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## Resisting Arrest: Shifting the Focus of the New York Police Department

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# Resisting Arrest: Shifting the Focus of the New York Police Department

Desiree Alexander

## INTRODUCTION

‘ . . . I am invisible man. No, I am not a spook like those who haunted Edgar Allan Poe . . . I am invisible, understand, simply because people refuse to see me . . . When they approach me they see only my surroundings, themselves, or figments of their imagination . . . anything except me. It is . . . often . . . wearing on the nerves . . . you doubt if you really exist . . . It’s when you feel like this that . . . you ache with the need to convince yourself that you do exist in the real world . . . and you strike out with your fists, you curse, and you swear to make them recognize you. And, alas, it’s seldom successful.’<sup>1</sup>

This quote is from the book, *Invisible Man* by Ralph Ellison.<sup>2</sup> It is set in the United States during the post-Civil War era where segregation laws prohibited black Americans from enjoying the same basic rights as white Americans.<sup>3</sup> The book, published in 1952, details a college educated black American’s struggle in America to survive and to thrive.<sup>4</sup> Sixty-three years after its publishing, this quote is still relevant. In 2015, black men still struggle to survive and thrive in America. Black men are disproportionately victims of police brutality.<sup>5</sup> Police brutality may result when someone resists arrest. Although a police officer can use as much force as necessary to make an arrest or prevent an escape,<sup>6</sup> often this may result in excessive force.<sup>7</sup>

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1. *Invisible Man*, by Ralph Ellison. (Copyright 1947, 1952 by Ralph Ellison. Reprinted by permission of Random House, Inc.)

2. *Id.*

3. *Id.*

4. *Id.*

5. Jeff Kelly Lowenstein, *Killed by the Cops*, Color Lines, [http://www.colorlines.com/archives/2007/11/killed\\_by\\_the\\_cops.html](http://www.colorlines.com/archives/2007/11/killed_by_the_cops.html)

6. Accordingly, a police officer or a peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he or she reasonably believes to have committed an offense, may use physical force when and to the extent he or she reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or in self-defense or to defend a third person from what he or she reasonably believes to be the use or imminent use of physical force N.Y. Penal Law § 35.30(1).

7. Jeff Kelly Lowenstein, *Killed by the Cops*, Color Lines, [http://www.colorlines.com/archives/2007/11/killed\\_by\\_the\\_cops.html](http://www.colorlines.com/archives/2007/11/killed_by_the_cops.html).

What do police officers see when they look at black men? As non-police officers and as concerned citizens, we can look at police brutality in resisting arrest cases through two different lenses. In order to combat this problem, Police Commissioner Bratton, viewing this problem through the lens that injuries, received during police citizen encounters are caused by the person resisting arrest, proposes that New York Police Department “NYPD” should raise the penalty for resisting arrest from a misdemeanor to a felony.<sup>8</sup> However, this solution is narrow and will not effectively solve the problem. Viewing this problem through the lens of the officers making the arrest, there is a better solution that can be outlined in three parts. First, there should be clearer guidelines for what conduct or lack of conduct constitutes resisting arrest. Second, the guidelines for officers reporting their use of force, when faced with someone resisting arrest, should be stricter. Lastly, there should be an external audit of the NYPD to evaluate complaints of resisting arrest abuse and to correct the problematic officers. In order to solve the problem of excessive injuries in police-citizen encounters, the NYPD must first shift their focus to their own internal operations.

This paper is a critique of policing in New York. This paper commends the NYPD for their attentiveness to crime reduction, but takes the position that such attentiveness can be refocused to increase its efficacy. Specifically, this paper looks at the charge of resisting arrest and its problematic enforcement. It addresses the current proposed solution to injurious police encounters, analyzes why it is insufficient, and proposes an alternative solution.

This paper will develop in three parts. Part I sets the stage by recounting three stories that illustrate the intersection between resisting arrest and police abuse. Part II discusses the background of American policing and its efforts to institutionalize slavery. It then discusses the charge of resisting arrest and its resulting implications. Part III explores the role of police discretion when charging resisting arrest. It also explores resisting arrest’s problematic implementation and the current proposed solution. Part III proposes an alternative solution and its ability to combat the problem of police brutality in resisting arrest cases.

## PART I

Here are three stories of resisting arrest involving police brutality. Reading these stories through both lenses will give us a better idea of how to solve the problem of police brutality in resisting arrest cases.

### *Story 1*

The first story occurs on April 15, 2011, where a white man, Officer Daragjati, while wearing plain clothes and driving an unmarked police vehicle,

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8. *Id.*

decided to stop a black man on Targee Street in the Stapleton neighborhood of Staten Island and frisk him.<sup>9</sup> Daragjati searched him and found no contraband.<sup>10</sup> The black man responded by complaining about the officer's treatment of him and asking the officer for his badge number.<sup>11</sup> In response, Daragjati charged him with resisting arrest and told him that he did not like being treated with disrespect.<sup>12</sup> Brooklyn Federal Judge William Kuntz had noted at the officer's sentencing last year that he was the subject of two civilian complaints from black men.<sup>13</sup>

### Story 2

The second story occurs on January 28, 2014, when an altercation between a black man, Floyd Dent, and two white officers, one of which was identified as William Melendez, was caught on police video cameras and made national news.<sup>14</sup> The video footage shows Inkster police pulling Dent over shortly before 10 o'clock at night.<sup>15</sup> The two officers approach with their guns drawn.<sup>16</sup> As Dent opens the door, they pull him out and shove him to the ground.<sup>17</sup> As he is on the ground, officer Melendez puts him in a choke-hold, and repeatedly pounds him on his head.<sup>18</sup> A second officer attempts to handcuff him behind his back, but Dent has his right arm up, trying to protect his face and head against Melendez.<sup>19</sup> That was just the beginning of the physical attack on Dent.<sup>20</sup> Police initially charged him with assault, resisting arrest, and possession of cocaine.<sup>21</sup> Dent says police planted the drugs at the time of his arrest.<sup>22</sup> His attorney, Gregory Rohl, added during a press conference that a close review of portions of the tape, not yet released publicly, show police planting the drugs.<sup>23</sup> This is not the first time

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9. Mosi Secret, *Officer Held in Civil Rights Case After Frisking*, The New York Times, available at, <http://www.nytimes.com/2011/10/18/nyregion/officer-accused-of-civil-rights-violation-in-false-arrest.html> (Oct. 2011).

10. *Id.*

11. *Id.*

12. *Id.*

13. Pamela Engel, *The NYPD Cop Who Put Eric Garner In A Chokehold Has A History Of Allegedly Violating Black Men's Rights*, Business Insider (Dec. 8, 2014, 9:35AM), <http://www.businessinsider.com/nypd-cop-daniel-pantaleo-sued-three-times-2014-12>.

