

# HYBRID ENFORCEMENT AND RACIAL CAPITALISM: UNEVEN DEVELOPMENT IN URBAN CRIMINAL LAW

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## I. INTRODUCTION

This essay advances a critical legal framework for understanding the influence of human geography on urban criminal law formation. Applying the theoretical framework of “uneven development” developed by scholars of human geography to criminal law formation helps explain worsening inequalities in the allocation of law enforcement capital as well as the accelerating pace of hybridization in criminal law, as police and prosecutors in major American cities increasingly repurpose land-use, zoning, and other civil and administrative mechanisms to achieve criminal-enforcement objectives.

This trend toward hybridized criminal-civil law enforcement facilitates the flow of not only financial capital—as exemplified by gentrification—but law enforcement capital in racialized low-income neighborhoods, in a mutually reinforcing cycle by which police are strategically deployed to the streets and hallways of depressed urban “hot spots” with ever-expanding authority not only to patrol and arrest low-income individuals but also to surveil and control the “problem properties” in which they live and work.

This theoretical framework supplements recent efforts in legal and criminological scholarship to better explain trends in contemporary urban law enforcement. Order-maintenance policing tactics have been the subject of increasing litigation<sup>1</sup> and legal study, for instance, with impact litigation

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1. See, e.g., *Floyd v. City of New York*, No. 08-CV-1034(SAS) (S.D.N.Y. Aug. 12, 2013) (J. Scheindlin) (enjoining the stop-and-frisk program based on the City’s policy or practice of unconstitutional stop-and-frisks by the NYPD targeting black and Latino residents without reasonable suspicion as required by the Fourth Amendment and adopting a policy of indirect racial profiling resulting in the disproportionate and discriminatory stopping of black and Latino persons in violation of the Equal Protection Clause); *Ligon v. City of New York*, No. 12 CV-2274(SAS), 2013 WL 71800, at \*3 (S.D.N.Y. Jan. 8, 2013) (J. Scheindlin) (enjoining the NYPD’s practice of

challenging systematic racial bias in policing and growing empirical study of these tactics' procedural justice implications.<sup>2</sup> At the same time, still other scholars and activists are exposing algorithmic biases and privacy implications of "big data" predictive policing and sentencing programs,<sup>3</sup> and recent legal and political science scholarship describes the rise of profit-driven policing, by which state and local courts, police, and prosecutors leverage fines, fees, and forfeitures to generate government revenue. Each line of critique is productive but, taken alone, fails to explain the simultaneous drift in urban policing toward the convergence of "criminal" and "civil" law enforcement mechanisms represented by tactics such as police- and prosecutor-led nuisance abatement and holdover evictions—tactics used in parallel to arrest-based approaches and without the promise of monetary gain attendant to profit-driven policing methods.

This essay draws on theories of uneven development and racial capitalism developed by scholars of human geography and political economy to help explain the interrelationship between hybridized criminal-civil enforcement and the rise of order-maintenance, big-data, and profit-driven policing tactics. While scholarship on the latter three trends helps to explain many features of present-day municipal law enforcement, it largely fails to account for the contemporaneous rise of non-pecuniary "hybrid" enforcement tactics like third-party holdover evictions, police- and prosecutor-initiated license revocation, and anti-gang ordinances and drug- and prostitution-free zones. Existing scholarship largely points to factors like municipal budget crises, federal revenue-sharing inducements, and the pull of monetary incentives offered by profit-driven policing to explain these trends. And yet, these explanations remain incomplete, failing to account for the shocking rapidity and scope of these tactics' adoption in municipal policing.

In my earlier article, *Fine-Tuning*, I argued that, in addition to these drivers, the decades-long development of police- and prosecutor-led civil enforcement actions is rooted in the doctrinal asymmetry in criminal and civil constitutional procedural protections ushered in by the Warren Court and

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conducting "trespass stops" outside privately-owned Bronx apartment buildings in the Trespass Affidavit Program); *Davis v. City of New York*, No. 10-CV-0699(SAS), 2012 WL 4813837, at \*2 (S.D.N.Y. Oct. 9, 2012) (J. Scheindlin) (granting in part and denying in part defendants' motion for summary judgment in lawsuit challenging NYPD vertical patrols conducting trespass stops in public housing).

