

Punishing Involuntary Resistance

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ABSTRACT

Prosecutors should have to prove voluntariness in cases arising out of resistance to arrest. During an arrest, police violence—such as the use of pepper spray or police canines—may induce involuntary resistance. Such resistance may give rise to criminal charges. The actus reus element of criminal responsibility, however, provides that a person may only be held criminally responsible for voluntary conduct.

And yet, prosecutors are often not forced to prove voluntariness in resisting cases. Instead, trial courts reject requests for voluntariness jury instructions, shift the burden to resisters to prove involuntariness, and—in some cases—disregard the voluntariness requirement altogether. This subversion matters because it wrongfully enables the criminalization of involuntary resisters.

Psychological and other scientific literature suggest that stressful events—like an arrest—may evoke great fear. Such fear may be in-born, or conditioned by violent and racially subordinating policing, or both. The more imminent the fearsome threat, the less control one may have over their response thereto, and the more likely they are to resist. Thus, during some arrests, the state may induce the resistance it punishes.

This Article contributes to the voluntariness requirement scholarship by offering a normative theory for how the requirement should be applied in resisting cases. This Article calls for making voluntariness an explicit, essential element of resisting offenses. In doing so, this Article reveals a means by which factfinders may disrupt cycles of harm perpetuated by police violence and criminal punishment.

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[W]hether or not the judge and prisoner share the same philosophy of punishment, they arrive at the particular act of punishment having dominated and having been dominated with violence, respectively.

—Robert Cover¹

Where there is predation, there is by evolutionary necessity its complement, predatory defense.

—Arne Öhman and Susan Mineka²

INTRODUCTION

On a spring night in Oregon, Pariss Lomchanthala, an indigent Pacific Islander man, was confronted by a white police officer who intended to arrest him for an outstanding parole violation warrant.³ Pariss refused to obey the officer's order to lie prostrate on the ground. Pariss was unarmed, had not threatened or assaulted the officer, and had not attempted to run away.⁴

Still, the officer ordered a police canine to attack Pariss.⁵ As the canine attacked, Pariss fought against both the officer and the canine.⁶ Soon, more officers arrived on the scene and captured Pariss, who was later charged with resisting arrest and assaulting a public safety officer.⁷

Before his trial, Pariss requested the court to inform the jury that Oregon law only permits criminal liability for “the performance of a voluntary act or omission.”⁸ He intended to argue that his actions against the officer were involuntary under the circumstances. But the

¹ Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1609 (1986).

² Arne Öhman & Susan Mineka, *Fears Phobias, and Preparedness: Toward and Evolved Module of Fear and Fear Learning*, 108 *PSYCHOLOGICAL REVIEW* 3, 486 (2001).

³ Incident # SMP12017712 – Smith Supp. Report 1 (May 13, 2012, Salem Police Dept.) (“Smith Supp. Report”); Salem Police Dept., *Person Profile: Paris Lomchanthala* 1 (listing Paris as “Native Hawaiian or Other Pacific Islander”); *Salem Police Officer Injured in Crash With Semi Truck*, *SALEM-NEWS* (Dec. 6, 2017), http://www.salem-news.com/articles/march262009/smith_injury_3-26-09.php (picture of Salem Police Officer Steven Smith).

⁴ *State v. Lomchanthala*, 267 Or. App. 538, 539 (2014). The officer claimed Pariss walked away (Smith Supp. Report, *supra* note 3, at 2), while Pariss stated he did not walk away, but instead stood still (Incident # SMP12017712 – Gamble Supp. Report 1 (May 13, 2012, Salem Police Dept.)) (“Gamble Supp. Report”).

⁵ *Id.*

⁶ *Lomchanthala*, 267 Or. App. at 539.

⁷ Gamble Supp. Report, *supra* note 4, at 1; <https://webportal.courts.oregon.gov/portal/>.