14. L.L. Braisier, *Video Shows Police Beating Man During Traffic Stop*, Detroit Free Press (Mar. 26, 2015, 1:15pm), <http://www.freep.com/story/news/local/michigan/2015/03/25/inkster-police-arrest-beating-video/70446394/>.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. L.L. Braisier, *Video Shows Police Beating Man During Traffic Stop*, Detroit Free Press.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

officer Melendez was accused of misconduct.<sup>24</sup> In 2004, Melendez was among eight Detroit Police officers on trial for civil rights abuses, including planting evidence on criminal suspects.<sup>25</sup>

### *Story 3*

The third story occurred on Wednesday December 3rd, 2014, when a Grand Jury decision shook New York City.<sup>26</sup> A Staten Island Grand Jury declined to indict Officer Daniel Pantaleo, who is white, in a case involving the death of Eric Garner, a black male.<sup>27</sup> Police officers approached Garner for selling unlicensed cigarettes on the street.<sup>28</sup> Mr. Garner stated that he was tired of getting harassed by the police.<sup>29</sup> Right after he spoke those words, a Officer Pantaleo placed Mr. Garner in a chokehold, subduing him.<sup>30</sup> Other officers jumped in to assist in arrest.<sup>31</sup> They tried to get him to place his hands behind his back, but Mr. Garner insisted that he could not breathe.<sup>32</sup> Minutes later, Mr. Garner died from what autopsy reports attribute to homicide and compression of neck (chokehold), compression of chest and prone positioning during physical restraint by police.<sup>33</sup> All of this was recorded by video footage and was released to the media.<sup>34</sup> This officer has been sued 3 times before for violating black men's rights.<sup>35</sup>

#### *A. The Problem*

In these three stories, three things are apparent. First, it is unclear, at best, how the arrestees were actually resisting arrest. Second, they were severely injured. Finally, they were all recorded, but received no justice. In theory, we do not want people to resist arrest because, as New York's top cop, Police Commissioner William Bratton has stated publicly, "[i]t results in potential injuries to the officer, to the suspect."<sup>36</sup> However, in application, as depicted by the three stories, enforcing resisting arrest is problematic. The guidelines for resisting arrest do not make it clear when a person is actually resisting arrest, which allows for tremendous police discretion. Such police discretion is abused

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24. L.L. Braisier *Video Shows Police Beating Man During Traffic Stop*, *Detroit Free Press*.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. L.L. Braisier, *Video Shows Police Beating Man During Traffic Stop*, *Detroit Free Press*.

35. *Id.*

36. Will Bredderman, *Bratton: Raising Resisting Arrest to a Felony Would Be 'Very Helpful'*, *Observer* (Feb. 4, 2015, 6:06pm) <http://observer.com/2015/02/bratton-raising-resisting-arrest-to-a-felony-would-be-very-helpful/#ixzz3RGGW1w5e>.

and results in injury to both the police officer and the person that is allegedly resisting arrest.

### B. *American Policing*

The Thirteenth Amendment to the United States Constitution abolished the practice of slavery in America in 1865,<sup>37</sup> but slavery has been institutionalized by American policing and still exists today. Since slavery, the legal industry has used laws to maintain America's control over African Americans. There were Slave Codes, Black codes, and discriminatory policing practices. Every time one mechanism is abolished, the next mechanism implemented increases in subtle racism. None of these practices have definitively led to the deterrence of crime and volatile police-citizen encounters.<sup>38</sup> They are predicated on racism. *Dictionary.com* defines racism as "a belief or doctrine that inherent differences among the various human racial groups determine cultural or individual achievement, usually involving the idea that one's own race is superior and has the right to dominate others or that a particular racial group is inferior to the others."<sup>39</sup> These mechanisms of American policing were and are still used to perpetuate racism. Each mechanism deserves a separate analysis to understand why the NYPD needs to shift its focus internally in order to achieve their goals.

#### 1. *Slave Codes*

America has a long and disgusting history surrounding the way African Americans have been treated. They have never had an equal space in America. They were not naturally born slaves.<sup>40</sup> They were free and independent people back in Africa.<sup>41</sup> Once they were stolen from their home country and brought to America, they were not immediately complacent. They tried different tactics to avoid being slaves, including running away and pretending not to understand commands.<sup>42</sup> Since this posed a problem for their slave masters, the slave masters employed severe tactics to compel obedience.<sup>43</sup> The slave masters beat the African Americans mercilessly into submission and compliance.<sup>44</sup> They used ministers of God to liken themselves, as slave masters, to God.<sup>45</sup> This way the African Americans would serve and comply out of religious fear.<sup>46</sup>

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37. U.S. CONST. amend. XIII.

38. *Stop and Frisk Facts*, New York Civil Liberties Union <http://www.nyclu.org/content/stop-and-frisk-data> (last visited 4/15/2009).

39. *Racism*, <http://dictionary.reference.com/browse/racism> (last visited Apr. 14, 2015)

40. DIGITAL HISTORY, METHODS OF CONTROLLING SLAVES 18 (2015).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 20.

Additionally, the Court interpreted the Constitution to mean that African Americans were less than human (property) and undeserving of all human rights afforded by the Constitution.<sup>47</sup> Legislators also found ways to maintain control over the African Americans. They instituted Slave Codes. Slave Codes are laws that were enacted during the period of slavery, directed solely at African Americans, for the purpose of ensuring that, legally, African Americans maintain an inferior position in society.<sup>48</sup> The laws accomplished the goal of keeping African Americans in an inferior position by making it legal for whites as well as police officers to discipline them.<sup>49</sup> For example, if an African American “resisted arrest” from either the police or any white person, then the arresting party was free to physically brutalize them.<sup>50</sup> Like the resisting arrest law today, the slave codes back then also did not properly define what resisting arrest was.<sup>51</sup> The slave laws left that discretion to the arresting officer. Such discretion, could and was abused like they are today. They included laws that deprived them of their liberty and were punishable by brutal beatings.

## 2. *Black Codes*

The time period during Slavery was the most blatant display of racism in our country’s history. However, the practice of slavery did not end with the ratification of the thirteenth Amendment. It persists today through legislation and policing practices. The text of the thirteenth Amendment reads, “Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.”<sup>52</sup> As per the text, America was able to continue their lucrative practice of enslaving Americans through the prison system. Therefore, their next move was to increase the subtlety of their racism, by choosing to exploit the prison system.

In order to exploit the prison system, Black Codes were enacted. Numerous small crimes were invented and enforced by harsh punishment and forced labor.<sup>53</sup> “African Americans often faced imprisonment under fabricated charges.”<sup>54</sup> “Additionally, prisons became overcrowded and prison populations changed from being primarily White to being primarily Black.”<sup>55</sup> At this point, with America’s prison population disproportionately made up of Black Americans, America was now able to exercise their constitutional right of practicing slavery. In these prisons, the lucrative practice of slavery was able to continue. “Convict

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47. Dred Scott v. Sanford 60 U.S. 393 (1857).

48. DIGITAL HISTORY METHODS OF CONTROLLING SLAVES 18 (2015).

49. *Slavery and the Law in Virginia*, Colonial Williamsburg (last visited Apr. 15, 2015) <http://www.history.org/history/teaching/slavelaw.cfm>.