2. See generally Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008).

3. See, e.g., generally, VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR* (2018); ANDREW G. FERGUSON, *THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT* (2017).

then catalyzed by the managerial and technological innovations of urban policing's so-called Blue Revolution.<sup>4</sup> This essay expands on this line of explanation by tying these developments to the growing, interdisciplinary literature on uneven development, government rent-seeking, and racial capitalism. Doing so helps connect the larger trend toward “criminal” and “civil” enforcement convergence in urban America to the same pressures accelerating gentrification and intensifying race- and place-based disparities in custodial arrests.

## II. UNEVEN DEVELOPMENT AND THE RISE OF HYBRID ENFORCEMENT MECHANISMS

Uneven development is a concept in human and economic geography that refers to patterns of differential economic development between geographical places.<sup>5</sup> At the urban scale, different sectors of the city are developed at different rates and uneven development is largely defined by gentrification, the process through which low-income neighborhoods are displaced by capital investment, which is emblematic of differential development under late capitalism.<sup>6</sup> However, scholarship on uneven development is primarily concerned with economic inequalities, independent of the allocation of law enforcement capital and the racial biases attendant to contemporary urban policing. As such, the concept of racial capitalism is a necessary complement to any discussion of differential development in urban criminal law formation.

While racial capitalism is a concept with a long pedigree in the Black radical tradition, in the context of urban criminal law formation, the most salient features of racial capitalism include what Carmen Gonzalez and Athena Mutua term the two “mutually constitutive” structural features of racial capitalism: profit-making and race-making.<sup>7</sup> Profit-making refers to the “capturing, as well as securing and expanding, surplus value, economic profits or wealth, and political power through processes of exploitation, expropriation, and expulsion.”<sup>8</sup> Race-making, on the other hand, refers to

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4. See generally Brendan M. Conner, *Fine-Tuning: The Emergent Order-Maintenance Architecture of Local Civil Enforcement*, 42 PACE L. REV. 138 (2021).

5. B. Christophers, *Uneven Development*, in INT'L ENCYCLOPEDIA OF HUM. GEOGRAPHY 12, 12 (Rob Kitchin & Nigel Thrift eds., 2009); see also Neil Smith, *Gentrification and Uneven Development*, 58 ECON. GEOGRAPHY 139, 142 (1982).

6. NEIL SMITH, UNEVEN DEVELOPMENT: NATURE, CAPITAL, AND THE PRODUCTION OF SPACE 69-71 (3d ed., 2008).

7. Carmen Gonzalez & Athena Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J. L. & POL. ECON. 127, 128 (2022).

8. *Id.*

“the processes by which ‘races’ and racial hierarchies are created and perpetuated, including through practices of differential dispossession, discrimination, segregation, and the creation of ‘sacrifice zones’—spaces where degraded nature, land, and humans deemed unprofitable are abandoned and left to die.”<sup>9</sup>

In this light, the explosion of non-pecuniary civil remedies in municipal law enforcement is recast as a kind of profit-making and government rent-seeking; law enforcement agencies operationalize the lower constitutional and evidentiary burdens of civil and administrative mechanisms like nuisance abatement, holdover evictions, and license revocation proceedings to achieve traditional penal goals. Unlike more traditional forms of profit-seeking policing—such as equitable sharing programs or pay-to-stay lawsuits<sup>10</sup>—the “profit-making” function of hybridized criminal-civil remedies is more indirect in that it rarely involves a monetary exaction. And yet, it expropriates and expels primarily low-income residents and business owners just the same, facilitating gentrification by easing the flow of capital into depressed neighborhoods. Similarly, the notion of uneven development can be extended to the differential pace of criminal law development, insofar as in the past five decades local governments have been the drivers of criminal law enforcement innovations that repurpose civil remedies to tackle problem properties and sidestep constitutional protections afforded to criminal defendants.<sup>11</sup>

