

THE CHOKEHOLD

*Nirej Sekhon**

Eric Garner's last words, "I can't breathe" became a political slogan for Black Lives Matter. Professor Paul Butler takes it from there in his most recent book, Chokehold. Equal parts exegesis, polemic, and self-help tract, he argues that a chokehold is more than just a brutal police tactic. It is a metaphor for a host of social practices that treat Black men as criminals. In this guise, it is not just a chokehold, but "the Chokehold." In this review, prepared for the University of Louisville Brandeis School of Law's 2018 Symposium on Dismantling Structural Inequality, I suggest that there is much that Chokehold gets right. The metaphor captures how feedback loops produce racially disparate criminal justice outcomes and how this, in turn, reproduces racist notions of Black male criminality. The book does so without losing sight of the very real pain inflicted upon Black men's bodies and psyches. But the metaphor has the problem of being very particularistic, returning the reader's mind to one specific police practice. Chokehold also might have done more to underscore the moral stakes in characterizing structural racism as the Chokehold.

I. INTRODUCTION

"I can't breathe."¹ Eric Garner gave the police ten chances to prevent those words from being his last.² But the police officer who responded to the complaint that Garner had been illegally selling individual cigarettes on the street, ignored Garner's gasping. The officer kept the supine Garner locked in a chokehold. Thus, Garner's eleventh "I can't breathe" became a political slogan for Black Lives Matter.³ Professor Paul Butler takes it from there in his most recent book, *Chokehold*.⁴ Equal parts exegesis, polemic, and self-help tract, he argues that a chokehold is more than just a brutal police tactic.

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¹ See PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 3–4 (2017).

² See *id.* at 4.

³ Terry Gross, 'I Can't Breathe' Examines Modern Policing And The Life And Death Of Eric Garner, NPR: FRESH AIR (Oct. 23, 2017, 2:27 PM), <https://www.npr.org/2017/10/23/559498678/i-can-t-breathe-explores-life-and-death-at-the-hands-of-police>.

⁴ BUTLER, *supra* note 1.

It is a metaphor for a host of social practices that treat Black men as criminals.⁵ In this guise, it is not just *a* chokehold, but “the Chokehold.”

In *Chokehold*, Professor Butler offers the general reader a provocative shorthand for making sense of how race and gender structure our criminal justice system and are themselves structured by it. This is a book in the vein of Michelle Alexander’s *The New Jim Crow*.⁶ *Chokehold* presents a unifying rhetorical gloss on a set of complex and diffuse practices that seem disconnected from one another, but produce a brutally coherent and unified racial effect. As evidenced by the success of *The New Jim Crow*, there is power in getting the metaphor right.

In this review, prepared for the University of Louisville Brandeis School of Law’s 2018 Symposium on Dismantling Structural Inequality, I suggest that there is much that *Chokehold* gets right. The metaphor captures how feedback loops produce racially disparate criminal justice outcomes and how this, in turn, reproduces racist notions of Black male criminality.⁷ The book does so without losing sight of the very real pain inflicted upon Black men’s bodies and psyches. But the metaphor has the problem of being very fistic, returning the reader’s mind to one specific police practice. *Chokehold* also might have done more to underscore the moral stakes in characterizing structural racism as the Chokehold. This review proceeds in three parts. Part II summarizes the book and its rhetorical project. Part III describes what is apt about the Chokehold and Part IV identifies its limitations.

II. THE POWER OF METAPHOR

When it comes to metaphors, racism seems to have the upper hand. A simple word or phrase can draw racist meaning out of the cultural ether, like a glass of ice draws moisture from air. Semiotics, the study of how words and symbols produce meaning,⁸ appropriately uses the word “condensation” to describe the way that prejudices, desires, and so many of the other impolite ideas and feelings that are suspended in our unconscious find expression through metaphors.⁹ The examples are limitless, but consider how “welfare queen,” “terrorist cell,” “street thug,” and “anchor baby” instantly galvanize entire sets of racially-specific images.¹⁰

⁵ *Id.* at 17–18.

⁶ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

⁷ See BUTLER, *supra* note 1, at 2–15.

⁸ See KAJA SILVERMAN, *THE SUBJECT OF SEMIOTICS* 3 (1983).

⁹ See *id.* at 88–89.

¹⁰ For any non-American readers whose “impolite ideas” are differently organized (and for those

The question of *why* racism has metaphoric potency gets complicated—there is stigma associated with being “a racist” in our society,¹¹ but race still structures our economic, social, and libidinal places in the world. Income, occupation, and wealth are stratified by race.¹² Race also shapes where we live, send our children to school, and the communities we create.¹³ But there is more to racism than just demography. It encapsulates an entire network of feelings, some of which are ineffably visceral: our aversions, desires, fears, and everything that lies between.¹⁴ Psychiatrist and theoretician Frantz Fanon noted that these feelings are borne of “conflictual clusters arising in part out of the environment and in part out of the purely personal way in which [an] individual reacts [to it].”¹⁵ James Baldwin described it as the projection of “unspeakable private [] fears and longings” onto Black people.¹⁶

Racism is supposed to be antediluvian and yet it structures our quotidian realities, big and small. Psychology research on implicit bias suggests that, for many of us, unconscious feelings about race are at odds with our consciously held—and professed—views about race.¹⁷ Suffice to say that we experience race in fraught and contradictory ways. Perhaps it is the intensity of feeling that this contradiction engenders that must find expression. Whatever the reason, we seem to need a shorthand to make sense of the ineffably complex relationships between privilege, desire, aversion, and everything else that defines who we are. When someone professes hatred for “welfare queens,” it may knit together the belief that taxes are theft, with an intense fascination with Black women’s sexuality, while suppressing vague feelings of guilt about children in poverty.