50. *Id.*

51. *Id.*

52. U.S. CONST. amend XIII § 1[Emphasis added.]

53. J. M. Kirby, Graham, Miller, & the Right to Hope, 15 CUNY L.J. 149, 157 (2011).

54. *Id.*

55. ANGELA DAVIS, ARE PRISONS OBSOLETE? 28-36 (2003).

laborers toiled on plantations, railroads, in mines, and, for corporations like U.S. Steel, under conditions described as ‘worse than slavery.’”<sup>56</sup>

Towards the late 1800s, these Black Codes were joined by social and economic laws, called Jim Crow laws. These laws were directed, again, solely at Black Americans, and affected those Black Americans who were not imprisoned.<sup>57</sup> These laws forbade any intermingling by Black Americans with other Americans, thus, perpetuating the inferior status that Black Americans had in America. It forbade intermarriage between blacks and whites as well as socializing in the same areas.<sup>58</sup> These laws remained firmly in place for nearly a century, until the passage of the Civil Rights Act of 1964.<sup>59</sup> The Civil Rights Act of 1964 forbids discrimination on the basis of race, color, or national origin.<sup>60</sup>

### 3. *Policing Practices*

We have drastically increased our subtle racism by going from blatant slavery, to facially discriminatory laws, and now to discriminatory policing practices. Police practices started strongly taking over this trend of subtly maintaining slavery by taking on the policing policy of Broken Windows. This was an “academic theory proposed by James Q. Wilson and George Kelling in 1982 that used broken windows as a metaphor for disorder within neighborhoods. Their theory links disorder and incivility within a community to subsequent occurrences of serious crime.”<sup>61</sup>

In 2014, the Police Reform Organizing Project (PROP) conducted a study regarding the cost of Broken Windows.<sup>62</sup> They found that for the first nine months of 2014 the NYPD made “an average of 648 misdemeanor arrests per day at a daily cost to the city of \$1,134,000.”<sup>63</sup> Those results also showed that within that same period, the NYPD made “an average of 4,536 misdemeanor arrests per week at a weekly cost to the city of \$7,938,000.”<sup>64</sup> Additionally, within the same period, the NYPD made “an average of 19,245 misdemeanor arrests per month at a monthly cost of \$33,993,750.”<sup>65</sup> PROP’s numbers clearly

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56. DAVID M. OSHINKSY, “WORSE THAN SLAVERY”“ PARCHMAN FARM AND THE ORDERL OF JIM CROW JUSTICE (1996).

57. *Jim Crow Laws*, National Parks Service, [http://www.nps.gov/malu/learn/education/jim\\_crow\\_laws.htm](http://www.nps.gov/malu/learn/education/jim_crow_laws.htm) (last visited Apr. 15, 2015).

58. *Id.*

59. *Black Codes*, History.com <http://www.history.com/topics/black-history/black-codes> (last visited Apr. 15, 2015).

60. 42 U.S.C.A. § 2000e.

61. Adam J. McKee, *Broken Windows Theory*, Encyclopedia Britannica, <http://www.britannica.com/EBchecked/topic/1929803/broken-windows-theory> (last visited Apr. 15, 2015).

62. *Over 1 Million Dollars A Day*, Police Reform Organizing Project, <http://www.policereformorganizingproject.org/wp-content/uploads/2012/09/Over-1-Million-Per-Day.pdf> (Dec. 2014).

63. *Id.*

64. *Id.*

65. *Id.*



show a huge cost to our city, yet it does not seem to outweigh the benefit of the program. The benefit of the program may be seen as less criminal activity for fear of this near zero tolerance policing of low-level crimes. Yet, this benefit has not been shown to be linked directly to broken windows policing.

This uncertain benefit does not outweigh the two major costs of this program. First, the cost of millions of dollars spent per week to crack down on petty crimes with little to no result is a waste of money. The trains in New York still smell of bodily fluids, are still off schedule and delayed. The public transportation fares and the bridge and tunnel tolls are still sky rocketing. Yet, we are spending millions of dollars every week to criminalize our citizens, particularly our African American citizens. Second, the cost of the lower level of trust that community members have in their police officers is not worth potentially deterring crime. For that type of detriment to our society, where the community distrusts the police as our protectors, we need guaranteed results, not just hope.

This Broken Windows policing seems directly linked to the lower level of trust between community members and police officers. Instead of walking out of your house and feeling safe and protected, you are now likely worried about what low level insignificant action will cause you to have a confrontational encounter with the police. The racial makeup of this policing policy explains the low community member trust of their police officers. PROP found that “[i]n 2013, 87% of the individuals charged with misdemeanors were people of color.”<sup>66</sup> This shows that almost every day, the police are criminalizing hundreds of people of color for petty crimes.

Another policing practice that has come under fire recently is “Stop and Frisk”. The Supreme Court affirmed this practice in 1968 in the case of Terry v. Ohio.<sup>67</sup> a few years after the Civil Rights Act of 1964 was enacted. This practice allows an officer to stop a person that they have reasonable suspicion is committing a crime and to frisk a person for weapons only if they have reasonable suspicion that this person is armed and dangerous.<sup>68</sup> In *Terry*, a plain clothes officer, noticed a couple of males suspiciously walking to and from a store.<sup>69</sup> The officer believed that they were casing the store in contemplation of committing a robbery.<sup>70</sup> Upon this reasonable suspicion, the officer stopped the men and because of the nature of the crime of robbery, the officer reasonably believed that they may be armed and dangerous in order to commit the crime and thus frisked the men without reaching into their pockets.<sup>71</sup> The officer

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66. *Id.*

67. *Terry v. Ohio* 88 S.Ct. 1868 (1968)

68. *Id.*

69. *Id.* at 1871.

70. *Id.* at 1871.

71. *Id.* at 1872.

subsequently found a gun.<sup>72</sup> The motion to suppress the gun at trial was denied because the stop and frisk was proper.<sup>73</sup>

On its face, the practice of Stop and Frisk seems neutral because of “the notion that a ‘stop’ and a ‘frisk’ amount to a mere ‘minor inconvenience and petty indignity, which can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer’s suspicion.”<sup>74</sup> However, in its application, Stop and Frisk has turned out to disproportionately affect African Americans in particular. It is aiding in the Post-Civil War Era’s goal of re-institutionalizing slavery notwithstanding the Thirteenth Amendment. In application, since 2002, every year, NYPD stopped and frisked hundreds of thousands of people (in 2013 and 2014 stop and frisks sharply decreased to tens of thousands of people affected.)<sup>75</sup> During those stops, over 85% of the people stopped and frisked were totally innocent.<sup>76</sup> Unfortunately, out of all the stops every year, African Americans consistently made up over half of the stops, while whites consistently made up merely 9-12% of the people stopped.<sup>77</sup> “[F]rom 2002 to 2011, black and Latino residents made up close to 90 percent of people stopped, and about 88 percent of stops – more than 3.8 million – were of innocent New Yorkers.”<sup>78</sup> For over a decade, we’ve been targeting minorities and their communities in a highly unsuccessful manner. This unequal policing practice seems more aligned with our nation’s theme of institutionalizing slavery than our goal of public safety and deterring crime.

Under the Fourteenth Amendment, the Equal Protection Clause states “[No state shall] deny to any person within its jurisdiction the equal protection of the laws.”<sup>79</sup> In order to have a successful claim of discrimination under the Equal Protection clause, one must show that a law or practice was intentionally created to cause a disproportionate and discriminatory outcome.<sup>80</sup> There are two elements here: intent and disparate impact.

The first element requires that one shows that the law or practice was created to intentionally cause a disparate impact.<sup>81</sup> However the second element is the most troublesome to prove. “[U]nequal application of the law . . . show[s] intentional discrimination.”<sup>82</sup> An unequal application of the law can be evidenced as the statistics show in Stop and Frisk Data. This data shows that “in

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72. *Id.* at 1873.

73. *Id.* at 1873.

74. *Id.* at 1874.

75. *Stop-and-Frisk Data*, New York Civil Liberties Union, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited Apr. 15, 2015).

