained at a traffic stop.²²⁸ Kevin refused to leave when instructed, and told the officer "you are a real dick head." When the officer told *662 him to leave, Kevin told the officer to "shut the fuck up."²²⁹ I tried this case in Durham District Court, and Kevin was acquitted.²³⁰ Ingram stopped Kevin for a seatbelt violation.²³¹ Kevin later saw Officer Ingram stopping someone else and believed Officer Ingram was "just out there harassing people."²³² So, Kevin took a picture of the traffic stop. When Officer Ingram yelled at Kevin to move on and leave the scene,²³³ Kevin circled back around the block and returned and gave the driver his phone number in case he was needed as a witness. Two hours later, the officer found Kevin and arrested him for resisting a public officer.²³⁴ When we went to trial, the court acquitted Kevin of the charge.²³⁵

In another case, a black woman was arrested in the courthouse for resisting an officer when she tried to prevent the officer from "taking [her] daughter into custody."²³⁶

In another case, a person was charged with resisting for yelling twice "está es policía" when undercover officers approached during an undercover prostitution investigation.²³⁷ Officer Green arrested a black woman for "grabbing his wrist while he was attempting to arrest the defendant's friend."²³⁸ Officer Cates arrested a seventeen-year-old black girl at the bus station for "walking in an area in which the officers were making an arrest when she was told to stay across the street."²³⁹ In that case the officers were arresting another person at the bus station for trespassing and resisting an officer.²⁴⁰

H. Community Advocacy

I defend these cases not only to vindicate the rights of the person unlawfully mistreated by police, but also to collect materials that can be used to illustrate police misconduct to policy makers. In John Hill's case, my community partner, Southern Coalition for Social Justice, developed a video of the incident using trial materials. The video was presented to the Durham City Council within the context of an ongoing community campaign to reform policing. This is a good example of how community lawyering can assist individuals and advance better community policies.²⁴¹

*663 VIII. LESSONS FOR POLICE

The police practice of using discretionary charges, like resisting, to arrest people of color is corrosive to trust of police in communities of color. Police should stop targeting people of color for investigation in minor infractions that do not directly implicate public safety. Officers who stop black people - for a minor reason or no reason at all - are causing more harm than good. Policing should directly affect public safety, and not profile people because of race on pre-textual grounds.

Police departments should strictly limit the use of officer discretion to engage in fishing expeditions that unfairly target minorities.

Findings from a growing body of research and decades of police experience are consistent with what Department of Justice investigation found in Ferguson: that when police and courts treat people unfairly, unlawfully, or disrespectfully, law

RESISTING ARREST AND RACISM - THE CRIME OF..., 85 UMKC L. Rev. 625

enforcement loses legitimacy in the eyes of those who have experienced, or even observed, the unjust conduct.²⁴² The Department of Justice investigation of Ferguson Police noted that the loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime.²⁴³ The Department of Justice recommended that to improve community trust and police effectiveness, Ferguson must ensure not only that its officers act in accord with the Constitution, but that they treat people fairly and respectfully.²⁴⁴

The Final Report of the President's Task Force on 21st Century Policing suggest training and education in the following areas: (1) community policing and problem-solving principles, (2) interpersonal and communication skills, (3) bias awareness, (4) scenario-based, situational decision making, (5) crisis intervention, (6) procedural justice and impartial policing, (7) trauma and victim services, (8) mental health issues, (9) analytical research and technology, and (10) languages and cultural responsiveness.²⁴⁵

***664** Crisis intervention and mental health first aid training are essential for police officers. Officers who cannot recognize mental illness and have no tools to approach and deescalate people in mental crisis will very likely make a bad situation worse. The failure to provide this training to officers puts them in jeopardy and the public at risk.

To deal with the entrenched and systemic racism in our culture, public servants need racial equity training that helps provide a broader social context and history of how racism operates in various institutions. A study of both implicit bias and systemic racism will help officers understand how they are downstream from several other institutions infected by racism, which continually fails people of color.²⁴⁶ Before the officer encounters people of color on the street, the odds are that other systems have mistreated, oppressed, exploited, or demeaned them, including systems of housing, education, employment, health care, and mental health. An understanding of the history and role of racial inequality and oppression within each of these institutions, and how they interrelate, is essential to understanding the situation that arises when police confront people of color. To end the cycle of violence and killing of people of color, police departments need nothing short of a societal repurposing from racialized social control to public safety.

Police training in procedural due process and fairness will help police explain the use of their authority in a way that helps build trust and legitimize the authority. Training in de-escalation techniques will also assist police in reducing the risk of resistance or violence.²⁴⁷

IX. CONCLUSION

Part of reforming police conduct and uprooting racism in our criminal justice system requires a strict focus on public safety, and a clear prohibition on the use of police power control or restrict the behavior of poor people of color. After physical safety, Police should also help protect personal and public property. Although a certain amount of coercion, force, threat of force, and control may be necessary to preserve the peace and protect property, police should be respectful, explain their conduct, and de-escalate volatile situations so as to lessen the risk of violence and harm. These methods are also consistent with the primary goal of promoting peace and safety.

Police agencies claim that they want to build trust with the black community, but they treat the problem as a problem of image. They believe that ***665** their fundamental mission and method is sound, they are just getting a bad rap in the media. This approach is misguided because it refuses to acknowledge the depth to which racialized social control is rooted in police culture. Police cannot earn the respect of poor communities of color by changing their image. The racial problem in policing is a structural problem not a public relations problem. Police have to earn the respect by changing the purpose of the policing from social control to safety, treating all communities with an equal measure of respect and only focusing on behavior that truly criminally jeopardizes public safety.

Police agencies who vilify the "Black Lives Matter" movement as being responsible for attacks against police are repeating the pattern of social control that leads to the distrust of police in communities of color - a pattern of criminalizing the "other" so that it can be controlled by force.²⁴⁸ Police have an opportunity to hear the critique of the BLM movement and become

self-critical of their own purpose. Am I really stopping this person because their driving is unsafe? Or, am I stopping them with the hope of finding evidence of drugs? The first stop serves public safety. The second stop perpetuates social control, particularly when people of color are unfairly and repeatedly targeted because of the color of their skin and their physical location.

Reviewing the data on arrests for resisting a public officer raises many questions worthy of further investigation. What is the gender of the officers making these arrests or engaging in misconduct? I have personally never encountered a resisting case brought by a female officer. Does that data support my experience that female officers bring this charge at a lower rate? If so, do women officers handle situations in ways that reduce the risk of resistance? Are they less likely to bring the charge even if it is warranted, because they are not trying to “pile on” additional unnecessary charges? Is there a personality type of an egotistical male who is recruited because he enjoys the exercise of authority and force for its own sake? Is there a personality profile of the kind of officer who escalates encounters because of “disrespect?” What is the role race plays in this feeling of “disrespect,” which prompts officers to escalate situations for no good reason? These officers make an arrest to “teach a lesson” about “who is in control,” and not to advance the safety for the common good. Statistically, black people are most often the target of this kind of “lesson” on authority.