What are those of us with anti-racist convictions supposed to do about this? The first order of business is to make sense of it. In that vein, there are rich scholarly literatures that have helped develop nuanced frameworks for

cherubically innocent American readers who simply have no trace of bias), it would pay to do a Google Image search for each of these expressions. The internet is, if nothing else, a pretty good proxy for our collective unconscious.

¹¹ See, e.g., John Koblin, *After Racist Tweet, Roseanne Barr’s Show Is Cancelled by ABC*, N.Y. TIMES, May 29, 2018, at A1.

¹² See Beverly Moran et al., *Race and Wealth Disparity: The Role of Law and the Legal System*, 34 FORDHAM URB. L.J. 1219, 1221–24 (2007).

¹³ See Jessica Dixon Weaver, *The Changing Tides of Adoption, Why Marriage, Race, and Family Identity Still Matter*, 71 SMU L. REV. 159, 174 (2018).

¹⁴ See FRANTZ FANON, BLACK SKIN WHITE MASKS 47, 63, 81, 114 (1967).

¹⁵ *Id.* at 81.

¹⁶ JAMES BALDWIN, THE FIRE NEXT TIME 96 (1993).

¹⁷ See Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL’Y 71, 87–92 (2010).

making sense of racism: “institutional racism,”¹⁸ “unconscious bias,”¹⁹ “intersectionality,”²⁰ and of course, this symposium’s namesake, “structural inequality.”²¹ These are good tools for making sense of the world, but they do not stand much of a chance against “welfare queen” in a battle for the general public’s hearts and minds. For many scholars on the left, the answer to racism’s reductive crudity is trying to cultivate popular appetite for complexity,²² but that project is destined to fail, perhaps because attention spans are too short or because it is too narcissistic an effort to remake the public in the scholar’s own image.

Professor Butler, who is obviously well versed in the scholarly literature about racism, is not content to just riff on theory for an academic audience. *Chokehold* takes on racism’s metaphoric potency, offering a counter-metaphor that pithily synthesizes without doltishly simplifying racism’s processes and effects. Professor Butler stages this assault for the benefit of those directly impacted and for those center-left allies who care enough to read a book, but not enough to devote themselves to deep study.²³ *Chokehold* aims to help the former make sense of “the system” that holds them in its grip and to give the latter “facts” that will help them make sense of why they are “sometimes afraid of Black men.”²⁴

Professor Butler presents the Chokehold as shorthand for making sense of race, masculinity, and social domination in the United States.²⁵ More specifically, the Chokehold represents how American institutions and “social practices” treat all African American men as would-be criminals to be “contained” by the State.²⁶ The ensuing account sprawls across a range of subtopics many of which are nicely summarized in Professor Cedric Merlin Powell’s contribution to this symposium.²⁷

Professor Butler begins with an explanation for how American racism has constructed a portrait of the Black male as a simian figure whose essential

¹⁸ See Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307, 323–24 (2009).

¹⁹ See Izumi, *supra* note 17, at 87–93.

²⁰ See Gwendolyn Leachman, *Institutionalizing Essentialism: Mechanisms of Intersectional Subordination Within the LGBT Movement*, 2016 WISC. L. REV. 655, 659–64 (2016).

²¹ See *id.* at 664.

²² See Tommie Shelby, *Racism, Moralism, and Social Criticism*, 11 DU BOIS REV. 57, 72 (2014).

²³ BUTLER, *supra* note 1, at 11.

²⁴ *Id.*

²⁵ See *id.* at 3–15.

²⁶ *Id.* at 17–18.

²⁷ See Cedric Merlin Powell, *The Structural Dimensions of Race: Lock Ups, Systemic Chokeholds, and Binary Disruptions*, 57 U. LOUISVILLE L. REV. 7 (2018).

nature inevitably leads him to criminality.²⁸ The processes through which Black men are equated with “thugs” is neither unitary nor linear.²⁹ That broadly shared understanding of Black men informs and is reproduced through individual acts,³⁰ popular culture representations,³¹ organizational policies,³² and other institutional and individual practices. The Chokehold describes the complex, recursive interactions between these processes.³³ The Chokehold’s immediate agent need not be White even if the ultimate result is the consolidation of Whites’ higher position in America’s status hierarchy.³⁴ For example, despite generations of advocacy for more diverse police forces,³⁵ Professor Butler notes that Black cops tend not to be any gentler on Black men than White cops are.³⁶

Even if the Chokehold’s immediate agent is not a readily identifiable malevolent White perpetrator, the victims’ identities are clear. The Chokehold produces a world in which all Black men are presumptively viewed as threatening; none of them gets a pass, not even children.³⁷

Constructing an object of control, “the thug,” is coterminous with justifying the creation and perpetuation of systematic practices to control him.³⁸ These techniques are not limited to formal criminal justice,³⁹ even some ostensibly benevolent social programs may contribute to the idea of Black thuggishness.⁴⁰ But the practices with which Professor Butler is primarily concerned are related to criminal justice. There is no shortage of practices to describe here since virtually every aspect of criminal justice is harsher on Black men than other groups: everything from stop and frisk,⁴¹ to fines for infractions,⁴² to the death penalty.⁴³ Once in place, these institutions

²⁸ See BUTLER, *supra* note 1, at 25–28.