76. *Id.*

77. *Id.*

78. *Stop and Frisk Facts*, New York Civil Liberties Union, <https://www.nyclu.org/en/stop-and-frisk-facts> (last visited Apr. 15 2015).

79. U.S. CONST. amend XIV §1

80. See generally *Washington v. Davis*, 426 U.S. 229 (1976)

81. *Id.*

82. *Akins v. Texas*, 325 U.S. 398, 403-404 (1945)

2011, Black and Latino New Yorkers made up 24 percent of the population in Park Slope, but 79 percent of stops.<sup>83</sup>

Though the second element has historically been the most troublesome to prove, it is possible. This issue has come up in jury selection cases. For example, in *Swain v. Alabama*, the court held that there was no sufficient disparate impact where there had not been black jury members chosen to be on the jury because black people had in fact been polled to be on the jury.<sup>84</sup> The Court reasoned that they “cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%.”<sup>85</sup> However, in another case, *Hill v. State of Texas*, the Court held that “chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a period as sixteen years or more.”<sup>86</sup> This case showed that sufficient disparate impact can only be shown by an impact where mere chance or coincidence can be ruled out as a cause. In a system that has been advancing in effecting subtle racism for centuries, disparate impact is clearly very hard to prove.

Recent measures are deflecting from the legal industry’s efforts to institutionalize slavery. One recent measure is the racial make-up of the NYPD. Currently, the NYPD is relatively diverse.<sup>87</sup> In their “Year End 2014 Enforcement Report,” the NYPD report that by the end of 2014, they had 22,220 Police officers in total.<sup>88</sup> There are other ranks, but for purposes of this note we will discuss police officers since we are dealing with resisting arrest charges.<sup>89</sup> According to the report, those officers’ races include White, Black, Hispanic, and Asian.<sup>90</sup> Of those officers, only 16.3% are Black and more than double that percentage (47.2%) are White.<sup>91</sup> Despite their diversity, there is still an overwhelming majority of White officers.<sup>92</sup> They make up about as much of the NYPD as the entire minority officers combined. Like the slave codes, and the black codes, current laws still leave a tremendous amount of room for police discretion and the abuse of it. Before we get into the abuse of police discretion, it is necessary to understand how the law leaves room for it.

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83. *Stop and Frisk Facts*, supra, available at <https://www.nyclu.org/en/stop-and-frisk-facts>

84. *Swain v. Alabama*, 380 U.S. 202 (1965)

85. *Id.*

86. *Hill v. State of Tex.*, 316 U.S. 400 at 402 (1942).

87. William J. Bratton, *Crime and Enforcement Activity in New York City, Analysis and Planning*, C-1  
[http://www.nyc.gov/html/nypd/downloads/pdf/analysis\\_and\\_planning/enforcement\\_report\\_year\\_end\\_2014.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/enforcement_report_year_end_2014.pdf) (last visited Apr. 15, 2015)

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

### C. *Resisting Arrest*

In New York, if an individual intentionally prevents or attempts to prevent an officer from legally arresting him or another person, then that individual is guilty of resisting arrest, which is a class A misdemeanor.<sup>93</sup> “Persons need not be specifically advised that they are under arrest in order to commit the offense of resisting arrest.”<sup>94</sup> A misdemeanor is punishable by sentence of imprisonment in excess of 15 days, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed.<sup>95</sup> New York Penal Law outlines two different ways in which one can resist arrest besides using force: passive resistance and taking flight.<sup>96</sup> But still, no clear line is drawn on what actions or inactions constitute resisting arrest.

### D. *Current Implications*

As Immanuel Kant once said, “the punishment must fit the crime.”<sup>97</sup> The Court too has embraced this requirement. In the case of resisting arrest, the current punishment, a charge of a misdemeanor is often greater than the crime. The implications of getting arrested, alone, have a lifelong effect without the added effects of being charged with a misdemeanor. These things are a necessity to survive in America. So a person’s American Dream is thwarted by the government, once one of its police officers decide that this person is resisting their arrest.

Even if one is arrested and arraigned the next day, one is still hugely impacted by this arrest. An arrest alone likely means time away from one’s job, family, and responsibilities. That time away can change one’s life. Imagine one telling one’s boss, that he or she can not come in to work today because he or she is waiting to be arraigned. Arrest, alone, hugely impacts Americans. When thinking about how the punishment can fit the crime, we must acknowledge that for committing this crime, merely getting arrest has severe consequences so we should exercise extreme caution before ratcheting up punishment.

Unfortunately, for many, the punishment does not stop at arrest. Many are actually charged with the crime of resisting arrest, which may or may not be tacked on to other charges. When charged with a misdemeanor, additional consequences arise. A misdemeanor is punishable by up to a year in jail. That is a year away from work, which in theory could result in a year or more of not being able to provide for one’s family or live as a productive citizen. That is a year away from school or applying to school, or just enjoying the outside world.

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93. N.Y. PENAL LAW § 205.30 (McKinney 1965).

94. 67 C.J.S. *Obstructing Justice* § 48 (2017).

95. N.Y. PENAL LAW § 10.04 (McKinney 2013).

96. N.Y. PENAL LAW § 205.30 (McKinney 1965).

97. Immanuel Kant, *The Retributive Theory of Punishment*, *The Philosophy of Law*, <http://www.redwoods.edu/instruct/jjohnston/Philosophy10/CaseStudies/RetributiveTheoryofPunishment.pdf> (1887)

One will have a criminal record that follows you everywhere. Especially in this day and age of technology, employers and colleges can find your criminal record with a simple background check. A background check is included in any other endeavors that you may aspire to achieve. You may never be able to own your own home. Further, it will affect your reputation. You are now a criminal in society.

## PART II

### A. *Police Discretion*

#### 1. *Necessity*

NYPD officers have a statutory right to stop and question a person in public places if they reasonably suspect that the person is committing, has committed or is about to commit a crime.<sup>98</sup> To justify such an intrusion, the police officer must indicate specific and articulable facts . . . Vague or unparticularized hunches will not suffice, nor will good faith on the part of the police be enough to validate an illegal interference with the individual.<sup>99</sup> NYPD happily complies with this statutory right every day. To be certain, this right is important. There are armed and dangerous people walking the streets. The police need such authority to ensure public safety. We can not allow everyone to have that authority because, by definition, it can not be authority if everyone has it. So as a society we empower some members of society to have the authority.

Police officers are allowed to commit crimes in order to enforce the law. For example, “A person is guilty of kidnapping in the second degree when he abducts another person.”<sup>100</sup> The dictionary defines “abduct” to mean “to take (someone) away from a place by force.”<sup>101</sup> When a police officer arrests someone that is exactly what they are doing. They are likely handcuffing you, putting you into their car and taking away by force. Yet, we do not arrest the police for kidnapping you. In fact, we praise the police (generally) for kidnapping you. Generally, as a society we want safer streets. Therefore, we have police officers who are empowered to kidnap people that the officer believes is committing, about to commit, or has committed a crime.

This is great power. But, with great power comes great responsibility. We do not expect officers to kidnap people just because they do not like them. Kidnapping people should serve a public safety purpose. This person is harmful to society in some way and needs to be temporarily removed from society until we can rectify the situation. We do not have clear guidelines on how police

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98. N.Y. CRIM. PRO. LAW. § 140.50 (McKinney 2010).

99. 31 N.Y. JUR. 2D *Crim. Pro.* § 130.