A. Training alone will not fix the problems in police departments

Training alone will not fix the problem about the relationship between police and vulnerable communities of color. As in any relationship, the long *666 history of distrust can only change with a substantial, determined, and long term change in behavior to build trust. Also, communities and police departments will need productive conversations on the true purpose of policing. Some of the questions these conversations could ask what is the main purpose of the police? Do police policies, practices, budgets, training reflect that main purpose? For example, if the purpose of policing is to protect public safety, why is it alright for an officer to arrest someone for being disrespectful? When the officer loses his temper and makes an arrest for resisting a public officer, the officer is not acting to protect public safety but to enforce respect for his authority. Sadly, it is this very abuse of authority for an illegitimate purpose which ultimately undermines the trust needed to respect authority.

B. Ending the War on Drugs as a Central Purpose of Policing

The War on Drugs has turned out to be a war on poor people of color. Instead of reducing the amount of drugs in our Country, the war on drugs have increased the number of non-violent poor people of color in prison or under court supervision. It has been another form of social control, and not a path to increased community safety.²⁴⁹ The War on drugs has militarized the police, and justified the use of an occupying force against poor people of color. black men are beaten, tased, arrested, shot, searched, and profiled in order to find drugs. Drugs should be viewed as a public health problem, not used as an excuse to control black people. The racial orientation of the War on Drugs is evident when considering that the same level of police intervention, tactics, and force are not used against white people of privilege who use drugs at the same rate as people of color.²⁵⁰

Declaring an end to the War on drugs and repurposing the police to community building and safety is a good first step to building a pattern of trust that will earn respect in communities of color. How can we imagine a new way of policing that addresses racial inequality? Can we completely remove the underlying fundamental purpose of policing which effectively controls and marginalizes people of color?

***667 C. Changing the Purpose of Policing**

Because police have played the role of enforcing social control of poor people of color, it will be difficult to reorient this aspect of policing. Until then it is important to strategically negotiate aspects and terms of this social control to make encounters safer and more fair. This might include minimizing contact between police and poor people of color by

RESISTING ARREST AND RACISM - THE CRIME OF..., 85 UMKC L. Rev. 625

deprioritizing enforcement of laws which are used to target poor people of color. Ordinances, which deprioritize marijuana where there are racial disparities in marijuana enforcement, offer an example. Also, agencies which stop issuing charges for tail lights, tinted windows, and other non-safety traffic violations have the effect of reducing racially discriminatory tops.²⁵¹

In addition to minimizing unnecessary contact between police and poor people of color, improving the quality of that contact would help. This is where police training in procedural due process, implicit bias, structural racism, crisis intervention, de-escalation, and structural racism are helpful. Officers equipped with the ability to understand these dynamics can improve the way police interact with poor communities of color. This kind of training can begin to rectify the dehumanizing effect of the War on Drugs, which allows police to look at young black men as potential drug dealers and not important and equal members of our community.

Finally, one can imagine a complete reorientation of police purpose and culture oriented toward the common community good. When an officer encounters a young person of color, the officer is mindful of the collateral consequences of that encounter. The officer understands a variety of alternatives to court: treatment, mediation, restorative justice, community service, warning, and other diversion techniques.²⁵² The officer's goal is not just to "clear a case by arrest," but to help the community take care of each other. This complete reorientation would require police departments to come to terms with the structural racism built into the very hierarchy and operation of police departments. The department would also need to understand how the structural racism within policing arises and reinforces the structural racism in other systems such as the criminal justice system, housing, education, employment, and public benefits.²⁵³

***668** The work culture and "blue line" within the departments will need to change.²⁵⁴ Police departments will need to become self-critical in order to evolve. Police officers can enforce the law through the lens of social workers, teachers, mediators, mental health providers, rather than the lens of a soldier. This is much healthier for the community than police officer as soldier. Soldiers cannot afford to second-guess their behavior, but community health professionals must critically analyze their behavior and motives - to see how their behavior may have unintended consequences for the most vulnerable among us. Changing police culture requires a discussion of accountability. To whom are the police accountable? In the military, the soldiers are not accountable to the enemies they are invading. It raises the question whether the State creates "crimes" in order to control a historically oppressed and marginalized part of our society, or keep everyone safe - equally.²⁵⁵ There is no review of the tactics or use of force to make sure they are invading in a fair manner. The "blue line" inside police departments, which actively discourage police officers from reporting and investigating the misconduct of fellow officers, is a manifestation of this problem. Internal affairs departments charged with investigating police misconduct become an unimportant risk management branch of the department protecting the city from litigation. Who do you call when the police break the law? There is no meaningful check on police misconduct inside or outside police departments. This exacerbates the distrust of police in over policed communities suffering continual and repeated police attacks.

In a democracy, police are not soldiers; they are public servants. In a democracy, the police should be accountable to the communities they serve. Community review boards with real investigatory and subpoena power, with real authority to sanction police and set policy are necessary to build trust and change police culture. Sometimes community advisory boards are populated only by affluent privilege parts of the community. They have no real authority to sanction police or change policies. This means that the police become accountable only to the white privileged folks, and not to the poor communities of color. In this way, ***669** "to serve and protect" is a euphemism for "to serve and protect those with means."

Returning to the situation that began this article, the stop of John Hill by the HEAT team officer. There is fear and mistrust on both sides. The history of racial control imbedded in the policies of the war on drugs continues to perpetuate the racial disparities we see at every stage of our criminal justice system. As a result the historical trauma of racialized police control is passed down from one generation to another of young black men.²⁵⁶ Also, the culture of policing, which perpetuates racial control and oppression, is also passed on through police culture and policies promoting the continuation of the failed war on drugs.²⁵⁷ In addition, the general ability of white people to experience policing as helpful, useful, and nonthreatening is also passed from generation to generation. This enables white people of privilege to minimize, avoid, and even deny the traumatic policing experiences of black people. Changing the cycle of fear, abuse, mistreatment, anger, frustration, even racial hatred must begin with the police. The history of race in our country teaches us that asking people of color to trust the police before

there are radical changes in policies and behavior is like asking the victim of a crime to trust their abuser before there is any evidence they are safe from further abuse.