⁸ *Lomchanthala*, 267 Or. App. at 540.

court denied his request for a voluntariness instruction.⁹ The jury later found Pariss guilty of felony assault on a public safety officer.¹⁰

Pariss's story illustrates how credible contestations of voluntariness in resisting cases are disregarded. People who resist arrest—and survive—may be prosecuted for various resisting crimes, such as fleeing arrest, resisting arrest, and assaulting an officer. Resisting offenses generally proscribe fleeing or physically resisting an arresting officer, provided the officer is not engaged in an unlawfully excessive use of force and the resister knows they are fleeing or resisting a law enforcement officer.¹¹ Some resisters, like Pariss, argue at trial that the voluntariness requirement for criminal responsibility entitles them to an acquittal.¹²

Every first-year law student learns that the voluntariness requirement is a foundational component of criminal responsibility.¹³ It provides that a person may only be held criminally responsible for conduct that was voluntary.¹⁴ Most states have either codified the voluntariness requirement in their general criminal culpability statutes or explicitly recognized the requirement in their case law.¹⁵

⁹ *Id.*

¹⁰ *Id.* at 540-41.

¹¹ All fifty states and the District of Columbia criminalize fleeing from and resisting an arrest supported by probable cause or an arrest warrant, provided the flier or resister knew that they were resisting a law enforcement officer. In most states, a person may even be convicted for resisting an unlawful arrest. Omavi Shukur, *The Criminalization of Black Resistance to Capture and Policing*, 103 B.U. L. REV. 1, 7 n. 19 (2023) (listing statutes and ordinances criminalizing resisting arrest); *id.* at 36-37 n. 250-252 (listing the thirty-three state statutes and judicial decisions that criminalize resisting unlawful arrest).

¹² See, e.g., Lomchanthala, 267 Or. App. at 540; State v. Riojas, 184 Wash. App. 1013, *7, 9.

¹³ See, e.g., Cynthia Lee & Angela P. Harris, *Criminal Law: Cases and Materials* 153 (W. Acad. 3rd ed. 2014) (2005) (“In general, a person cannot be convicted of a crime unless he or she commits a voluntary (i.e., volitional) act that causes social harm.”); see also Bennett Capers, Roger A. Fairfax Jr., Eric J. Miller, *Criminal Law: A Critical Approach* 195 (W. Acad. 2023); Joshua Dressler, *Understanding Criminal Law* 83 (9th ed. 2022).

¹⁴ *Infra* Part I.

¹⁵ Ariz. Rev. Stat. Ann. § 13-201 (“The minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform a duty imposed by law which the person is physically capable of performing.”); Haw. Rev. Stat. Ann. § 702-200 (West) (“In any prosecution it is a defense that the conduct alleged does not include a voluntary act or the voluntary omission to perform an act of which the defendant is physically capable.”); Ky. Rev. Stat. Ann. § 501.030 (West) (“A person is not guilty of a criminal offense unless: (1) He has engaged in conduct which includes a voluntary act or the omission to perform a duty which the law imposes upon him and which he is physically capable of performing.”); Mo. Ann. Stat. § 562.011 (West); N.H. Rev. Stat. Ann. § 626; Tex. Penal Code Ann. § 6.01 (West); AL ST § 13A-2-3; Alaska Stat. Ann. § 11.81.600 (West); A.C.A. § 5-2-204; 720 ILCS 5/4-1; C.R.S.A. § 18-1-502; Del. Code Ann. tit. 11, § 242 (West); IC 35-41-2-1; K.S.A. 21-5201; Mich. Comp. Laws Ann. § 8.9 (West); Mont. Code Ann. § 45-2-202 (West); N.J.S.A. 2C:2-1; O.R.S. § 161.095; R.C. § 2901.21; N.Y. Penal Law § 15.10 (McKinney); 18 Pa. Stat. and Cons. Stat. Ann. § 301 (West); Herd v. State, 125 Md. App. 77,

At first blush, this requirement may appear to adequately protect involuntary resisters from criminalization and punishment. One problem, however, is that courts do not treat voluntariness as an essential element of resisting offenses. Consequently, the requirement is easily subverted in resisting cases. This subversion takes multiple forms: trial courts reject requests for voluntariness jury instructions, shift the burden to resisters to prove involuntariness, and—in some cases—disregard the requirement altogether.¹⁶ As a result of this subversion, resisters are criminally punished without any determination of whether their resistance was voluntary.