100. N.Y. PENAL LAW § 135.20 (McKinney 1965).

101. *Abduct*, Merriam Webster, <http://www.merriam-webster.com/dictionary/abduct> (Last visited Apr. 15, 2015).

officers should police. We, instead, let these officers make judgment calls. Unfortunately, that type of discretion leads to harmful and unproductive ends.

## 2. *Abuse*

Police discretion can be and too often is abused. Commissioner Bratton gave a speech to a predominantly African-American crowd during a Black History Month breakfast at the Greater Allen AME Church in Queens.<sup>102</sup> “Slavery, our country’s original sin, sat on a foundation codified by laws enforced by police, by slave-catchers,” Bratton said.<sup>103</sup> It seems here that Commissioner Bratton is acknowledging the background of American policing and its effort to institutionalize slavery as mentioned earlier in this paper. While speaking, the Commissioner pointed out that the first thing Dutch colonist Peter Stuyvesant did upon arriving in what was then New Amsterdam was set up a police force to prop up a system of slavery.<sup>104</sup> “Since then, the stories of police and black citizens have intertwined again and again,” Bratton said.<sup>105</sup> “The unequal nature of that relationship cannot and must not be denied.”<sup>106</sup>

Not surprisingly, statistics back up the assertion of the unequal nature of the relationship that police officers have with black citizens. “In low-level drug possession cases, for example, the citywide numbers show that a black defendant is almost twice as likely as a white defendant to face a resisting arrest charge. That disparity is even greater on Staten Island, where blacks are almost two-and-a-half times more likely to be accused of resisting arrest.”<sup>107</sup> Noel Leader, a former NYPD sergeant and co-founder of the group, 100 Blacks in Law Enforcement Who Care, stated that “[t]his unnecessary contact between communities of color and law enforcement has created a very high level of hostility and anger[.]”<sup>108</sup> Seymour James, head of the Legal Aid Society, stated that he thinks the disparity is “reflective of the fact that the police are physically abusive towards people of color and treat them with less respect than whites who are arrested’[.]”<sup>109</sup> When compared to white defendants, a black defendant is 64.9% more likely to get charged with resisting arrest in a disorderly conduct case; 85.4% more likely to get charged with resisting arrest in a misdemeanor drug possession case; and 109.4 % more likely to get charged with resisting arrest for a petty theft case.<sup>110</sup>

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102. Christopher Mathias, Bratton Says Police To Blame for ‘Worst Parts’ of Black History, But Reform Advocates Are Unimpressed, *POLITICS*, [http://www.huffingtonpost.com/2015/02/24/william-bratton-nypd-slavery-history-broken-windows\\_n\\_6746906.html?](http://www.huffingtonpost.com/2015/02/24/william-bratton-nypd-slavery-history-broken-windows_n_6746906.html?) (Feb. 24, 2015).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Robert Lewis & Noah Veltman, Resisting Arrest in Black and White, *WNYC News*, <http://www.wnyc.org/story/resisting-arrest-black-white/> (Dec. 12, 2014).

108. *Id.*

109. *Id.*

110. *Id.*

These numbers are alarming. With such a disproportionate impact on any community but especially minority communities, we need to shift our focus from the offender and take a serious look at why these communities of color are being targeted. The NYPD's method of crime retention is focusing on the offender.

At the beginning of this paper I discussed three separate stories of brutal police encounters. These stories are the few that make the news. They depict very real scenarios of what happens when police discretion is abused. But, thankfully, these stories are not indicative of all officers. They represent the small percentage of officers that are "bad apples" and need to be removed. From these stories, we learned that it was not clear that the victim was actually resisting arrest, and that the officers had a history of bad behavior. From this information, it is clear that a good place to start, when brainstorming how to end these brutal police encounters, is internally.

Looking into the NYPD, statistics show that only forty percent of NYPD make resisting arrest charges.<sup>111</sup> Five percent of NYPD officers account for forty percent of all resisting arrest charges.<sup>112</sup> Another fifteen percent of NYPD officers account for seventy-two percent of all resisting arrest charges.<sup>113</sup> These statistics point to an issue that has since been ignored by the NYPD: police accountability. New York has not taken a serious look at their actual police officers. Too often, NYPD settles cases and the officers get to go on paid leave while the NYPD investigates similar brutal situations. If there are no consequences for the actions of these bad apple officers then there is no hope for us to end the brutal encounters.

### B. Problem

Unfortunately, we are turning into a society of "us," as lay citizens, against "them," the police officers. When the police officers are brutalizing people in the street for no articulable reason, those victims have no one else to call for help in that moment of brutality. They can seek justice and exposure of the brutality only after they have been brutalized. The problem is brutal police encounters. Brutal police encounters are everything except helpful. They can result in injury to the arresting officer, the arrestee, and if the officers employ a deadly weapon then it can lead to endangering the lives of bystanders. Additionally, because there is no legitimate check and balance system to control the brutal officers, many of these encounters are unprovoked and unwarranted. It is just abuse of discretion, as noted by the police encounter statistics where nearly 90% of all stops were innocent.<sup>114</sup> This causes poor police-community relations. If people of one race are stopped more regularly (as these statistics suggest) than people of another

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111. Robert Lewis, *Can the NYPD Spot the Abusive Cop?*, WNYC News, <http://project.wnyc.org/resisting/> (Dec 4, 2014).

112. *Id.*

113. *Id.*

114. *Stop and Frisk Facts*, *supra*, available at <http://www.nyclu.org/node/1598>.

race, it follows that those people, who are stopped more, may start to feel like a target. Feeling like a target is not healthy for the maintenance of police-community relations. Community members begin to distrust the very people that are charged with protecting them.

Further, trust begins to drop even more when it comes to justice. There are three points where we can remedy these brutal police encounters: [1] After it is all over; [2] while it is happening; and [3] before it even begins. First, remedying the situation when it is all over is incredibly problematic. That is because the options are very limited. On the speedometer of police encounters, things can go from 0 to 100 real quick. More specifically, these encounters have ranged anywhere from mild inconvenience and humiliation for a stop to brutal murder and sodomy.<sup>115</sup> For the minor stop, there is no remedy. We have justified the police officers need to stop one for the safety of all.<sup>116</sup> The only possible remedy occurs if they actually unlawfully search you and find contraband on you.<sup>117</sup> If there is no contraband found, besides civil remedies which are nearly impossible to pursue or win, there is no real remedy for your lost time, possibly lost wages, being late to pick your child up, missing your train, and especially not for the humiliation that you have suffered from being treated like a criminal in the public eye.

For the other side of the speedometer, where the police encounter results in death, justice also may not be found. The Eric Garner case is a prime example of such lack of justice. In 2015, the likelihood of people recording your behavior in public is at an all-time high. Despite the recording of the death of Eric Garner, the officer was still not indicted. This was especially surprising to those who believe in the famous Judge Watchler quote in which he asserts that prosecutors could get a grand jury to “indict a ham sandwich” if they wanted to.<sup>118</sup> This encounter was caught on tape, of multiple officers pursuing one target, placing him in a chokehold despite his exclamations that he could not breathe. Yet, the officer was relieved of any criminal liability. Since then, other famous police encounters have surfaced to share the light with the Eric Garner case.<sup>119</sup> Therefore, when justice is not even guaranteed despite video footage of the incident, it is not sufficient to wait until after the incident occurred in order to seek justice.