Footnotes

- ^{a1} Scott Holmes is a Clinical Assistant Professor of Law at North Carolina Central University, where he supervises the Civil Litigation Clinic and teaches classes. He graduated from the University of North Carolina at Chapel Hill for both Law School and undergraduate studies. He worked as a public defender for a few years before entering private practice, where he handled court appointed criminal cases in state and federal court, at trial and on appeal. He is grateful to his Criminal Procedure class of 2016 for collecting data, his colleague professor Elizabeth McLaughlin Haddix at the UNC Center for Civil Rights for invaluable guidance, critique, and editing for this article. He is also grateful to all of the clients who permitted him to assist them in Court and tell their stories here.
- ¹ DERRICK WESTON BROWN, *Mother to Son*. 2015. *Baltimore*, in RESISTING ARREST: POEMS TO STRETCH THE SKY (Tony Medina ed., 2016).
- ² *District 1*, DURHAM NORTH CAROLINA, <https://durhamnc.gov/200/District-1>
- ³ *Id.*
- ⁴ To watch the video of John Hill's arrest, see Southern Coalition for Social Justice, *Excessive Force by Durham PD*, YouTube (Jun. 12, 2014), <https://www.youtube.com/watch?v=QunwfEE-MmE>
- ⁵ Arielle Clay, Durham PD releases videos countering excessive force claims, WRAL (May 20, 2014), <http://www.wral.com/excessive-force-racial-profiling-alleged-in-durham-arrest/13660912/>
- ⁶ Recording and Transcript of Trial on file with the author. See also Ray Gronberg, *Lawyer: Police used excessive force against Durham Cyclist*, DURHAM HERALD, May 9, 2014; Ray Gronberg, *Durham Police Release video of bicyclist incident*, DURHAM HERALD, May 20, 2014.
- ⁷ JAMES H. CONE, THE CROSS AND THE LYNCHING TREE, 4-5 (2011)
- ⁸ *Id.* at 7.
- ⁹ *Id.* at 12.
- ¹⁰ Ida B. Wells, THE LIGHT OF TRUTH: WRITINGS OF AN ANTI-LYNCHING CRUSADER 60, 62-68, 75 (Mia Bay & Henry Louis Gates, Jr. eds., 2014).
- ¹¹ *Id.* at 61, 73.
- ¹² *Id.* at 74-75

Holmes, Curtis 9/1/2017
For Educational Use Only

RESISTING ARREST AND RACISM - THE CRIME OF..., 85 UMKC L. Rev. 625

¹³ *Id.* at 60-61, 74-75.

¹⁴ *Id.* at 66.

¹⁵ *Id.* at 58.

¹⁶ *Id.* at 75.

¹⁷ *Id.* at 75.

¹⁸ Alan Blinder, *Mistrial for South Carolina Officer Who Shot Walter Scott*, N. Y. TIMES, Dec. 5, 2016.

¹⁹ *Id.*

²⁰ Greg Braxton, *'The Talk': Parents of Color Address the Tensions Between Police and their Kids*, L.A. TIMES, July 29, 2016; Melissa Block, *'The Talk': How Parents of All Backgrounds Tell Kids About The Police*, NATIONAL PUBLIC RADIO (Sept. 5, 2014) <http://www.npr.org/2014/09/05/346137530/the-talk-how-parents-of-all-backgrounds-tell-kids-about-the-police>; *Powerful Video Shows the Difference Between the Way Black and White Parents Talk to their Kids about Cops*, TAKEPART, (Dec. 14, 2014), http://www.takepart.com/video/2014/12/13/video-difference-black-and-white-parents-talk-kids_

²¹ Michelle Alexander, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 16-19 (2011).

²² The charge of resisting, delaying, or obstructing a law enforcement officer is also called “resisting public officer.” (RPO). For the purpose of this article, I will refer to this charge simply as “resisting.”

²³ Political Humor, *John Oliver Takes a Good Look at the Bad Apples Working in Police Forces*, YouTube (Oct. 3, 2016), https://www.youtube.com/watch?v=X61FBd47J_w. For more about police culture role in perpetuating police misconduct, *see generally* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004).

²⁴ *See* Sharon LaFrancier & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Jerry Wolford, *Greensboro Police Quietly Moving Forward on Changes in Policies*, GREENSBORO NEWS AND RECORD, May 11, 2016.

²⁸ *Id.*

²⁹ Mandy Locke, *The D Squad: Some Harnett Deputies Bring Harm, Residents Say*, NEWS AND OBSERVER (May 1, 2016).

30 *Id.*

31 U.S. DEPT. OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 11-12 (2014).

32 U.S. DEPT. OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 25 (2015).

33 *See generally* Steve Viser, *Cobb County to Pay \$100K to Woman arrested for 'F-Bombing' Cops*, ATLANTA JOURNAL CONSTITUTION, Dec. 11, 2014; Levi Pulkkinen, *Man pummeled by Seattle police: Video saved me*, SEATTLE POST INTELLIGENCER, Feb. 17, 2015 (Ocak's attorney James Egan previously said in court papers that his client was arrested for "contempt of cop" - for upsetting police by not being adequately demure and deferential.); Steve Inkseep, NPR Morning Edition, July 22, 2015 (Tracey Meares is a professor at Yale Law. She was also on President Obama's police reform task force. She's actually surprised by how well this traffic stop went at first. But, the cigarette was the turning point. Meares says it looked like a case of contempt of cop. That's when a police officer tries to reassert authority in the face of disrespect. And, she says it's not justified); Patt Morrison, *Policing 101*, L.A. TIMES, Aug. 19, 2015 (We teach don't be the "contempt of cop" cop. Usually, you get contempt of cop when your emotions take over, when the goal becomes something other than educating, like, "You're not respecting my authority."); Ryan J. Reilly, *Prosecutors Finally Dropped their bogus charges against me for reporting in Ferguson. Not everyone is so lucky*, HUFFINGTON POST, May 19, 2016 (One of the municipal codes we were charged with violating, which makes it unlawful for a person to "interfere in any manner with a police officer or other employee of the County in the performance of his official duties," is a "contempt of cop" statute that is unconstitutionally overbroad).

34 "Implicit Bias" is a term describing unconscious psychological racial prejudice learned and expressed culturally. William M. Wiecek & Judy L. Hamilton, *Beyond the Civil Rights of 1964: Confronting Structural Racism in the Workplace*, 74 LA. L. REV. 1095, 1113-1116 (Summer 2014).

35 "Structural Racism" is a sociological term describing how institutions, businesses, agencies and organizations adopt policies which create and perpetuate racial disparities without individuals making racially motivated decisions. William M. Wiecek & Judy L. Hamilton, *Beyond the Civil Rights of 1964: Confronting Structural Racism in the Workplace*, 74 LA. L. REV. 1095, 1102-03 (Summer 2014).

36 Danny Hooley, *Attorney: 90 Percent of Durhamites Charged with Resisting Arrest Are Back* INDEPENDENT WEEKLY, Mar. 13, 2016.

37 KATHERYN RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS* 15 (New York and London: New York University Press, 1998). *See also* Eliza Morgan Meredith, *The Long History of Policing Black Durham*, (May 2016) (unpublished thesis, Duke University) <http://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/11981/Eliza%20Meredith-%20Thesis%202016.pdf?sequence=1>; MARVIN DULANEY, *BLACK POLICE IN AMERICA* 1-3 (Bloomington and Indianapolis: Indiana University Press, 1996).