²⁹ See *id.* at 18.

³⁰ See *id.* at 19, 29.

³¹ See *id.* at 27.

³² See *id.* at 21, 26–27.

³³ See *id.* at 18.

³⁴ See *id.* at 5–6, 145–46.

³⁵ See NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, THE KERNER REPORT 316 (Princeton Univ. Press 2016).

³⁶ See BUTLER, *supra* note 1, at 33–34.

³⁷ See *id.* at 43–44.

³⁸ See *id.* at 17–18.

³⁹ For example, relegation to a life in the hyper-segregated, impoverished hood is part of the control strategy. See *id.* at 139.

⁴⁰ See *id.* at 151–52 (describing President Obama’s “My Brother’s Keeper Initiative”).

⁴¹ See *id.* at 83, 91–96.

⁴² See *id.* at 12, 234.

⁴³ See *id.* at 67, 122–23.

help perpetuate the very ideas about Black criminality to which they owe their existence.⁴⁴

Professor Butler tells us that the “system is broke on purpose,”⁴⁵ but this still leaves unanswered questions. How is it that criminal justice institutions—as fractured, uncoordinated, and diffuse as they are in the United States—manage to consistently produce such dramatic racial disparity across jurisdictions? The simple answer typically offered is that Black men commit more crimes everywhere.⁴⁶ For example, Black men account for half of all murder perpetrators (and victims) nationally.⁴⁷ But this does not explain why policing is harsher on Black men for everything else, particularly minor misconduct.⁴⁸ In addition, Professor Butler notes that even with homicide, criminal framing is not inevitable.⁴⁹ It turns out that young White men have a problem with handguns as well; they take nearly as many lives as Black men.⁵⁰ It just happens that White men tend to take their own lives rather than the lives of others. In the United States, suicide is treated as a public health dilemma and the Black gun problem as a criminal dilemma; but, if the goal were to reduce gun-related mortality, it probably makes sense to engage both issues through a public health lens.⁵¹

While Professor Butler does not dwell on the ultimate causes of America’s racial hierarchy, he does note that the violence required to maintain it is more than just instrumental.⁵² The Chokehold’s undercurrents are deeply libidinal.⁵³ Professor Butler focuses on the psychic and physical effects of the relentless police touching that Black men must endure, appropriately characterizing practices like stop and frisk as “torture.”⁵⁴ The implication, never fully developed, is that the police derive some psychic gratification from these practices.⁵⁵ Perhaps that gratification, however

⁴⁴ See *infra* Section III.

⁴⁵ *Id.* at 1.

⁴⁶ *Id.* at 21.

⁴⁷ *Id.* at 120–21.

⁴⁸ See *id.*

⁴⁹ See *id.* at 121–22.

⁵⁰ See *id.* at 129 (“When a black man takes a life, it is most often the life of another black man. When a white man takes a life, it is most often his own. . . . So both black men and white men are at similar risks when it comes to guns.”).

⁵¹ See generally Tim Murphy, *Did This City Bring Down Its Murder Rate by Paying People Not to Kill?*, MOTHER JONES (July/August 2014), <https://www.motherjones.com/politics/2014/06/richmond-california-murder-rate-gun-death/> (describing public health-based experiment to reduce homicides in Richmond, California).

⁵² See generally BUTLER, *supra* note 1, at 49–55.

⁵³ See *id.* at 84, 98.

⁵⁴ See *id.* at 103–04.

⁵⁵ See *id.* at 84–85, 98, 102 (asking what it means that police do so much “touching” and remarking

complex, is a metaphor for the broader experience of the American body politic. The spectacle of Black physicality—and all that comes with it: fear, fascination, and longing—are far more important to us than we could ever admit.⁵⁶ It would be difficult to account for racism’s intractable persistence otherwise.

Like racism more generally, the Chokehold is not going to just go away, not even if a range of good-intentioned reforms were implemented.⁵⁷ Professor Butler notes empirical evidence suggesting that police departments subject to federal oversight for civil rights violations tend to revert back to their original selves (if not get worse) following the intervention.⁵⁸ The kinds of liberal, incremental reforms that crowd law reviews may even make things worse by enervating what would have been more aggressive, potentially transformative advocacy.⁵⁹ The Chokehold cannot be gradually eased; it is all or nothing.⁶⁰

III. FEEDBACK & CORPOREALITY

The Chokehold’s strength as a metaphor lies in its ability to succinctly capture the phenomenon of feedback, but without losing sight of criminal justice’s brutal consequences on Black bodies. Professor Butler describes “[a] chokehold [as] justif[y]ing additional pressure on the body because the body does not come into compliance, but the body cannot come into compliance because of the vice grip that is on it.”⁶¹ One of the ways in which the criminal justice system reproduces racial subordination is by taking enforcement cues from information that it generates itself.⁶² This, as explained in Part A below, allows aggressive enforcement practices against people of color to become self-reinforcing. But, as described in Part B below, Professor Butler does not allow the reader to get lost in the abstractions that are endemic to the actuarial ways of thinking that prevail in law and public policy. Notions like “disparity” and “social cost” reduce racism to a problem

that “frisks are frisky”).