Likewise, seeking a remedy during the encounter is futile as well. If you scream out for help or try to reason with the officer, it may be seen as resisting arrest. This can only escalate the situation. Further, there is no one that can help

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115. See article discussing brutal police encounters, specifically regarding Abner Louima at Controversial Police Encounters Fast Facts, CNN, <http://www.cnn.com/2015/04/05/us/controversial-police-encounters-fast-facts/> (Apr. 12, 2015).

116. Terry v. Ohio 88 S.Ct. at 1874, *supra*.

117. N.Y. Crim. Pro. Law. § 710.20 (McKinney 2010).

118. *From the Archives: Chief Judge Wanted to Abolish Grand Juries*, Daily News, <http://www.nydailynews.com/news/politics/chief-judge-wanted-abolish-grand-juries-article-1.2025208> (Nov 26, 2014).

119. *Controversial Police Encounters Fast Facts*, *supra*.



you at this point. The police officers have control over the situation and there is no one that can check them in that moment. Your best bet, is to allow your civil rights to be violated, wait until it is all over to seek justice and then hope that you do receive some justice.

Lastly, there is the option of remedying the situation before the encounter even occurs. That would require the NYPD to first shift their focus from the prospective criminals to their own officers to ensure that they are following the proper protocol. With the option of shifting the NYPD's focus internally, two problems arise. First, they have to have clearer guidelines of what does and does not constitute resisting arrest. Second there must be clearer guidelines for reporting resisting arrest.

### 1. *Lack of Clarity in the rule*

New York Penal Law outlines two different ways in which one can resist arrest besides using force: passive resistance and taking flight. Passive resistance seems to be the more problematic type of resisting arrest. Additionally, the New York Penal Law also outlines two cases. People v. Arbeiter held that "In merely delaying the inevitable by allegedly remaining seated during the arrest process, defendants did not 'attempt[ ] to prevent' their arrest within the meaning of the resisting arrest statute as presently constituted."<sup>120</sup> In another case where the appellants argued that there was no resistance because there was no affirmative duty on their part to assist the officers in making the arrest by walking out of the building, the court stated "[they] cannot agree . . . Each of the appellants delayed his own arrest and necessarily the arrest of the others. Thus . . . it nevertheless constituted resistanceFalse"<sup>121</sup> From these two cases alone, defining resisting arrest seems to both revolve around delaying the officer, yet on one hand, delaying the inevitable is not sufficient,<sup>122</sup> but on the other hand, delaying the officer is "obstructing justice".<sup>123</sup> With inconsistent case law, law enforcement does not actually know where to draw the line for actions or inactions that constitute resisting arrest. If law enforcement does not know, then how can lay people know? They can not. That is why resisting arrest is inherently problematic.

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120. People v. Arbeiter 650, 774 N.Y.S.2d 915 774 Citing (*see*, People v. McDaniel, 154 Misc.2d 89, 593 N.Y.S.2d 154, *lv. denied*81 N.Y.2d 889, 597 N.Y.S.2d 950, 613 N.E.2d 982).

121. People v. Williams 25 N.Y.2d 86302 N.Y.S.2d 780250 N.E.2d 201 at 90/203Citing (People v. Martinez, 43 Misc.2d 94, 250 N.Y.S.2d 28; \*91 650 N.Y.S.2d 915, 35 Misc.2d 216, 222, 228 N.Y.S.2d 981, 987).

122. People v. Arbeiter 1996 169 Misc.2d 771 650,774 N.Y.S.2d 915 Citing (*see*, People v. McDaniel, 154 Misc.2d 89, 593 N.Y.S.2d 154, *lv. denied*81 N.Y.2d 889, 597 N.Y.S.2d 950, 613 N.E.2d 982).

123. People v. Williams 25 N.Y.2d 86 302 N.Y.S.2d 780 250 N.E.2d 201 Citing (People v. Martinez, 43 Misc.2d 94, 250 N.Y.S.2d 28; \*91 People v. Knight, 35 Misc.2d 216, 222, 228 N.Y.S.2d 981, 987).

## 2. *Lack of Clarity in reporting guidelines*

Another problem is the lack of clarity in reporting guidelines. Officers are required to report their encounters and fill out a questionnaire regarding what happened during the encounter. However statistics show that officers grossly inaccurately report what happens during their encounters. Stephen P. Davis, NYPD's chief spokesman, stated that use of force is self-reported by police officers.<sup>124</sup> Commissioner Bratton stated that of nearly 400,000 arrests in 2013, only about 2% or about 8,000, involved force which was self-reported by the officer.<sup>125</sup> The *New York Times* noted that, "In stop-and-frisk encounters, which are even more closely documented, the department counts nearly all contact as force- including use of handcuffs."<sup>126</sup> Yet, in 2013, 12,453 arrest included charges of resisting arrest which is thousands more than 8,000 that Commissioner Bratton has reported. This discrepancy is problematic. If there were 12,453 charges of resisting arrest, and use of force includes the use of handcuffs, then it logically follows that there should be, at least 12, 453 reports of use of force. However, as reported by Commissioner Bratton, there are thousands less. Commissioner Bratton has not acknowledged this discrepancy to the public or in any public department reports. This only shows that at the very least, the NYPD's focus needs to shift. They need to start focusing on officers. They need to figure out why there are discrepancies between the subjective officer reports and the objective data of resisting arrest charges.

### C. *Proposed Solutions*

A couple months after the Eric Garner grand jury decision, on February 4, 2015, New York Commissioner Bratton testified before a joint hearing of four State Senate committees, calling for a movement for the penalty, for the charge of resisting arrest, to increase from a misdemeanor charge to a felony charge.<sup>127</sup> Before implementing such a proposal, let us look at how the scenarios above would be impacted. In the first story, for merely expressing concern about the way an officer was treating him and asking for the officer's badge number, this black man would be charged as a felon. In the second story, for merely driving while black (since no traffic violations or other means for probable cause or even reasonable suspicion were articulated), this black man would be charged as a felon. In the final story, for merely expressing concern about the officer's behavior and selling loose cigarettes on the street, yet another black man would be charged as a felon.

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124. J. David Goodman, *Bratton's Numbers on Use of Force by New York Police Raise Questions*, New York Times, available at [http://www.nytimes.com/2014/09/19/nyregion/brattons-numbers-on-use-of-force-by-new-york-police-raise-questions.html?smid=pl-share&\\_r=0](http://www.nytimes.com/2014/09/19/nyregion/brattons-numbers-on-use-of-force-by-new-york-police-raise-questions.html?smid=pl-share&_r=0).