How can the voluntariness requirement be invigorated to better protect involuntary resisters from the harms of criminalization and punishment? This Article explores this question. In doing so, it contributes to the scholarship on the voluntariness requirement¹⁷ by offering a normative theory for how the requirement should be applied in resisting cases. Namely, voluntariness should be an explicit, essential element of resisting offenses. This would force prosecutors to affirmatively prove voluntariness in resisting cases.

A key premise of this Article is that some people may resist gun-wielding arresting officers involuntarily, that is, reflexively or otherwise non-consciously. *Resistance* is used herein as an umbrella term, encompassing both flight from and resistance to arresting officers. Involuntary resistance may take various forms, such as reflexively jerking away from an arresting officer's grasp or striking an officer with a closed fist.

Unlike cases involving civilian-on-civilian violence, resisting cases arise out of state agents attempting to capture and shackle civilians' bodies. These cases are unique because they may arise out

90, 724 A.2d 693, 700 (1999) (“Even a crime *malum prohibitum* requires a voluntary act.”); *State v. Engle*, 743 N.W.2d 592, 595 (Minn. 2008) (“Any crime, including reckless crimes, requires some voluntary act.”); *State v. Caddell*, 287 N.C. 266, 215 S.E.2d 348 (1975) (noting “the rule that criminal liability requires a voluntary act.”); *State v. Turner*, 953 S.W.2d 213, 216 (Tenn. Crim. App. 1996) (“[I]n general, a minimum requirement for criminal liability is the performance of a voluntary act.”); *Childers v. State*, 2021 WY 93, ¶ 24, 493 P.3d 168, 172 (Wyo. 2021) (noting that “a voluntary act is an absolute requirement for criminal liability”).

¹⁶ *Infra* Part III.

¹⁷ See, e.g., Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545 (2013); Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269 (2002); Melissa Hamilton, *Reinvigorating Actus Reus: The Case for Involuntary Actions by Veterans with Post-Traumatic Stress Disorder*, 16 BERKELEY J. CRIM. L. 340, 341 (2011); Rebecca Hollander-Blumoff, *Crime, Punishment, and the Psychology of Self-Control*, 61 EMORY L.J. 501 (2012); Michael S. Pardo & Dennis Patterson, MIND, BRAINS, AND LAW: THE CONCEPTUAL FOUNDATIONS OF LAW AND NEUROSCIENCE 122-130 (2013); Michael Corrado, *Is There an Act Requirement in the Criminal Law?*, 142 U. PA. L. REV. 1529 (1994); Douglas Husak, *Rethinking the Act Requirement*, 28 Cardozo L. Rev. 2437 (2007); Gideon Yaffe, *The Voluntary Act Requirement*, in THE RUTLEDGE COMPANION TO PHILOSOPHY OF LAW 174-190 (A. Marmor, ed. 2012).

of reflexive flight-or-fight responses elicited by law enforcement. In such cases, criminal punishment is tantamount to inflicting harm on civilians for involuntary reactions induced by the state.

This Article analyzes three resisting cases that exemplify the need for an explicit, essential voluntariness requirement. The accused person in each case is a person of color—one Pacific Islander, one Latina, one black.¹⁸ During their jury trials, these resisters contested the voluntariness of their resistance. In each case, there was evidence of involuntariness: resistance during a police canine attack,¹⁹ resistance after being painfully grabbed from behind without warning,²⁰ and resistance after multiple deployments of pepper spray while being held at gunpoint.²¹ The resisters' claims of involuntariness were credible: they may not have been able to consciously control their reactions to the violence preceding and co-occurring with their resistance.

And yet, none of the prosecutors in these cases was put to a burden of affirmatively proving voluntariness beyond a reasonable doubt. This, despite one jurisdiction having a statutory voluntariness requirement for criminal responsibility and a pattern voluntariness instruction that was specifically requested by the accused.²² Instead, the trial courts in these cases denied a request for a voluntariness jury instruction, placed the burden on the accused to prove involuntariness, and—in one case—ignored the requirement altogether. The resisters in these cases were all ultimately convicted of violent felony offenses arising out of their resistance.