⁵⁶ See BALDWIN, *supra* note 16, at 96; JAMES BALDWIN, NOTES OF A NATIVE SON 37 (Beacon Press 1983) (critiquing Richard Wright’s *Native Son*, “Whenever we encounter [Black men who possess Bigger Thomas’ traits] . . . our faith is made perfect and his necessary and bloody end is executed with a mystical ferocity and joy.”).

⁵⁷ See BUTLER, *supra* note 1, at 185.

⁵⁸ *Id.* at 171, 197.

⁵⁹ See *id.* at 196.

⁶⁰ See *id.* at 200.

⁶¹ *Id.* at 5.

⁶² See BERNARD HARCOURT, AGAINST PREDICTION: SENTENCING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 156 (2007).

of countable units to be equitably rearranged through discreet legal and policy interventions.⁶³ One can easily lose sight of blood and pain when working out a neat puzzle.

A. Feedback Loops

The Chokehold tightens because it itself induces non-compliance.⁶⁴ By taking enforcement cues from information that it itself generates, criminal justice institutions can self-rationalize aggressive enforcement practices against people of color. Bernard Harcourt has described feedback loops of this variety as creating a “ratchet effect.”⁶⁵ A ratchet effect occurs when police use the demographic profile of a carceral population that reflects racially selective enforcement to predict the identities of future offenders and direct enforcement resources accordingly.⁶⁶ If all the people in jail are Black, it stands to reason that Blacks commit more crimes and should be policed more intensively. Over time, this cycle will result in ever greater disparity in arrests and incarceration.⁶⁷

Professor Butler repeatedly returns to the example of Ferguson, Missouri, where the city government, courts, and police used the criminal code to systematically fleece the city’s African American population.⁶⁸ Ferguson presents an egregious, but not atypical, case study on how feedback loops operate.

In a recent piece entitled *Dangerous Warrants*,⁶⁹ I offer an account of “non-compliance warrants” that illustrates how pernicious feedback loops can be for poor people of color.⁷⁰ “Non-compliance warrants” are arrest warrants issued for failures to comply with a judicially- or executive-imposed condition—for example, when an accused individual fails to appear (FTA) in court or pay a fine, an arrest warrant may issue.⁷¹ Non-compliance warrants are the most numerous form of outstanding warrant in most jurisdictions.⁷²

Aggressive police enforcement of non-compliance warrants creates feedback loops that amplify the racial consequences of aggressive policing

⁶³ See *infra* pp. 54–56.

⁶⁴ BUTLER, *supra* note 1, at 5.

⁶⁵ HARCOURT, *supra* note 62, at 145.

⁶⁶ *Id.* at 152–54.

⁶⁷ *Id.*

⁶⁸ See BUTLER, *supra* note 1, at 1, 26–27, 47–48, 69–70.

⁶⁹ Nirej Sekhon, *Dangerous Warrants*, 93 WASH. L. REV. 967 (2018).

⁷⁰ See *id.* at 983–87.

⁷¹ See *id.* at 970.

⁷² *Id.* at 969.

in poor minority communities.⁷³ “[A]rrests beget warrants and warrants beget arrests.”⁷⁴ Arrests for substantive criminal law violations generate non-compliance warrants in the form of FTAs, alleged probation violations, and other failures to comply.⁷⁵ Those warrants, in turn, generate arrests for new substantive criminal law violations.⁷⁶ The Supreme Court’s recent decision in *Utah v. Strieff* illustrates how.⁷⁷ In that case, the Supreme Court held that contraband yielded by a search conducted following an illegal stop is admissible where it emerged during the stop that the suspect had an outstanding non-compliance warrant.⁷⁸ That warrant allowed the officer to formally arrest the suspect and then search him “incident to arrest,”⁷⁹ revealing narcotics.⁸⁰ That discovery, in turn, generated a new criminal case.⁸¹

In any municipality that has a substantial poor population, there will be proportionately greater numbers of non-compliance warrants for poor defendants. “[M]inorities inordinately constitute the ranks of the poor, and the non-compliance warrants issued will reflect that demographic fact.”⁸² Because there are proportionally more “minority inputs” into the criminal justice machinery for new criminal law and traffic violations, that will contribute to their proportionally greater failures to appear, failures to pay, and failures to comply with probation conditions.⁸³ This will be compounded by the fact that “[t]he poor are less likely to comply with the kinds of conditions that trigger warrants, particularly those that require payment.”⁸⁴ Even making appearances in court is more difficult for the poor, who tend to have marginal employment that affords little flexibility to take time off.⁸⁵ This makes appearing for court dates more difficult than for those who have

⁷³ *Id.* at 1003.

⁷⁴ *Id.* at 993.

⁷⁵ *Id.* at 1003.

⁷⁶ *Id.*

⁷⁷ *Utah v. Strieff*, 136 S. Ct. 2056, 2060 (2016).

⁷⁸ *Id.* at 2060–64.

⁷⁹ *See Riley v. California*, 134 S. Ct. 2473, 2483–84 (2014).

⁸⁰ *Utah*, 136 S. Ct. at 2060.