125. *Id.*

126. *Id.*

127. Raising Resisting Arrest to a Felony Would Be 'Very Helpful', *Supra*.

While, hopefully, Commissioner Bratton's proposal is intended to be helpful in deterring people from resisting arrest, this paper explores how this proposal will be the exact opposite of helpful. Commissioner Bratton told reporters that "[w]e need to get around this idea that you can resist arrest. You can not. You just can not do it. It results in potential injuries to the officer, to the suspect."<sup>128</sup> In this statement, Commissioner Bratton is recognizing this lens in which the "potential injuries" that result from resisting arrest are caused by the person resisting. However, in these three reported stories above it is not. Commissioner Bratton is looking for a way to deter the people who resist arrest. He argues that the current misdemeanor penalty allowing up to a year in jail as punishment does nothing to "deter the nearly 2000 resisting arrest charges each year."<sup>129</sup>

### 1. *Felony charges*

In order to assess the value of Commissioner Bratton's proposal, one must understand the implications of receiving a felony charges. Upon conviction of a felony and sentencing, a felon loses their opportunity to participate in society as citizen. One has no voice in his or her state or country. One loses the opportunity to vote and only receives that opportunity to vote once he or she completes his or her sentence and parole.<sup>130</sup> One also loses the opportunity to serve on a jury.<sup>131</sup> As a convicted felon, one can still run for elected office. However if one is holding a public office when convicted then one must be removed.<sup>132</sup>

Another fundamental staple in our country is the jury process, where one stands up as a defendant's peer and help to decide what will and will not be tolerated in one's society. However, as a convicted felon, one is no longer recognized as that important in society. Even after one has repaid one's debt to society, one is no longer worthy of serving on a jury. Another staple in our country is family. We have prioritize family so much in this country that we even have laws governing the preservation of what we think the ideal family is. Family seems to be untouchable. But, as a convicted felon, you lose your rights to your family as well. The Federal Adoption & Safe Families Act requires that the state sue in Family Court to end your parental rights if your child has been in foster care for a year.<sup>133</sup> If one is in jail for a year under a felony charge, of course it is possible for one's child to be in foster care for a year. If one is an immigrant who moved here with one's child for a better life, and one is all alone in America, where will one's child go? They will likely have to go into foster care.

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128. *Id.*

129. *Id.*

130. The Consequences of Criminal Charges: A People's Guide, available at [http://www.sikhcoalition.org/documents/pdf/criminal\\_charges.pdf](http://www.sikhcoalition.org/documents/pdf/criminal_charges.pdf) (last visited Apr. 15, 2015).

131. See New York Judiciary Law § 510 (1983).

132. N.Y. Civ. Rights Law § 79 (McKinney 2011).

133. McKinney's Family Court Act § 1039-b, NY FAM CT § 1039-b.

Approximately 96% of Americans rely on government benefits.<sup>134</sup> America is known as the land of opportunity and that is because they provide help to citizens to achieve their goals. From student loans to social security, almost every American, who is eligible for a government program, take advantage of the program in order to succeed in America. If one is incarcerated for more than a year, your social security benefits will be terminated until one is released. Further, one's housing can be jeopardized as well. Public housing under New York City Housing Authority (NYCHA) has very strict rules. They can refuse to rent to a person because of his or her criminal record, which will be readily accessible via your background check.

Immigration is another area where you are vulnerable after a felony conviction. As a felon, one is vulnerable to immediate detention. One may not be able to secure health insurance, become a citizen, obtain or renew your green card, return to the US at least for a certain time, nor apply for asylum even if one is faced with persecution in one's home country. Employment can also be affected by a felony conviction. If one has been convicted of a felony, there is a record of it in different places and it is available to credit reporting agencies. One's employer can access your criminal history through your credit report, but they can only access that with your consent. However, they can refuse to hire you if you do not consent to them accessing your credit report. Employers can also purchase copies of your Criminal History Record Search from New York State.

Clearly, there are vast consequences to being charged with a felony. To reiterate Immanuel Kant's point, "The punishment must fit the crime."<sup>135</sup> Here, clearly, the punishment does not fit the crime. As we read in the three true stories that commenced this note, it does not take much to be charged with resisting arrest. A person, merely challenging an officer's authority to arrest him or her at a given point can turn into that officer deciding that you have resisted arrest. Challenging authority does not warrant revocation of your ability to vote, serve on a jury, maintain your immigration status, have a roof over your head, and maintain your family. It certainly is not worth the destruction of your reputation and credibility in this state. Commissioner Bratton's proposal will only ruin a greater majority of lives instead of actually deterring the behavior he seeks to punish.

## 2. *Not Resisting Arrest*

What's more, this proposal is not helpful because people are, sometimes, not even resisting. How can we deter people from resisting arrest when they are not actually doing it to begin with? There is way too much police discretion involved with this charge where it is their word against the "resister." Likely,

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134. Henry Farrell, *The invisible American Welfare State, I The Monkey Cage*, (Feb. 8, 2011) [http://themonkeycage.org/2011/02/08/the\\_invisible\\_american\\_welfare/](http://themonkeycage.org/2011/02/08/the_invisible_american_welfare/).

135. *The Retributive Theory of Punishment*, *supra*.

once the officer feels like they are not getting the respect they deserve then they lash out and assert their authority. For the charge for resisting arrest, however, not making the officer feel special enough is not the law. To charge someone with resisting arrest, they must be intending to thwart the arrest.

### 3. *Increased litigation*

Apart from the problem of ruining people's lives, there is another consideration. Increasing the penalty for resisting arrest will only increase litigation costs. "As stops increased, New York City saw a sharp uptick in litigation costs for lawsuits alleging violations by the NYPD. In 2009, for the first time in thirty years, the NYPD became the city agency with the highest dollar amount of legal settlements."<sup>136</sup> As we have already reviewed, raising the penalty to a felony results in much more implications than just receiving a felony charge. As a result, much more is on the line for a person facing a felony charge. Naturally, in such a case, there will be much more incentive for the person to engage in litigation against the NYPD fighting for their reputation and their lives. They can allege brutality against NYPD in order to, at the very least, have their charges dropped. On top of all of the other implications of a felony charge, our judicial system will now be inundated with lawsuits against the NYPD. Courts will have a docket, flooded with police brutality cases. If proceeding all the way to trial, officers would spend more time testifying than actually protecting New York Streets. There will be much less incentive to plead cases out, because there is much more on the line. All of this will result from cases where it is likely that the person did not actually resist arrest. Police deserve respect. However, its implementation needs to be re-worked so that it can actually deter people from resisting. If the resisting arrest charges were consistently based on actual resistance, rather than the officer's emotions, then the felony option would have a better chance of working.

## PART III

### A. *Alternative Solution*

My solution is simple. Identify the abusive officers and remove them from the beat. In order to identify the abusive officers, the NYPD must [1] clarify the actions and inactions that constitute resisting arrest; [2] clarify the reporting standards; and [3] conduct an external audit of the NYPD. In order to isolate the abusive officer we need to clarify what constitutes resisting arrest in order to keep an accurate record of the officers who are truly abusive. Clarifying the reporting standards will make it easier to isolate the officers who are under reporting their use of force. Conducting an external audit of the NYPD will give

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136. *A Report On Arrests Arising From The New York City Police Department's Stop-And-Frisk Practices*, supra, available at [http://www.ag.ny.gov/pdfs/OAG\\_REPORT\\_ON\\_SQF\\_PRACTICES\\_NOV\\_2013.pdf](http://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf).

New York a neutral and detached review of which officers are truly problematic. Shifting their focus will prevent all of the issues that were identified throughout this note.

*1. Efficacy*

Commissioner Bratton's proposal not only narrowly and insufficiently addresses the goal of deterring people from resisting arrest, but also creates more problems. As mentioned, his proposal will create life changing implications flowing from a felony charge; further damage the trust between community members and police officers; likely increase litigation; and will produce more costs than benefits. His proposal also does not even address the problem of abuse of police discretion. My proposal works to prevent all of these problems and directly addresses the problem of abusing police discretion.