Psychological and other scientific literature suggests that fearsome, violent events—like the violent arrests that gave rise to the foregoing cases—may evoke fearful, reflexive involuntary resistance.²³ Such fear may be in-born, or conditioned by life

¹⁸ Salem Police Dept., *Person Profile: Paris Lomchanthala* 1 (listing Paris as “Native Hawaiian or Other Pacific Islander”); Riojas, 184 Wash. App. 1013 (noting that someone on the scene referred to Mersadeze as Mexican and Mersadeze noting that she felt antagonized because both this witness and the arresting officer were white); State v. Mayfield, State Warrant, Case No 03-328FW (Ga. Sup. Ct., Franklin Co., May 8, 2003) (“Mayfield Warrant”) (listing Jerome as a “Black Male.”).

¹⁹ Lomchanthala, 267 Or. App. 538.

²⁰ Riojas, 184 Wash. App. 1013.

²¹ Mayfield v. State, 276 Ga. App. 544 (2005).

²² Or. Rev. Stat. Ann. § 161.095 (West); Lomchanthala, 267 Or. App. at 540 (Oregon Uniform Criminal Jury Instruction 1065).

²³ Vincenzo J. Olivett and Davis S. March, *The Civilian's Dilemma: Civilians Exhibit Automatic Defensive Responses to the Police* 7, *J. of Personality & Social Psych.* (Oct. 5, 2023, advance online publication) (finding that “police-threat associations may evoke defensive behaviors that are difficult to control or inhibit during an initial split-second

experiences, or both.²⁴ This fear is capable of automatically triggering defensive physiological and behavioral responses, such as flight or

expression.”); Rafael Yuste, LECTURES IN NEUROSCIENCE (2023) 270-71 (detailing how painful stimuli may “activate motor neurons,” causing a person to reflexively extend some muscles and contract others); *Id.* at 261 (defining a *reflex* as an “involuntary response to a sensory stimulus”); Öhman et al., *supra* note 2, at 483–84 (describing the *fear module* as “a relatively independent behavioral, mental, and neural system that is specifically tailored to help solve adaptive problems prompted by potentially life-threatening situations in the ecology of our distant forefathers.”); Nico H. Frijda, Richard K. Ridderinkhof, and Erik Rietveld, *Impulsive Action: Emotional Impulses and Their Control*, 5 FRONTIERS IN PSYCHOLOGY 518, 1 (2014); *Id.* at 1-3 (positing a theory of impulsive action in which an appraisal of harm may automatically elicit a response); *Id.* at 4 (explaining that a hostile state of action readiness may cause one to throw a bicycle stand at a police van during a “street row”); Nico H. Frijda, *Impulsive Action and Impulse Control*, in THE EMOTIONAL BRAIN REVISITED 207 (2014) (same); Quyen Epstein-Ngo, Laura K. Maurizi, Allyson Bregman, and Rosario Ceballo, *In Response to Community Violence: Coping Strategies and Involuntary Stress Responses Among Latino Adolescents*, 19 CULTURAL DIVERSITY AND ETHNIC MINORITY PSYCHOLOGY 1,38–49 (2013); Bertram T. Hoffmann Ayala D, Huber M, Brandl F, Starke G, Sorg C, Mulej Bratec S, *Human Threat Circuits: Threats of Pain, Aggressive Conspecific, and Predator Elicit Distinct BOLD Activations in the Amygdala and Hypothalamus*, FRONT PSYCHIATRY (2023 Jan); Michael S. Fanselow and Laurie S. Lester, *A Functional Behavioristic Approach to Aversively Motivated Behavior: Predatory Imminence as a Determinant of the Topography of Defensive Behavior*, in EVOLUTION AND LEARNING (R. C. Bolles & M. D. Beecher, eds. 1988), 185-212; Aline F. Bastos, Andre S. Vieira, Jose M. Oliveira, Leticia Oliveira, Mirtes G. Pereira, Ivan Figueira, Fatima S. Erthal, Eliane Volchan, *Stop or Move: Defensive Strategies in Humans*, 302 BEHAVIOURAL BRAIN RESEARCH 252-62 (2016); Jennifer N. Perusini and Michael S. Fanselow, *Neurobehavioral Perspectives on the Distinction Between Fear And Anxiety*, 22 LEARN MEM. 9 417-25 (2015 Aug); Dean Mobbs, Predrag Petrovic, Jennifer L. Marchant, Demis Hassabis, Nikolaus Weiskopf, Ben Seymour, Raymond J. Dolan, Christopher D. Frith, *When Fear Is Near: Threat Imminence Elicits Prefrontal-Periaqueductal Gray Shifts in Humans*, 317 SCIENCE 5841, 1079–83 (2007); Dean Mobbs, Jennifer L. Marchant, Demis Hassabis, Ben Seymour, Geoffrey Tan, Marcus Gray, Predrag Petrovic, Raymond J. Dolan, and Christopher D. Frith, *From Threat to Fear: The Neural Organization of Defensive Fear Systems in Humans*, J NEUROSCI. (2009 Sep); L. Michael Romero, *Fight or Flight Responses in* ENCYCLOPEDIA OF ANIMAL BEHAVIOR (Second Edition) (Jae Chun Choe, ed. 2019) 547-552; S. Marc Breedlove and Neil V. Watson, BEHAVIORAL NEUROSCIENCE, Eighth Edition 38-40, 132, 149, 156-57, 480-81, 491 (Sinauer Associates, 2017) (detailing how the nervous system and endocrine system play key roles in generating stress responses); Kasia Kozłowska, Peter Walker, Loyola McLean, & Pascal Carrive, *Fear and the Defense Cascade*, 23 HARVARD REVIEW OF PSYCHIATRY 4, 263-287 (2015) (describing adaptive fear-induced physiological stress responses); Randolph Martin Nesse, Seema Bhatnaga, & Bruce J. Ellis, *Evolutionary Origins and Functions of the Stress Response System*, in STRESS: CONCEPTS, COGNITION, EMOTION, AND BEHAVIOR 95-101 (George Funk ed., 2016) (detailing the dimensions of physiological stress responses); Georg Northoff, THE SPONTANEOUS BRAIN, at 9, 21-27, 42, 65, 121, 133 (MIT Press 2018) (detailing how “how the brain’s neural activity can involve different degrees of resting-state activity, and, still, be shaped, by external stimuli.”); Andreas Löw, Peter J. Lang, J. Carson Smith, & Margaret M. Bradley, *Both Predator and Prey: Emotional Arousal in Threat and Reward*, 19 PSYCHOLOGICAL SCIENCE 9, 865–73 (2008); *see infra* Part II.