⁸¹ *See id.*

⁸² Sekhon, *supra* note 69, at 1003 (citing Elizabeth Kneebone & Richard V. Reeves, *The Intersection of Race, Place, and Multidimensional Poverty*, BROOKINGS (April 21, 2016), <https://www.brookings.edu/research/the-intersection-of-race-place-and-multidimensional-poverty/>).

⁸³ *Cf.* John S. Goldkamp & E. Vilciã, *Targeted Enforcement and Adverse System Side Effects: The Generation of Fugitives in Philadelphia*, 46 CRIMINOLOGY 371, 374 (2008).

⁸⁴ Sekhon, *supra* note 69, at 1003.

⁸⁵ U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* 48 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [hereinafter *Ferguson Investigation*].

more stable employment.⁸⁶ Once a warrant has issued, those with unstable employment stand a greater risk of losing their jobs if incarcerated, even for relatively short periods of time.⁸⁷

The sheer prevalence of outstanding non-compliance warrants among poor people of color creates powerful incentives for the police to stop them for warrant checks.⁸⁸ Technically, it is unconstitutional to stop someone for a suspicion-less warrant check.⁸⁹ But, the exclusionary remedy is not available for such unconstitutional searches.⁹⁰ When officers believe that a substantial number of people are likely to have outstanding warrants, such that the hit rate of doing random warrant checks will be high, we should expect unconstitutional stops to occur.⁹¹ In poor neighborhoods, where residents do not enjoy political and economic power, outstanding warrants' prevalence, combined with their geographic concentration, will often make the likelihood of a hit high.⁹² It is in those places where warrant enforcement will be most intensive.

In Ferguson, Missouri, one saw a particularly mercenary version of such feedback. The municipal court liberally issued non-compliance warrants for defendants charged with minor crimes and citations.⁹³ Those fees and fines were levied disproportionately against minority defendants.⁹⁴ The municipal court required in-person appearances for most municipal offenses.⁹⁵ That increased the likelihood of FTAs—particularly for the poor defendants.⁹⁶ The fear of incarceration may, ironically, lead the poor to be less likely to deal with outstanding warrants.⁹⁷ This will be most true for non-compliance warrants that are for failing to pay.⁹⁸ Traffic and low-level criminal offenses

⁸⁶ See *id.*

⁸⁷ See Alice Goffman, *On the Run: Wanted Men in a Philadelphia Ghetto*, 74 AM. SOCIOLOGICAL REV. 339, 354 (2011).

⁸⁸ See Sekhon, *supra* note 69, at 1002.

⁸⁹ *Id.* at 969.

⁹⁰ See *id.* at 995–97 (discussing the Frisbie-Ker doctrine).

⁹¹ See *Utah v. Strieff*, 136 S. Ct. 2056, 2068–69 (2016) (Sotomayor, J., dissenting).

⁹² See Sekhon, *supra* note 69, at 972.

⁹³ See Ferguson Investigation, *supra* note 85, at 3.

⁹⁴ See *id.* at 68. Ferguson may be an extreme example, but other jurisdictions also heap fees and fines upon poor defendants with little regard for their ability to pay. See HUMAN RIGHTS WATCH, PROFITING FROM PROBATION 22–26 (Feb. 2014), https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf.

⁹⁵ See *id.* The court also failed to provide accurate day and time information to defendants as to when they were supposed to appear. *Id.* at 3.

⁹⁶ See *id.* at 42–43.

⁹⁷ See Daniel M. Flannery & Jeff M. Kretschmar, *Fugitive Safe Surrender*, 11 CRIMINOLOGY & PUB. POLICY 437, 451 (2012); Ferguson Investigation, *supra* note 85, at 4, 47–49.

⁹⁸ See *id.* at 42–43.

are typically punished with fines. Similarly, paying fees and fines is often a condition of probation.⁹⁹ Other probation conditions, such as complying with treatment and counseling obligations, also require making payments.¹⁰⁰ And of course, warrants for failing to pay child support are almost exclusively leveled against poor men.¹⁰¹ When financial obligations like these go unpaid—or one fails to appear for a court hearing involving such a financial obligation—a bench warrant will often be issued.¹⁰²

Just the perception of having “caught a warrant” amplifies the sense of vulnerability to arrest and incarceration among the young men of color who constitute America’s urban underclass. The mere perception can curtail life choices, like applying for a job or even being present for the birth of a child.¹⁰³ It can even lead to death, as Walter Scott’s family members speculated was true for him.¹⁰⁴ The now infamous police shooting of the unarmed Scott occurred moments after he fled from police while stopped for a minor traffic violation. Scott’s family speculated that he fled for fear that the officer would discover an outstanding non-compliance warrant for child support arrears and arrest him.¹⁰⁵ You cannot run when you are caught in the Chokehold.¹⁰⁶

B. Corporeality

Criminal justice and racism each acts on the body in intimate and brutal ways. When they do so together, it is with particularly devastating effect. The Chokehold is visceral. “I can’t breathe,” sums it up.¹⁰⁷ The Chokehold’s power and appeal lie in its insistence that we remain focused on the body, that we not get lost in the abstractions that typically preoccupy law and policy scholars. It is not just the body, but the *body in pain* that the Chokehold tries to signify.¹⁰⁸

⁹⁹ See generally Nirej Sekhon, *Punitive Injunctions*, 17 U. PA. J. L. & SOC. CHANGE 175, 193–96 (2014) (discussing discipline of outstanding child support orders).