First, my proposal would keep the penalty for the charge of resisting arrest as a misdemeanor. This would prevent the life changing effect of being charged with a felony. A felony charge is too grave for the crime of resisting arrest because the crime is inherently problematic. Officers have a tremendous amount of police discretion in this area and they occasionally react improperly, rendering the charge improper and useless. Until we remove the abusive officers, lay people should not be vulnerable to a felony charge. It is too big of a risk.

Second, my proposal will likely increase the level of trust between community members and their police officers. Spotting and removing the abusive officers will leave the genuine and responsible officers to police areas. As the stop and frisk statistics show, many innocent minority people are disproportionately targeted by these policing practices. Once we crack down on the arbitrary and egregious stops, community members will feel more comfortable in their neighborhood because they will stop feeling like a target.

Third, my proposal will likely decrease litigation. Right now, as depicted in the stories at the beginning of this paper, families are seeking justice after these brutal police encounters. Identifying and removing the abusive officers will lessen and possibly abolish the arbitrary and egregious stops which will logically lessen the amount of litigation surrounding this issue. If there is no brutality, there will be no brutality lawsuits.

Fourth, my proposal will likely drastically reduce the cost we spend on these egregious encounters. At the beginning of this paper, there were PROP statistics that showed the NYPD major costs of misdemeanor policing in 2014. We saw a daily cost of \$1,134,000, a weekly cost \$7,938,000, and a monthly cost of \$33,993,750.<sup>137</sup> This is a huge amount of money spent on reactive measures instead of proactive measures. My proposal will remove the abusive officers,

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137. Over 1 Million Dollars A Day, supra, available at <http://www.policereformorganizingproject.org/prop-report-cost-broken-windows-2014-one-million-dollars-day-new-yorkers/>.

which will lessen the amount of frivolous arrests, and thus reduce this amount of money that we spend on disproportionately criminalizing minority people.

Lastly, unlike Commissioner Bratton's proposal, my proposal directly addresses the issue of abusing police discretion. We may never get rid of an officer's ability to abuse their discretion. Opportunity for abuse is rampant in any position of discretion. As stated earlier, only 40% of NYPD officers make resisting arrest charges.<sup>138</sup> Within those officers, there is a huge under reporting of use of force by officers. That means that either these officers are not trained enough on what use of force is, or these officers are purposely under reporting their own use of force.

Additionally, even when use of force is reported, that in itself may not even be accurate. As shown in two out of the above three stories, the "resisters" were not really resisting. "'Resisting arrest' does not require that the person being arrested use force or violence. 'It is enough that he engage in some conduct with the intent of preventing the officer from effecting an authorized arrest of himself or another person.'" <sup>139</sup> Eric Garner, stating his concern over constantly being a target of the police is not resisting. The other two stories were grave abuses of police discretion and were later rectified, fortunately. However, one cannot rectify death. They can try to compensate for death, but Eric Garner's case, even that was not an option.

## 2. *Lack of scholarship on the topic*

The release of videos of these brutal police encounters resulting from alleged resisting arrest have inspired protests across America.<sup>140</sup> However the one arena where there is a lack of response is the legal industry itself. One way in which the legal response has failed is in its scholarship. There is an incredible lack of scholarship on the issue of resisting arrest.<sup>141</sup> In New York, there are only five articles that mention resisting arrest, but only as a tack on charge to the real charge that they would like to talk about.<sup>142</sup> There is no article that directly speaks to the issue of resisting arrest. That may be because, currently it is only a misdemeanor offense resulting in less than interesting results. Or, it is likely because it is often overlooked. Resisting arrest is at the root of almost all, if not

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138. Robert Lewis, *Can the NYPD Spot the Abusive Cop?*, *supra*.

139. *People v. Stevenson*, 31 N.Y.2d 108, 112, 335 N.Y.S.2d 52, 286 N.E.2d 445 (1972) quoting Denzer and McQuillan, Practice Commentary to Penal Law § 205.30, McKinney's Penal Law (1967). *Cf. People v. Williams*, 25 N.Y.2d 86, 302 N.Y.S.2d 780, 250 N.E.2d 201 (1969). Cited by § 205.30 Resisting arrest McKinney's Consolidated Laws of New York Annotated Penal Law.

140. *The NYPD Cop Who Put Eric Garner In A Chokehold Has A History Of Allegedly Violating Black Men's Rights*, *supra*.

141. *Simplified Information v. Information: An Unconstitutional standard* 67- DEC N.Y. St. B.J. 20; *The Demise of New York's 'Son of Sam' Law—The Supreme Court Upholds Convicts' Rights to Sell Their 64-APR N.Y. St. B.J. 28*; *The Lemmon Slave Case* 4 Jud. Notice 1; *Shootings By Police Officers are Analyzed Under Standards Based on Objective Reasonableness* 72-SEP N.Y. St. B.J. 17; *Collateral Effects of a Criminal Conviction* 70-AUG N.Y. St. B.J. 26.

142. *Id.*

all, brutal police encounters because when on resists arrest and officer can use force to complete the arrest. It is necessary to repair the inherently problematic charge of resisting arrest before we move to fix the problem of brutal police encounters.

#### CONCLUSION

African Americans now constitute nearly 1 million of the total 2.3 million people who are incarcerated.<sup>143</sup> African Americans are incarcerated at nearly six times the rate of whites.<sup>144</sup> These statistics, along with the rest of the statistics in this paper, show that criminalization already has a disproportionate impact on African Americans in general. Since the institution of slavery was created, the legal industry has been perpetuating racism, or the belief that one race is inferior. Whether this is intentional or not is a separate issue, but the fact remains that by staying silent on this issue, we are helping racism persist. The only way to combat it is to dismantle the racist systems that are in control. One racist system is the system of retaining abusive officers. These officers and their negative impact on minority communities perpetuates the notion the African Americans are criminals and need to be caged in jail.

The proposed solution by Commissioner Bill Bratton is quite clearly not the answer to the problem of brutal police encounters. The proposal does not attack the issue of bad policing. It ignores the police's role in resisting arrest and completely places the blame on the person that is allegedly resisting. The NYPD needs to take a better approach when addressing these concerns because a person's liberty is at stake.

The Eric Garner case is a clear depiction of this unfortunate truth. A black man was killed by the set of people that we as a society designate to protect us from such heinous and ludicrous crimes. A black man was a victim and as patterned through history, he and his family received zero justice. The lack of indictment in this case, after the release of the brutal video footage, caused a huge public outcry resulting in protests all over New York City. Yet another white officer has gotten away with fatally injuring a black citizen in an attempt to make an arrest. Some citizens maintain that the altercation would not have escalated so far if Mr. Garner had not resisted arrest. However, it may behoove the NYPD to consider that though "a citizen should never resist arrest, perhaps the police should resist it more often."<sup>145</sup>

In conclusion, the way to solve the problem of citizens resisting arrest is not to place harsher penalties on the citizen. Because there is an enormous level of police discretion, the NYPD should shift their focus from the "resister" to the

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143. *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/pages/criminal-justice-fact-sheet> (Last visited Apr. 15, 2015)

144. *Id.*

145. Jesse Wegman, *Who Should Resist Arrest*, The New York Times, available at <http://takingnote.blogs.nytimes.com/2014/08/15/who-should-resist-arrest/>.



actual problematic officers. Such a shift in focus will isolate the real problems. At the very least, the shift may provide insight that the officers are not the problem, thus substantiating a claim for harsher penalties. At the most, it will create a society where we as members will begin to trust and respect our police officers. Respect is earned not given.