²⁴ Öhman et al., *supra* note 2, at 483-87 (“fears and social phobia originated from a second evolved behavioral system related to conspecific attack and self-defense”); *id.* at 505 (describing angry faces as “biologically fear-relevant stimuli”); Bertram et al., *supra* note 23, at 2 (including “aggressive conspecific[s] and bodily pain as “threatening stimuli that are

fight.²⁵ The more imminent the threat, the less control one may have over their response thereto, and the more likely they are to reflexively resist.²⁶ These findings suggest that, in some resisting cases, the state elicits the resistance it punishes. But, without an explicit, essential voluntariness requirement, factfinders are able to disregard the potential involuntariness of the resistance in question.

I argue that resisting statutes should be amended to explicitly include voluntariness as an essential element. Since prosecutors are constitutionally required to prove all essential elements of an offense in order to secure a conviction, an explicit voluntariness element would force prosecutors to affirmatively prove voluntariness.²⁷ And since judges are constitutionally required to issue jury instructions on all essential elements, this change would also force judges to issue voluntariness instructions in all resisting jury trials.²⁸ An essential voluntariness element would also discourage prosecutors from pursuing criminal charges stemming from involuntary resistance,

relevant for most species”); Malcolm D. Holmes & Brad W. Smith, “Social-Psychological Dynamics of Police-Minority Relations: An Evolutionary Interpretation,” 59 *Journal of Criminal Justice* 58, 63 (2018) (“While residents of disadvantaged minority neighborhoods expect the police to deal with these problems, they lack confidence in the ability of police to do so. . . . Unpleasant interactions with the police condition citizens to fear them.”); C.R. DIV., U.S. DEP’T OF JUST., MINNEAPOLIS AND THE MINNEAPOLIS POLICE DEPARTMENT 31-47 (2023) [hereinafter DOJ, INVESTIGATION OF MPD] (detailing the racially subordinating dimensions of policing in Minneapolis); C.R. DIV., U.S. DEP’T OF JUST., INVESTIGATION OF THE LOUISVILLE METRO POLICE DEPARTMENT & LOUISVILLE METRO GOVERNMENT 11-19 (2023) [hereinafter DOJ, INVESTIGATION OF LMPD] (Same for Louisville); C.R. DIV. & U.S. ATT’Y’S OFF. N. DIST. OF ILL., U.S. DEP’T OF JUST., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 22-45 (2017) [hereinafter DOJ, INVESTIGATION OF CPD] (Same for Chicago); C.R. DIV., U.S. DEP’T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 74-115 (2016) [hereinafter DOJ, INVESTIGATION OF BPD] (Same for Baltimore); C.R. DIV., U.S. DEP’T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 28-41 (2015) [hereinafter DOJ, INVESTIGATION OF FPD] (Same for Ferguson).