38 JEAN BRADLEY ANDERSON, *DURHAM COUNTY: A HISTORY OF DURHAM COUNTY, NORTH CAROLINA*, 48-50 (2d ed. 2011).

39 RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS*, 18. *See generally* Sam Mitrani, *Stop Kidding Yourself: The Police Were Created to Control Working Class and Poor People*, LAWCHA: LABOR AND WORKING-CLASS HISTORY ASS'N, December 29, 2014; DOUGLAS BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (New York, London, Toronto, Sydney, Auckland: DoubleDay, 2008); Meredith *supra* note 20.

40 *See generally*, EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA, CONFRONTING THE LEGACY OF RACIAL TERROR (2015).

41 WALTER WEARE, BLACK BUSINESS IN THE NEW SOUTH: A SOCIAL HISTORY OF THE NC MUTUAL LIFE INSURANCE COMPANY 21 (Durham and London: Duke University Press, 1993).

42 GEORGE JR. LOUGEE, DURHAM, MY HOMETOWN 108-110 (Carolina Academic Press, 1990).

43 TIMOTHY B. TYSON, *Wars for Democracy: African American Militancy and Interracial Violence in North Carolina During World War II*, in DEMOCRACY BETRAYED: THE WILMINGTON RACE RIOT OF 1898 AND ITS LEGACY 266-67 (David S. Cecelski and Timothy Tyson, eds., 1998).

44 *Id.*

45 *Bus Driver Freed in Soldier's Death*, AFRO- AMERICAN, Sep. 23 1944.

46 *North Carolina Justice*, THE CHICAGO DEFENDER, Oct. 14, 1944 at 12.

47 Bayard Rustin, *Time on Two Crosses: The Collected Writings of Bayard Rustin* 18-19 (Devon W. Carbado and Donald Weise eds., 2003).

48 *Morgan v. Com. of Va.*, 328 U.S. 373, 380 (1946).

49 *Id.*

50 Bayard Rustin, *TIME ON TWO CROSSES: THE COLLECTED WRITINGS OF BAYARD RUSTIN* 14-15 (Devon W. Carbado and Donald Weise eds., 2003).

51 *Id.* at 18.

52 *Id.* at 23

53 *Id.*

54 *Id.* at 31.

55 *Id.* at 35.

56 *Id.*

57 *Id.*

58 *Id.*

59 Alexander, *supra* note 21.

60 *Id.* See also Aneel L. Chablani, *Legal Aid's Once and Future Role for Impacting the Criminalization of Poverty and the War on the Poor*, 21 MICH. J. RACE & L. 349 (2016).

61 Durham County Court File, 02CR-S42653 [on file with author].

62 John Stevenson, *All Cheek Road Drug Raid Charges Dropped*, THE HERALD-SUN, July 13, 2002.

63 Alexander, *supra* note 21, at 351.

64 UNITED STATES CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/37063> (last visited Nov. 2, 2016).

65 *Id.*

66 Structural racism arises from a totality of social relations, social, political, economic, legal, ideological, which reinforce white privilege over subordinate races. One can participate in racial structures that reproduce racial inequality without having any personal racial animosity or bias. See generally EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLORBLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (2003).

67 See generally DAVID WELLMAN, *Unconscious Racism, Social Cognition Theory, and the Legal Intent Doctrine: The Neuron Fires Next Time*, in HANDBOOK OF THE SOCIOLOGY OF RACIAL AND ETHNIC RELATIONS 40, 40 (Hernan Vera & Joe Feagin eds., 2007).

68 Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 *Seattle U. L. Rev.* 795, 797 (2012) (“Implicit racial bias describes the cognitive processes whereby, despite even the best intentions, people automatically classify information in racially biased ways. Since the late 1990s, a vast amount of research on implicit bias has demonstrated that a majority of Americans, for example, harbor negative implicit attitudes toward blacks and other socially disadvantaged groups, associate women with family and men with the workplace, associate Asian-Americans with foreigners, and more.”).

69 William M. Wiecek & Judy L. Hamilton, *Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace*, 74 *LA. L. REV.* 1095 (2014) (Policies and procedures that appear on their face to be race neutral nevertheless continue to reproduce disparate outcomes. “This manifestation of racism is unseen, automatic, and self-propagating.”).

70 Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 *STAN. L. & POL'Y REV.* 257 (2009) (What is not debatable, however, is that this ostensibly race-neutral effort has been waged primarily against black Americans. “Relative to their numbers in the general population and among drug offenders, black Americans are disproportionately arrested, convicted, and incarcerated on drug charges.”).

RESISTING ARREST AND RACISM - THE CRIME OF..., 85 UMKC L. Rev. 625

71 Alexander, *supra* note 21.

72 U.S. DEP'T JUST., CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 67 (2015).

73 *Id.*

74 N.C. GEN. STAT. § 14-223.

75 Hereinafter referred to as “resisting” charges.

76 N.C. GEN. STAT. § 14-33(c)(4) (2016).

77 N.C. GEN. STAT. § 14-277.1 (2016).

78 *See generally* *Types of Activity Encompassed by the Offense of Obstructing a Public Officer*, 108 U. PA. L. REV. 388 (1960).

79 An officer may arrest someone when the officer has probable cause to believe that person has committed a minor misdemeanor criminal offense in the officer’s presence. N.C. GEN. STAT. § 15A-401. In the officer’s discretion, the officer may issue a citation instead, and avoid arresting the person. N.C. GEN. STAT. § 15A-302. It does not violate the Fourth Amendment to arrest and strip search a person for a minor infraction. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (“If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”)

80 N.C.P.I. CRIM. 230.32. Resisting, Delaying or Obstructing An Officer--Excessive Force By the Officer (1999).

81 *Id.*

82 *State v. Pettigrew*, 693 S.E.2d 698, 704 (N.C. Ct. App. 2010) (“If, however, a juvenile commits a criminal offense on or after the juvenile’s 16th birthday, the juvenile is subject to prosecution as an adult in superior court.”); N.C. GEN. STAT. §7B-1604 (2009).

83 Alexandra O. Cohen et. al., *When Does A Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMP. L. REV. 769, 774-75 (2016) (“They insist that the justice system acknowledge that children differ from adults in ways that bear directly on the question of their culpability and their capacity for change. As importantly, what is significant about these opinions is their reliance on scientific studies of adolescent brain structure and functioning, as well as social science research of adolescent behavior, that confirm that teenagers are driven by circumstances and impulses, are vulnerable to the influences of their peers, are less capable of considering alternative courses of action and avoiding unduly risky behavior, and lack the self-control that almost all of them will gain later in life.”).