¹⁰⁰ See *id.* at 177, 184.

¹⁰¹ See *id.* at 193–97.

¹⁰² Goffman, *supra* note 87, at 341, 346.

¹⁰³ See *id.* at 343–44, 351–52, 354.

¹⁰⁴ Frances Robles & Shaila Dewan, *Skip Child Support. Go to Jail. Lose Job. Repeat.*, N.Y. TIMES (Apr. 19, 2015), <https://www.nytimes.com/2015/04/20/us/skip-child-support-go-to-jail-lose-job-repeat.html>.

¹⁰⁵ *Id.*

¹⁰⁶ See BUTLER, *supra* note 1, at 1.

¹⁰⁷ Matt Apuzzo, *Charges Sought in Eric Garner’s Death, but Justice Officials Have Doubts*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/politics/eric-garner-charges-recommended.html>.

¹⁰⁸ See ELAINE SCARRY, *THE BODY IN PAIN* (1985) (analyzing physical suffering and the difficulty of expressing pain through language).

The Chokehold recognizes that the police's power flows from their ability to inflict pain.¹⁰⁹ There are no words that can capture such pain completely. This is not a unique challenge for those writing about race and policing. Pain poses a fundamental challenge to language itself.¹¹⁰ The physical experience of pain is deeply subjective and difficult for the sufferer to express. When occurring beyond some ineffable threshold, pain eclipses the sufferer's capacity for words altogether, leaving her to "pre-language cries and groans."¹¹¹ Pain is "language destroying,"¹¹² sealing the sufferer off from the world, prefiguring death's absoluteness.¹¹³

Pain is tightly bound up with power.¹¹⁴ Legendary criminologist Egon Bittner noted that "the role of the police is best understood as a mechanism for the distribution of non-negotiable coercive force employed in accordance with the dictates of an intuitive grasp of [] situational exigencies."¹¹⁵ This coercive force instrumentalizes civilians' vulnerability to pain, and sometimes their actual experience of pain, for the officer's purposes and, by extension, the State's purposes. Whatever the specific reason an officer uses force in a particular case, a broader symbolic function is always at play. Police violence makes of the civilian's body a platform upon and through which to enact the spectacle of the State's authority.¹¹⁶ Power lies not just in pain's literal infliction, but in the communicative acts that follow.¹¹⁷ Because pain can be language destroying, the agent that provides an account of it will be other than the sufferer.¹¹⁸ All too often, when police inflict pain, it is they who also provide the only official account of what happened.¹¹⁹ Those accounts are inevitably self-rationalizing.

Even progressive discourse around race and criminal justice policy has a way of turning away from the *body in pain*. Because it is, by definition, hard to express pain in words, we tend to avert our scholarly gazes away from it.¹²⁰

¹⁰⁹ See Jennifer Abel, *US Cops: Armed and Dangerous?*, THE GUARDIAN (Aug. 16, 2010), <https://www.theguardian.com/commentisfree/cifamerica/2010/aug/16/police-usa-civil-liberties>.

¹¹⁰ See SCARRY, *supra* note 108, at 4.

¹¹¹ *Id.* at 6.

¹¹² *Id.* at 6, 19.

¹¹³ See *id.* at 4, 31.

¹¹⁴ See *id.* at 11–12, 14.

¹¹⁵ EGON BITTNER, *THE FUNCTIONS OF POLICE IN MODERN SOCIETY* 46 (1970).

¹¹⁶ See SCARRY, *supra* note 108, at 28–32.

¹¹⁷ See *id.* at 12.

¹¹⁸ *Id.*

¹¹⁹ Nirej Sekhon, *Blue on Black: An Empirical Assessment of Police Shootings*, 54 AM. CRIM. L. REV. 189, 207–08 (2016).

¹²⁰ Cf. SCARRY, *supra* note 108, at 11–12 (noting the same phenomenon in the study of literature and attributing it to the form's reliance on written/spoken word).

As a consequence, pain has less political salience in discourse around race and criminal justice than it should.¹²¹ Law and policy scholars' drift is towards minimizing "disparity" and "costs," both of which are anchored in more actuarial than corporeal notions of social reality.¹²² This is suggested by the extent to which "mass incarceration" has become the go-to expression in law and policy circles for talking about race and criminal justice.¹²³ Of course, bodies are at the core of this notion, but it has become more of an actuarial concept than a corporeal one. We should, of course, be horrified by the sheer number of Black and Brown bodies that are warehoused in prisons and jails in comparison to Whites. While letting people out might fix disparity (or jailing more Whites), it would leave in place a range of other coercive practices that inflict pain on bodies.

The limitations of actuarial framing are further suggested by the ease with which it dovetails with the notion of "keeping costs down"—which is the grammar of American statecraft. Does our marginal return on each carceral dollar spent justify its expenditure? This question has driven a good bit of criminal justice reform in the last decade.¹²⁴ It may be strategically necessary in the political realm to appeal to costs and benefits in this way, but there is moral obtuseness to the bean counting that is hard to get past.