²⁵ Frijda, *supra* note 23, at 207 (“emotions of some intensity tend to induce impulsive actions that are not preceded by deliberation, nor are they intentional in the strict sense.”); Epstein-Ngo, *supra* note 23, at 43 (finding that both personal victimization and witnessing community violence was positively associated with involuntary stress responses).

²⁶ Mobbs et al., *From Threat to Fear: The Neural Organization of Defensive Fear Systems in Humans*, *supra* note 23, at 12241 (“Thus, when the subjects thought there was a low probability of shock, they had more controlled locomotor behaviors, yet the knowledge they were likely to be caught increased locomotor errors. “); Bastos et al., *supra* note 23, at 260 (discussing observation that “as contact between predator and prey is about to take place, the probability of prey jump-attack is maximal . . .”); Rod K. Brunson & Ronald Weitzer, *Negotiating Unwelcome Police Encounters: The Intergenerational Transmission of Conduct Norms*, 40 *JOURNAL OF CONTEMPORARY ETHNOGRAPHY* 4, 425–456 (2011), Bastos et al., *supra* note 23, at 260; Perusini et al., *supra* note 23, at 421; Löw et al., *supra* note 23, at 870 (“As with animals . . . the reflex was potentiated when viewers were confronted with an aversive cue”);

²⁷ See, e.g., *Patterson v. New York*, 432 U.S. 197, 210 (1977); *Leland v. Oregon*, 343 U.S. 790, 795 (1952).

²⁸ See, e.g., *In re Winship*, 397 U.S. 358, 364 (1970); *Cool v. United States*, 409 U.S. 100, 104 (1972) (*per curiam*).

improve involuntary resisters' leverage in plea bargain negotiations, and increase involuntary resisters' chances of securing acquittals at trial.

Failure to make voluntariness an explicit, essential element of resisting offenses would relegate involuntary resisters to challenging mens rea or raising affirmative defenses like self-defense or duress.

Affirmative defenses do not compensate for the lack of an explicit, essential voluntariness element.²⁹ While prosecutors have to prove essential elements, accused persons may be forced to prove affirmative defenses.³⁰ Moreover, judges can determine that there is insufficient evidence to support issuing a jury instruction on an affirmative defense.³¹ Affirmative defenses, then, provide less protection to involuntary resisters than essential elements.

The mens rea element is also not a faithful substitute for an explicit, essential voluntariness element.³² Standing alone, certain mens rea requirements—such as *knowing* and *reckless*—would permit the criminalization of even involuntary and unintentional conduct.³³ Also, despite finding that a prosecutor proved a mens rea of *intent*, a factfinder may have doubts as to whether the actual conduct in

²⁹ See Michael S. Moore, *The Neuroscience of Volitional Excuse*, in PHILOSOPHICAL FOUNDATIONS OF LAW AND NEUROSCIENCE 181 (Dennis Patterson and Michael S. Pardo, eds., 2016) (“excuses are to be distinguished from those conditions that rule out there being an act for which one is prima facie responsible. If one’s body causes harm while one . . . performs a reflex movement or a movement during an epileptic seizure, one does not excuse the ‘actor’ in such conditions. Rather, these cases instance ways in which the bodily motions of a person can cause harm to another without those bodily motions constituting an act of that person. In such cases there is nothing to be excused because one has done no wrongful action.”).