84 Patrick S. Metzger, *Plugging the School to Prison Pipeline by Addressing Cultural Racism in Public Education Discipline*, 16 U.C. DAVIS J. JUV. L. & POL’Y 203, 204 (2012). *See generally* Thalia Gonzalez, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline* 41 J.L. & EDUC. 281 (2012); Sarah Barr, *Racial Disparities Persist Even as School Suspensions Decrease, Federal Data Shows*, JUVENILE JUSTICE INFORMATION EXCHANGE (June 7, 2016) <http://jjie.org/racial-disparities-persist-even-as-school-suspensions-decrease-federal-data-shows/258419/> (When children face criminal charges for “acting out” in school, they are more likely to end up in the juvenile justice system. Data shows that black

RESISTING ARREST AND RACISM - THE CRIME OF..., 85 UMKC L. Rev. 625

children are targeted at significantly higher rates than non-blacks. “Black children in preschool are 3.6 times more likely to be suspended than their white peers.” Furthermore, “Black students are 2.3 times more likely to be referred to law enforcement or have a school-related arrest as their white peers.”).

⁸⁵ See generally Justice Policy Institute, Education Under Arrest: The Case Against Police in Schools, JUSTICE POLICY INSTITUTE, (Nov. 2011), available at <http://www.njjn.Org/uploads/digitallibrary/EducationUnderArrest.JusticePolicyInstit>; Rebecca Klein, *Black Students in the U.S. Get Criminalized While White Students Get Treatment*, Black Voices, THE HUFFINGTON POST (July 28, 2015), http://www.huffingtonpost.com/entry/racial-disparities-american-schools_us_55b67572e4b0074ba5a576c1?utm_hp_ref=tw).

⁸⁶ Durham County Court Files, 16CR50217, 15CR50418, 14CR61128, 15CR059672, 15CR053897, 16CR700419, 15CR59598, 14CR04592, 14CR4539, 14CR710757, 14CR57857, 16CR700422, 15CR51162, 16CR50171, 14CR03643, 15CR56317, and 15CR54540 [on file with author].

⁸⁷ Magistrate Order, N.C. v. Caballero, No. 16CR-50217 (Jan. 1, 2016).

⁸⁸ Magistrate Order, N.C. v. Wilds, No. 15CR-50418 (Jan. 15, 2015).

⁸⁹ *Id.*

⁹⁰ Magistrate Order, N.C. v. Overby, No. 14CR-61128 (May 7, 2015).

⁹¹ Durham Court Files, 15CR053897, 16CR700419, 15CR59598, 14CR04539, 14CR710757, 15CR54540 [on file with author].

⁹² Dismissal Notice of Reinstatement, State v. Tatum, No. 15CR-1818 (2015).

⁹³ *Id.*

⁹⁴ Magistrate’s Order, State. v. McClary, No. 16CR-59672 (2015).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Durham County Court File, No. 14CR-4592 [on file with author].

⁹⁸ Dismissal Notice of Reinstatement, State v. Meza, No. 14CR-3643 (2014) (The prosecutor entered a dismissal in this case noting, “The State does not wish to proceed.”).

⁹⁹ Magistrate Order, State v. Parker, No. 16CR-705128 (2015).

¹⁰⁰ Magistrate Order, State v. Freeman, No. 16CR-050622 (2016).

¹⁰¹ *Id.*

¹⁰² See Jennifer Fischer, *The Americans with Disabilities Act: Correcting Discrimination of Persons with Mental Disabilities in the Arrest, Post-Arrest, and Pretrial Processes*, 23 LAW & INEQ. 157, 160 (2005). See generally Leroy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 24 SEATTLE U. L. REV. 373 (2010); Ron Honberg, *Should Police Accommodate People With Mental Illness in Crisis? The Supreme Court Weighs In-Kind Of*, NATIONAL ALLIANCE ON MENTAL ILLNESS (May 19, 2015), <https://www.nami.org/Blogs/NAMI-Blog/May-2015/Should-Police-Accommodate-People-with-Mental-Illne#>.

¹⁰³ Alexandra Natapoff, *Gideon's Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 446 (2015) (“This phenomenon is sometimes referred to as the “criminalization of poverty:” namely, that many aspects of being poor have been rendered criminal. The homeless are punished for sleeping on the street. Working women are punished for their lack of access to childcare. The poor are punished for their dependence on government benefits or informal sources of income.”).

¹⁰⁴ See generally Aneel Chablani, *Legal Aid's Once and Future Role for Impacting the Criminalization of Poverty and the War on the Poor*, 21 MICH. J. RACE & L. 349 (2016).

¹⁰⁵ Magistrate’s Order, *State v. Abernathy*, No. 15CR-50613 (2015).

¹⁰⁶ See FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 27 (May 2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf (“Law enforcement officers should be required to seek consent before a search and explain that a person has the right to refuse consent when there is no warrant or probable cause. Furthermore, officers should ideally obtain written acknowledgement that they have sought consent to a search in these circumstances.”).

¹⁰⁷ See *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

¹⁰⁸ *U.S. v. Robinson*, 814 F.3d 201, 204 (4th Cir. 2016) (Because the carrying of a concealed firearm is not itself illegal in West Virginia, and because the circumstances did not otherwise provide an objective basis for inferring danger, we must conclude that the officer who frisked Robinson lacked reasonable suspicion that Robinson was not only armed but also dangerous.”).

¹⁰⁹ Magistrate’s Order, *State v. Abernathy*, No. 15CR-50613 (2015).

¹¹⁰ *State v. Heptinstall*, 306 S.E.2d 109, 111 (N.C. 1983) (“This test had been stated in our cases before enactment of the statute as ‘whether [the defendant] has the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to co-operate with his counsel to the end that any available defense may be interposed.’” (quoting *State v. Propst*, 161 S.E.2d 560, 566 (N.C. 1968))). See generally *State v. McCoy*, 277 S.E.2d 515, 528 (N.C. 1981); *State v. Cooper*, 213 S.E.2d 305, 316 (N.C. 1975).

¹¹¹ Magistrate Order, No. 15CR-2844 (2015).

¹¹² *Id.*

¹¹³ Warrant for Arrest, *State v. OKelly*, No. 15CR-58266 (2015).