By training our attention on the body, the Chokehold avoids the pitfalls of conceptualizing race and criminal justice in exclusively actuarial terms. For example, one way to problematize stop and frisk is by the low "hit rate," the ratio of stops generating evidence of criminal wrongdoing in relation to total stops.¹²⁵ This ratio tends to be low generally, but higher for White suspects than Blacks.¹²⁶ Presumably this is because police pay more attention to actual indicia of criminality with White suspects rather than simply relying on racial stereotype. This is the common criticism in legal scholarship and is to problematize in cost-benefit terms.¹²⁷ While this problem is solved by working harder to increase the Black hit-rate, that does not begin to account for all that is wrong with stop and frisk.

¹²¹ *Id.* at 12.

¹²² See generally Nicole P. Dyszlewski et al., *Mass Incarceration: An Annotated Bibliography*, 21 ROGER WILLIAMS L. REV. 471 (2016) (annotating sources on the topic of mass incarceration).

¹²³ See *id.*

¹²⁴ See Caren Myers Morrison, *Foreword: Criminal Justice Responses to the Economic Crisis*, 28 GA. ST. U. L. REV. 953 (2012).

¹²⁵ See BUTLER, *supra* note 1, at 94.

¹²⁶ See *id.*

¹²⁷ See Al Baker, *New York Minorities More Likely to Be Frisked*, N.Y. TIMES (May 12, 2010), <https://www.nytimes.com/2010/05/13/nyregion/13frisk.html>.

Professor Butler is not immune to actuarial thinking;¹²⁸ one cannot afford to be as a legal scholar. But he directs the reader to the question of pain, for example detailing the physicality of a stop and frisk encounter.¹²⁹ What the Supreme Court has blithely described as a brief, minimally intrusive patdown for weapons,¹³⁰ in practice, can involve harsh treatment. For example, an encounter where a young man is forced to disrobe in public and invasively searched all the while being ridiculed by the officer conducting the search.¹³¹ There is a decidedly libidinal and sadistic quality to many of these interactions—such that Professor Butler suggests persuasively that we ought to think about stop and frisk in the register of “torture,” not just disparity.¹³²

The move from disparity to torture may be a salutary one for legal scholarship around policing and criminal justice. Not only does the latter better account for the lived experience of those subject to harsh policing, it also better accounts for how harsh policing signifies and consolidates State authority. Harsh policing is not a problem that can be remedied by adjusting the State’s racial ledger as disparity analysis sometimes suggests. Rather, it requires a more penetrating critique of what the American State amounts to. To the extent that inflicting pain is “objectified as an insignia of [the State’s] power,”¹³³ harsh policing should lead us to wonder if the State needs to be fundamentally reorganized as Professor Butler urges.¹³⁴ Perhaps the Chokehold is a step in that direction. But how significant a step is it?

IV. CAN THE CHOKEHOLD HOLD?

The success of Professor Butler’s project turns on how eagerly commentators and advocates embrace it. There are two reasons that one might be skeptical that this will happen. First, the Chokehold may be too tightly associated with a very specific law enforcement practice to gain broader metaphoric traction. Second and related, making sense of the Chokehold as a metaphor may require reasonable familiarity with the scholarly theories of racism. This invites the question of what the Chokehold adds to such analyses. And here, Professor Butler might have done more to further develop the moral implications of his argument.

¹²⁸ BUTLER, *supra* note 1, at 69–70.

¹²⁹ *See id.* at 82, 104.

¹³⁰ *See Terry v. Ohio*, 392 U.S. 1, 24–25 (1967).

¹³¹ *See* John B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL. 315, 350–52 (2006).

¹³² BUTLER, *supra* note 1, at 103–05.

¹³³ SCARRY, *supra* note 108, at 56.

¹³⁴ BUTLER, *supra* note 1, at 199–200.

A. Can the Chokehold stand alone?

“I can’t breathe.” The Chokehold’s tether to that phrase is both its strength and weakness. Eric Garner’s last words powerfully suggest a chokehold’s physiological effect and its power as a political rallying cry against police violence.¹³⁵ To be effective, an anti-racist metaphor and perhaps all political metaphors, should move between the general and the particular—giving expression to both without collapsing into one or the other. It should, in other words, link individual stories of pain and injustice with the broader sweep that actuarial-style thinking enables. The Chokehold’s drift is toward the former, perhaps at the expense of the latter.

The Chokehold is at a disadvantage in comparison to Michelle Alexander’s now iconic rhetorical gloss on race and criminal justice, “The New Jim Crow.”¹³⁶ The phrase has become a shorthand for anti-racist critique of mass incarceration.¹³⁷ As fellow symposium panelist Anders Walker has observed in his earlier work, the Jim Crow metaphor for mass incarceration is imperfect, at best.¹³⁸ But it is a powerful metaphor nonetheless. “Jim Crow” both describes a set of complex institutional arrangements, but also has serious visual and narrative purchase connecting examples of individual suffering with an account of structural injustice.¹³⁹ The phrase thus functions as a bridge linking a deep well of inherited moral indignation with the institutional practices of the present. The Chokehold is unlikely, by itself, to generate such connections.

The Chokehold may be able to gain traction as a metaphor for “social practices” that treat all African American men as would-be criminals.¹⁴⁰ But I question whether it can do so on its own—that is, without piggy-backing on the various accounts of racism that scholars have developed over the last several decades.¹⁴¹ Given the number of instances in the book where Professor Butler turns to such theories,¹⁴² one suspects not. The shorthand that is the Chokehold may require reasonable familiarity with the longhand

¹³⁵ Apuzzo, *supra* note 107.

¹³⁶ ALEXANDER, *supra* note 6.