The geographer Neil Smith, in articulating the theory of uneven development, argued that gentrification is a structural product of land and housing markets under late capitalism, in that capital migrates out of urban spaces seeking a higher rate of return on investment while inner-city production capital depreciates in value.<sup>12</sup> Gentrification, in other words, is fueled by a “rent gap”—an enduring disparity between current property rental income and potentially achievable rental income—as the higher rate of return on investment in low-income neighborhood property facilitates capital flows to urban redevelopment.<sup>13</sup>

It was Karl Marx who first proposed that capitalism simultaneously concentrates wealth in bourgeois capitalists while magnifying poverty in the

9. *Id.*

10. See generally April D. Fernandes et al., *The “Damaged” State vs. the “Willful” Nonpayer: Pay-to-Stay and the Social Construction of Damage, Harm, and Moral Responsibility in a Rent-Seeking Society*, 8 RUSSELL SAGE FOUND. J. SOC. SCI. 82 (2022).

11. See generally Conner, *supra* note 1.

12. NEIL SMITH, *THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY* 23 (1996).

13. *Id.* at 70.

working class.<sup>14</sup> Marx himself, as a political economist, said much on the interplay between legal, political, and economic structures, devoting entire chapters to topics such as the transformation of property laws of commodity production into laws of capital appropriation, the breaking-up of feudal retainers resulting in the expropriation of the agricultural population, and the regulation of wages through rate-setting and criminal law by Act of Parliament in the fifteenth and sixteenth centuries. Yet Marx's assumption that capitalism would extend globally resulting in "even" development proved incorrect, leading later theorists such as Leon Trotsky to argue that development was in fact "combined and uneven" in that capitalism developed not simply through external expansion but also internal variation.<sup>15</sup> These insights birthed an entire field of human geography on the causes of inequality within different scales of space—locally, nationally, globally.<sup>16</sup>

This resort to economic geography and scholarship on racial capitalism is driven in part by the lack of a theoretical foundation in legal scholarship for studying differential law formation. Sociology of law, by comparison, gives short shrift to the movement of capital in urban space on law formation. And legal positivism—which defines law as a system of both primary social rules regulating conduct and secondary rules regulating how the primary rules may be identified, changed, and adjudicated—seemingly brackets the influence of uneven development on legal norm-making.<sup>17</sup> At the same time, the legal pluralism of the Law and Society movement contemplates the interfacing of formal and non-legal, or "informal," norms of social control, but it does little to interrogate structural conditions that influence norm-making and enforcement.<sup>18</sup>

### III. CONCLUSION

The upshot of these legal-theoretical blind spots is that the dynamics of contemporary criminal law formation remain understudied and undertheorized by legal scholars today. As a result, a veritable arsenal of hybrid legal mechanisms that have effectively transformed tort and property law as we know them the past few decades has largely escaped scholars'

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14. See KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY*, VOL. I, 927–30 (Ben Fowkes trans., Penguin Classics 1990) (1867).

15. See James McCarthy, "Uneven Development" in *DICTIONARY OF HUMAN GEOGRAPHY* 779–82 (Derek Gregory, et al. eds., 5th ed., Wiley-Blackwell 2009).

16. *Id.* at 780.

17. See generally H.L.A. HART, *THE CONCEPT OF LAW* (Penelope A. Bulloch & Joseph Raz eds., 2d ed., 1994).

18. See e.g., Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869, 886 (1988).

notice. By turning to the theories and concepts articulated by scholars of human and economic geography and racial capitalism, legal commentators can better outline areas for future empirical and other study, particularly for research seeking to identify and explain patterns in urban development and the allocation of criminal law enforcement authority in urban America. Incorporating these broader insights can help legal scholars account for the *longue durée* of American urban criminal law formation and better formulate lasting solutions for municipal police reform.