**Holmes, Curtis 9/1/2017
For Educational Use Only**

RESISTING ARREST AND RACISM - THE CRIME OF..., 85 UMKC L. Rev. 625

- ¹¹⁴ Magistrate Order, State v. Coward, No. 15CR-060571 (2015).
- ¹¹⁵ For an interesting development in neighborhood watch, social media, and racial profiling, see *Social Network Nextdoor Moves to Block Racial Profiling Online*, NATIONAL PUBLIC RADIO (Aug. 23, 2016), <http://www.npr.org/sections/alltechconsidered/2016/08/23/490950267/social-network-nextdoor-moves-to-block-racial-profiling-online>; See also Aarti Shahani, *Social Network Nextdoor Moves to Block Racial Profiling Online*, NATIONAL PUBLIC RADIO (Aug 23, 2016).
- ¹¹⁶ *Florida v. Royer*, 460 U.S. 491, 497-98 (1983).
- ¹¹⁷ *Brown v. Texas*, 443 U.S. 47, 52-53 (1979) (holding that the application of a Texas statute that criminalized refusal to provide a name and address to a peace officer violated the Fourth Amendment where the officer lacked reasonable suspicion of criminal activity); see also *Hiibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177, 184 (2004) (deeming the reasonable suspicion requirement a “constitutional [limitation]” on stop-and-identify statutes).
- ¹¹⁸ N.C. GEN. STAT. § 20-35 (2016); In re D.B., 714 S.E.2d 522, 526 (N.C. App. 2011)(While many states have enacted “stop and identify” statutes such as the one in Hiibel, North Carolina has not)
- ¹¹⁹ Magistrate Order, No. 14CR-060065 (2014).
- ¹²⁰ *Investigation of the Ferguson Police Department*, U.S. DEPT. OF JUST. CIV. RIGHTS DIV. 21 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf
- ¹²¹ Magistrate’s Order, State v. Sanders, No. 15CR-050155 (2015).
- ¹²² State v. Due, No. 15CR-700887 (2015). The prosecutor dismissed this charge “in the interest of justice.”
- ¹²³ Magistrate’s Order, State v. Pipkin, No. 15CR-051838 (2015).
- ¹²⁴ Warrant for Arrest, State v. Hamm, No. 15CR-051838 (2015).
- ¹²⁵ Magistrate’s Order, State v. Hodges, No. 15CR-053702 (2015).
- ¹²⁶ Magistrate Order’s, No. 16CR-50027 (2016), Magistrate’s Order, No. 14CR-58115 (2014).
- ¹²⁷ North Carolina Uniform Citation, Orocio-Garcia, No. 15CR-708753 (2015).
- ¹²⁸ Magistrate’s Order, State v. Simmons, No. 15CR-059393 (2015).
- ¹²⁹ Warrant for Arrest, State v. Raines, No. 14CR-57278 (2015).

RESISTING ARREST AND RACISM - THE CRIME OF..., 85 UMKC L. Rev. 625

¹³⁰ Magistrate Order, *State v. Williams*, No. 16CR-51181 (2016).

¹³¹ Magistrate Order, *State v. Hicks*, No. 15CR-705734 (2015).

¹³² Magistrate Order, *State v. Ervin*, No. 15CR-053486 (2015).

¹³³ *State v. Eubanks*, No. 15CR-700222 (2015).

¹³⁴ *Brady v. Maryland* creates a due process obligation for prosecutors to provide exculpatory and impeachment information that could assist the defense prior to trial. The operative language of such a motion could be as simple as: Pursuant to *Brady vs. Maryland*, 373 U.S. 83 (1963) and *United States vs. Agurs*, 427 U.S. 97 (1976), and N.C. GEN. STAT. 160A-168(C)(4), moves the Court for an order that the State provide any and all in-car video, TASER video, documents, reports, MDC (mobile display computer communications), email, texts, or other evidence in whatever form that would tend to mitigate the degree of the accused's offense or the appropriate punishment, or would otherwise tend to be favorable to the accused in any way, including but not limited to: Durham Police Department, Professional Standards, Internal Affairs' (IA) investigation files, findings and conclusions, interviews (audio and written) for the accused and all officers claimed to have been involved, whether charged or uncharged with related offenses."

¹³⁵ *State v. Wells*, 298 S.E.2d 73, 75 (N.C. 1982), *cert. denied*, 302 S.E.2d 248 (N.C. 1983) (indictment must allege the duty of the officer at the time the act of resistance occurred).

¹³⁶ *Id.* at 75.

¹³⁷ *Id.* ("Although defendant made no motion in the trial court to arrest judgment on this charge, this Court ex mero motu has taken notice of the fatally defective citation and now orders that judgment on this charge be arrested."); *see also State v. Dunston*, 123 S.E.2d 480, 480-81 (N.C. 1962) (holding that an indictment alleging that "[the officer] was then and there attempting to discharge and discharging the duty of his office by hitting said officer in the stomach and kicking him on the legs" was fatally defective for failing to state the duty the officer was discharging or attempting to discharge); *State v. Jenkins*, 77 S.E.2d 796, 797 (N.C. 1953) ("These allegations do not describe the official character of the person alleged to have been resisted with sufficient certainty to show that he was a public officer within the purview of the statute."); *State v. Raynor*, 69 S.E.2d 155, 156 (N.C. 1952) ("The charge that defendant 'did resist arrest' neither charges the offense in the language of the Act, G.S. s 14-223, nor specifically sets forth the facts constituting the offense created by the Act. It is wholly insufficient to support the verdict and judgment rendered.").

¹³⁸ *State v. Helms*, 102 S.E.2d 241, 245 (N.C. 1958) ("Hence, the record disclosing that the bill of indictment is fatally defective, this Court, of its own motion, arrests the judgment. *State v. Jordan*, 100 S.E.2d 497; *State v. Lucas*, 244 N.C. 53, 92 S.E.2d 401, and cases cited; *State v. Eason*, 242 N.C. 59, 86 S.E.2d 774, and cases cited. As held in these cases, this does not bar further prosecution of defendant for violations of G.S. s 90-106 if the solicitor deems it advisable to proceed on a new bill.").

¹³⁹ Magistrate Order, *State v. Demarcus Jatun*, No. 15CR-1818

¹⁴⁰ *Id.*

¹⁴¹ Dismissal Notice of Reinstatement, *State v. Higdon*, No. 15CR1155 (2015).

¹⁴² *Id.*

¹⁴³ State v. Davis, 368 S.E.2d 52, 56 (N.C. Ct. App. 1988).

¹⁴⁴ *Id.*

¹⁴⁵ See INS v. Delgado, 466 U.S. 210, 215 (1984).

¹⁴⁶ See Florida v. Bostick, 501 U.S. 429, 434 (1991); State v. Kincaid, 555 S.E.2d 294, 299 (N.C. Ct. App. 2001).

¹⁴⁷ State v. Brooks, 446 S.E.2d 579, 586 (N.C. 1994).

¹⁴⁸ *Bostick*, 501 U.S. at 434.

¹⁴⁹ *Terry*, 392 U.S. at 16.

¹⁵⁰ Adams v. Williams, 407 U.S. 143, 146 (1972).

¹⁵¹ Brown v. Texas, 443 U.S. 47, 51 (1979).

¹⁵² State v. Watkins, 446 S.E.2d 67, 70 (N.C. 1994) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)).

¹⁵³ United States v. Sokolow, 490 U.S. 1, 7 (1989).

¹⁵⁴ State v. Zuniga, 322 S.E.2d 140, 146 (N.C. 1984) (quoting State v. Sanders, 295 N.C. 361, 376 (1978)).