¹³⁷ See *id.* at 2.

¹³⁸ See Anders Walker, *The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration*, 41 HASTINGS CONST. L.Q. 845, 847 (2014).

¹³⁹ See ALEXANDER, *supra* note 6, at 30–31.

¹⁴⁰ BUTLER, *supra* note 1, at 17–18.

¹⁴¹ See *supra* notes 20–26 and discussion.

¹⁴² See BUTLER, *supra* note 1, at 7, 77, 159, 166 (discussion of intersectionality and interest convergence theory).

of critical race scholarship. If this is true, then what is the value-added of the Chokehold?

B. The Chokehold and Defensive Violence

The Chokehold is powerful because it underscores the life-or-death stakes that policing and criminal justice policy create for Black men. It is not the only account to make this point, but it does so in a provocative and original way. Professor Butler's book is not a recipe for incremental, liberal reform. Its prescriptions are world-changing and not to be realized through the machinations of interest politics. A more dramatically seismic political event will bring about such change. His book, in other words, is a call to take up struggle. And, if the Chokehold metaphor is taken seriously, at stake is life itself—resistance is tantamount to self-defense, at least for those subject to the Chokehold in the most intense of ways.

Professor Butler does not however, see this moral analysis through in the book. In its final pages, he counsels against violence.¹⁴³ That position makes good sense as a pragmatic matter of political expediency: a State that holds its citizens in the Chokehold is surely capable of even worse brutalities, should those citizens resort to violence. But Professor Butler seems to go further and suggest that defensive violence is not morally justified at all.¹⁴⁴ If the Chokehold creates life-or-death stakes for those subject to it, why isn't self-protective violence morally justified? The question seems particularly apt given that self-defense may well be on the brink of constitutional enshrinement.¹⁴⁵ The Supreme Court has hinted that the underlying point of the Second Amendment is to enable citizens to resist public tyranny.¹⁴⁶ The Chokehold would seem to present as compelling an example of public tyranny as one could imagine.

There may well be righteousness in forsaking individual or collective moral rights to violence, but that is different than not having had a moral right at all. Professor Butler is not one to shy away from the radical implications of his arguments,¹⁴⁷ but it does seem like he has done so in *Chokehold*. Or

¹⁴³ See *id.* at 247.

¹⁴⁴ *Id.*

¹⁴⁵ See generally Ann E. Tweedy, "Hostile Indian Tribes . . . Outlaws, Wolves . . . Bears . . . Grizzlies and Things Like That?" *How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 13 U. PA. J. CONST. L. 687 (2011).

¹⁴⁶ See *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008) ("[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.").

¹⁴⁷ See, e.g., Paul Butler, *Race-Based Jury Nullification: Case-in-Chief*, 30 J. MARSHALL L. REV. 911, 919–22 (1997) (summarizing moral claims for nullification in non-violent criminal cases with African

maybe there is greater complexity to the moral questions than appears at first blush. That is still reason for having devoted more pages to the book's final sections. Doing so would have put *Chokehold* in dialogue with a rich and layered history of thought about violence, race, and resistance.¹⁴⁸ *Chokehold* skirts that discussion.

The absence of a full engagement with the question of violence leaves *Chokehold*'s conclusion more muted than one would expect. Professor Butler notes that Donald Trump's election did not, for African Americans, mark the arrival of an apocalypse, so much as its continuation.¹⁴⁹ Professor Butler wonders whether "this time, the apocalypse will be productive and cause a critical mass to rise up and demand transformation."¹⁵⁰ The "critical mass" presumably consists of liberal allies who care about racism even if it does not constrain their immediate fortunes or life choices. How many times must those in the grip of the Chokehold announce that they can't breathe while those allies consider whether to "rise up?" At the end, *Chokehold* seems to suggest, that maybe, just one more time. But if that cry of pain is unheeded again this time, then what?

V. CONCLUSION

Chokehold is a provocative and accessible book. It is a good resource for anyone concerned about the injustice meted out daily by our criminal justice machine. It is a particularly useful tool for those who are steeped in either race theory or criminal law and procedure, but not both. I hope *Chokehold* prompts some to "rise up" in the way that Professor Butler describes in the book's final pages. Perhaps, in the second edition, he will share his thoughts on what is to be done, should that not come to pass.

American defendants).

¹⁴⁸ See Martin Luther King, Jr., *Letter from a Birmingham Jail*, THE ATLANTIC (Feb. 2018), <https://www.theatlantic.com/magazine/archive/2018/02/letter-from-birmingham-jail/552461/> ("If [Black people's] repressed emotions do not come out in [] nonviolent ways, they [will] come out in ominous expressions of violence. This is not a threat; it is a fact of history."); James Baldwin, *An Open Letter to My Sister, Miss Angela Davis*, THE N.Y. REVIEW OF BOOKS (Jan. 7, 1971), <https://www.nybooks.com/articles/1971/01/07/an-open-letter-to-my-sister-miss-angela-davis/> ("[W]e must fight for your life [Angela Davis' following the Marin County courtroom shooting in 1970] as though it were our own—which it is—and render impassable with our bodies the corridor to the gas chamber. For, if they take you in the morning, they will be coming for us that night.")

¹⁴⁹ See BUTLER, *supra* note 1 at 247–50.

¹⁵⁰ *Id.* at 250.