¹⁵⁵ State v. Mills, 411 S.E.2d 193, 195 (N.C. Ct. App. 1991).

¹⁵⁶ Brinegar v. United States, 338 U.S. 160, 175-76 (1949)

¹⁵⁷ State v. Sinclair, 663 S.E.2d 866, 869 (N.C. Ct. App. 2008)

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

162 *Id.*

163 *Id.* at 491

164 *Id.*

165 *Id.*

166 *Id.* (quoting *State v. Thompson*, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907 (N.C. 1979)).

167 Dismissal Notice of Reinstatement, *State v. Darris Cayruth*, No. 15CR-57959 (2015).

168 *Id.*

169 North Carolina Uniform Citation, *State v. Abernathy*, No. 15CR-050613 (2015).

170 *Id.*

171 Dismissal Notice of Reinstatement, *State v. Martinez*, No. 14CR-3155 (2014).

172 *Id.*

173 Magistrate Order, *State v. Whitted*, No. 15CR-708933 (2015).

174 *Id.*

175 Anne Blythe, *Tasered man asks for reviews: Concerns emerge about officers' use*, TRIBUNE BUSINESS NEWS, Jan 30, 2009, at 3. Recording of Trial and transcript of dismissal hearing on file with author.

176 *Jones v. Buchanan*, 325 F.3d 520, 527 (4th Cir.2003); *see also Graham v. Connor*, 490 U.S. 386, 395 (1989).

177 *Graham*, 490 U.S. at 399.

178 *Id.* at 397.

179 *Jones*, 325 F.3d at 527 (quoting *Graham*, 490 U.S. at 396).

180 *Graham*, 490 U.S. at 396.

**Holmes, Curtis 9/1/2017
For Educational Use Only**

RESISTING ARREST AND RACISM - THE CRIME OF..., 85 UMKC L. Rev. 625

181 [Smith v. Ray](#), 781 F.3d 95, 101 (4th Cir. 2015).

182 [Yates v. Terry](#), 817 F.3d 877, 884-85 (4th Cir. 2016).

183 [Estate of Armstrong v. Vill. of Pinehurst](#), 810 F.3d 892, 902 (4th Cir.2016) (quoting [Orem v. Rephann](#), 523 F.3d 442, 448 (4th Cir.2008)).

184 [Yates](#), at 886.

185 [State v. Mobley](#), 83 S.E.2d 100, 102 (N.C. 1954).

186 [Id.](#) (citing [State v. Beal](#), 87 S.E. 416 (N.C. 1915); [State v. Allen](#), 80 S.E. 1075 (N.C.1914); [State v. Belk](#), 76 N.C. 10 (1877); [State v. Bryant](#), 65 N.C. 327 (1871); [State v. Kirby](#), 24 N.C. 201; [State v. Curtis](#), 2 N.C. 471 (1797)).

187 [State v. Mobley](#), 83 S.E.2d 100, 102 (1954) (“He may use only such force as reasonably appears to be necessary to prevent the unlawful restraint of his liberty.”).

188 N.C.P.I. Crim. § 230.32. Resisting, Delaying or Obstructing An Officer - Excessive Force By the Officer.

189 The following twenty-three states substantially eliminated the right to resist an unlawful arrest through legislative enactment: ALASKA STAT. § 13A-3-28; ARK. CODE ANN. § 5-54-103; CAL. PENAL CODE § 834a; COLO. REV. STAT. § 18-8-103(2); CONN. GEN. STAT. § 53a-23; DEL. CODE ANN. tit. 11, § 464(d); FLA. STAT. § 776.051(1); HAW. REV. STAT. § 710-1026(1); ILL. COMP. STAT. 5/7-7; IOWA CODE § 804-12; KAN. STAT. ANN. § 21-3217; KY. REV. STAT. ANN. § 520.090(1); MONT. CODE ANN. § 45-3-108; NEB. REV. STAT. § 28-1409(2); N.H. REV. STAT. ANN. § 594:5; N.Y. PENAL LAW § 35.27; N.D. LAWS § 12.1-05-03(1); OR. REV. STAT. § 161.260; 18 PA. CONS. STAT. § 505(b)(1)(ii); R.I. GEN. LAWS § 12-7-10; S.D. CODIFIED LAWS § 22-11-5; TEX. PENAL CODE ANN. §9.31(b)(2); VA. CODE ANN. § 18.2-460(8). See generally Craig Hemmens & Daniel Levin, *‘Not a law at all’: A Call for a Return to the Common Law Right to Resist Unlawful Arrest*, 29 S.W. U.L. REV. 1 (1999); Kimberly T. Owens, *Maryland’s Common Law Right to Resist Unlawful Arrest: Does it Really Exist?*, 30 U. BALT. L. REV. 213 (2000); Craig Hemmens, *Resisting Unlawful Arrest Mississippi: Resisting the Modern Trend*, 2 CAL. CRIM. L. REV. 2 (2000).

190 [State v. Singletary](#), 327 S.E.2d 11, 13 (N.C. Ct. App. 1985); [State v. Leigh](#), 179 S.E.2d 708, 713 (N.C. 1971).

191 [Singletary](#), 327 S.E.2d at 13 (1985) (citing [State v. Leigh](#), 179 S.E.2d at 713).

192 [State v. Allen](#), 188 S.E.2d 568, 573 (N.C. Ct App. 1972) (“The evidence is that when the officer ‘took hold’ of Walter Allen, Walter grabbed the officer’s shirt pocket. The officer slapped Walter Allen who was then subdued by another officer. This is clearly not an unreasonable amount of force to use in resisting the unlawful arrest. It did not exceed that force which appeared to be necessary to resist the restraint. We conclude that Walter Allen was exercising his lawful right to resist an illegal arrest when the affray, out of which these charges arose, occurred.”).

193 [Id.](#) at 573.

194 [Chaplinsky v. New Hampshire](#), 315 U.S. 568, 571 (1942).

¹⁹⁵ *Id.* at 571-72.

¹⁹⁶ *Id.* at 572.

¹⁹⁷ *Id.* at 573-74.

¹⁹⁸ *Gooding v. Wilson*, 405 U.S. 518, 527 (1972).

¹⁹⁹ *Id.* at 518-19.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 528.

²⁰² *Id.*

²⁰³ *Lewis v. City of New Orleans*, 415 U.S. 130 (1974)

²⁰⁴ *Id.* at 132.

²⁰⁵ *Id.*

²⁰⁶ *City of Houston v. Hill*, 482 U.S. 451, 455 (1987).

²⁰⁷ *Id.* at 461.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 462.

²¹⁰ *Id.*

²¹¹ *Id.* at 466.

²¹² *Brooks v. N. Carolina Dep't of Correction*, 984 F. Supp. 940, 952-53 (E.D.N.C. 1997).

²¹³ *Id.* (citing *Chaplinsky*, 315 U.S. at 572).

214 *Id.* (citing [Lewis](#), 415 U.S. at 132; [Hill](#), 482 U.S. at 461).

215 *Id.* (citing [State v. Leigh](#), 179 S.E.2d 708 (1971)).

216 *Id.* (citing [Hill](#), 482 U.S. at 465).

217 *Id.*

218 *Id.*

219 Magistrate's Order, [State v. Anderson](#), No. 14CR061842 (2015).

220 Keith Upchurch, *Charges Against Black Lives Matter Protesters Dismissed*, HERALD-SUN, (June 2015); Dawn Baumgartner Vaughn, *Durham Protesters Get Day in Court*, HERALD-SUN (May 7, 2015). Thanks to my co-counsel Amelia O'Rourke-Owens for her tireless work on behalf of these protesters.

221 Magistrate's Order, [State v. Allen](#), No. 15CR 052064 (2015). The allegations also suggest that someone was "maced" during this encounter.

222 Magistrate's Order, [State v. Love](#), No. 15CR 051135 (2015).

223 Anne Blythe, *Prosecutor Throws Out Charge Against Occupy Protester*, RALEIGH NEWS AND OBSERVER (Feb. 14, 2012).

224 Magistrate's Order, [State v. Gattis](#), No. 15CR711042 (2015).

225 *Id.*

226 Magistrate's Order, [State v. McClary](#), No. 14CR 059672 (2015).

227 *Id.*

228 Magistrate's Order, [State v. Love](#), No. File 15CR51135 (2015).

229 *Id.*

230 Danny Hooley, *Resisting, in Black and White*, INDEPENDENT WEEKLY (Mar. 16, 2016).

231 *Id.*

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.*

236 Magistrate's Order, State v. Woods, No. 14CR57440 (2014).

237 Magistrate's Order, State v. Foor, No. 14CR58009 (2014).

238 Magistrate's Order, State v. Chance, No. 16CR52397 (2016).

239 Magistrate's Order, State v. Patterson, No. 16CR50171 (2016).

240 *Id.*

241 *Id.*

242 U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) (citing TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002)).

243 *Id.* (citing Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 534-36 (2003); U.S. DEP'T OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, PROMOTING COOPERATIVE STRATEGIES TO REDUCE RACIAL PROFILING, No. 20-21 (2008) ("Being viewed as fair and just is critical to successful policing in a democracy. When the police are perceived as unfair in their enforcement, it will undermine their effectiveness."); NAT'L INST. OF JUSTICE, NEW PERSPECTIVES IN POLICING, EXPLORING THE ROLE OF THE POLICE IN PRISONER REENTRY, NO. 13-14 (2012) ("Increasingly, research is supporting the notion that legitimacy is an important factor in the effectiveness of law, and the establishment and maintenance of legitimacy are particularly important in the context of policing").

244 U.S. DEP'T OF JUSTICE, *supra* note 221 at 80-81.

245 FINAL REPORT, *supra* note 108, at 51.

247 *Guiding Principles on the Use of Force* 40, POLICE EXECUTIVE RESEARCH FORUM (2016) ("Policy 4: De-escalation as a formal agency policy. Agencies should adopt General Orders and/or policy statements making it clear that de-escalation is the preferred, tactically sound approach in many critical incidents.").

248 Julia Craven, *5 Things To Tell Anyone Who Blames Black Lives Matter for Violence Against Cops*, HUFFINGTON POST, Sept. 3, 2015 ("As Shaun King wrote for The Daily Kos: 'Just because this man who killed Officer Goforth was black, doesn't make him a

RESISTING ARREST AND RACISM - THE CRIME OF..., 85 UMKC L. Rev. 625

part of this movement any more than being white qualifies you as a member of the Ku Klux Klan”).

249 Alexander, *supra* note 21, at 199.

250 *Id.* at 7. See also Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 261 (2009) (“When asked to close their eyes and envision a drug offender, Americans did not picture a white middle class man snorting powder cocaine or college students smoking marijuana. They pictured unkempt African-American men and women slouched in alleyways or young blacks hanging around urban street corners. At least for the last twenty years, however, whites have engaged in drug offenses at rates higher than blacks.”).

251 Andrew Barksdale, *Fayetteville Police Making Fewer Stops*, FAYETTEVILLE OBSERVER (Aug. 17, 2014).

252 See generally MARIAN LIEBMAN, RESTORATIVE JUSTICE: HOW IT WORKS (2007); KAY PRANIS, BARRY STUART, MARK WEDGE, PEACEMAKING CIRCLES: FROM CRIME TO COMMUNITY (2003); Steve DeVane, *New diversion program could help teens keep records clean*, FAYETTEVILLE OBSERVER, (June 11, 2016) (“The diversion program which started March 2014 for 16 and 17-year olds, was expanded in October 2015 to include up to 21 year-olds. The program keeps young people from getting a record that could hurt their efforts to get a job later in life”).

253 For more on structural racism, see EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLORBLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES (2003).

254 See generally Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004) (“When police officers are accused of misbehavior, however, police solidarity has the opposite effect. In the face of outside criticism, cops tend to circle the wagons, adopting a “code of silence,” protecting each other, and defending each other’s actions. If the misconduct is found to be true, moreover, their departments deem the miscreants “rogue cops” whose conduct does not reflect negatively on the organization from which they came.”); Gabriel Chin, Scott Wells, *The “Blue Wall Of Silence” As Evidence Of Bias And Motive To Lie: A New Approach To Police Perjury*, 59 U. PITT. L. REV. 223 (1998).

255 James Baldwin, *This Far and No Farther*, in THE CROSS OF REDEMPTION: UNCOLLECTED WRITINGS 132 (2010) (“Now, the State creates the Criminal, of every conceivable type and stripe, because the State cannot operate without the Criminal ‘The incarceration of the Prisoner reveals nothing about the Prisoner, but reveals volumes concerning those who hold the keys. And finally, then, since I am an American discussing American Prisoners, we are also discussing one more aspect of the compulsive American dream of genocide.’”).

256 Greg Braxton, *‘The Talk’: Parents of Color Address the Tensions Between Police and their Kids*, L.A. TIMES (July 29, 2016); Melissa Block, *‘The Talk’: How Parents of All Backgrounds Tell Kids About The Police*, NATIONAL PUBLIC RADIO (Sept. 5, 2014) <http://www.npr.org/2014/09/05/346137530/the-talk-how-parents-of-all-backgrounds-tell-kids-about-the-police>; *Powerful Video Shows the Difference Between the Way Black and White Parents Talk to their Kids about Cops*, TAKEPART, (Dec. 14, 2014), http://www.takepart.com/video/2014/12/13/video-difference-black-and-white-parents-talk-kids_

257 Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004) (Police culture role in perpetuating police misconduct).