³⁰ Patterson, 432 U.S. at 210; Dixon v. United States, 548 U.S. 1, 17 (2006) (“[W]e presume that Congress intended the petitioner to bear the burden of proving the defense of duress by a preponderance of the evidence.”); see also Stanley v. Mabry, 596 F.2d 332, 333 (8th Cir. 1979) (“[W]e find no constitutional violation occurred by placing the burden of proof on petitioner to prove his insanity by a preponderance of the evidence.”).

³¹ People v. Cornille, 484 N.E.2d 301, 306 (1985) (“The trial court refused these instructions on the basis that they attempted to introduce the affirmative defense of ignorance or mistake and there was insufficient evidence presented by defendant to warrant giving such instructions. We agree.”); United States v. Diaz, 916 F.2d 655, 658 (11th Cir. 1990) (“[W]e find that this action, occurring after the conclusion of all the acts which gave rise to the conspiracy charge, is insufficient evidence of withdrawal to merit an instruction on this affirmative defense.”).

³² See Brown v. State, 955 S.W.2d 276, 280 (Tex. Crim. App. 1997) (“[T]he issue of the voluntariness of one’s conduct, or bodily movements, is separate from the issue of one’s mental state.”).

³³ See, e.g., Or. Rev. Stat. Ann. § 161.085 (West) (defining mens rea of *knowingly* as “with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists.”).

question was under the accused's conscious control.³⁴ That is, a finding that a person intended to engage in an act does not necessarily mean the person was able to act otherwise.³⁵ By centering the objective circumstances of the conduct at issue, the voluntariness requirement is better than the mens rea element at accounting for the state violence that may induce involuntary resistance.³⁶

The aim, however, is not to perfect the criminalization of resistance.³⁷ Instead, the goal, in part, is to uncover how one of the key

³⁴ Several legislatures and commentators gauge voluntariness by the consciousness of the conduct. *See, e.g.*, N.Y. Penal Law § 15.00 (McKinney) (defining a “voluntary act” as “a bodily movement performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it.”); Del. Code Ann. tit. 11, § 243 (West) (“‘Voluntary act’ means a bodily movement performed consciously or habitually as a result of effort or determination, and includes possession if the defendant knowingly procured or received the thing possessed or was aware of the defendant’s control thereof for a sufficient period to have been able to terminate possession.”); Colo. Rev. Stat. Ann. § 18-1-501 (West) (“‘Voluntary act’ means an act performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it.”); *see also* Stephen J. Morse, *Criminal Law and Common Sense: An Essay on the Perils and Promise of Neuroscience*, 99 *MARQ. L. REV.* 39, 52–53 (2015) (“The ‘voluntary’ act requirement is defined, roughly, as an *intentional* bodily movement—or omission in cases in which the person has a duty to act—done in a reasonably integrated state of consciousness.”); Denno, *supra* note 17, at 314 (“consciousness is the foundation for voluntary conduct.”); Yaffe, *supra* note 17, at 175 (“If the mental state that guides the bodily movement is not ‘conscious’ . . . then . . . the bodily movements it guides are therefore not voluntary actions.”).

³⁵ *See* Brown, 955 S.W.2d at 280 (rejecting argument that the issue of voluntariness was subsumed by the “intentionally and knowingly” mens rea element of murder); *State v. Lara*, 183 *Ariz.* 233, 235, 902 P.2d 1337, 1339 (1995) (“[I]ntent is one of our culpable mental states descriptive of *mens rea*, not *actus reus*.”).

³⁶ *State v. Utter*, 4 *Wash. App.* 137, 139 (1971) (“There are two components of every crime. One is objective—the *actus reus*; the other subjective—the *mens rea*.”); Farrell et al., *supra* note 17, at 1590 (“[T]he concept of involuntariness applies to circumstances as well as actions.”). In order to satisfy the mens rea element, prosecutors have to prove that the accused engaged in the conduct in question with certain state of mind, such as intentionality or recklessness. Francis Bowes Sayre, *Mens Rea*, 45 *Harv. L. Rev.* 974, 1016 (1932) (describing mens rea as “the mental factor necessary to prove criminality.”).

³⁷ In another article, I argue that the racially subordinating dimensions of resisting laws may only be remedied by abolishing the prison industrial complex (“PIC”) and eradicating racial subordination. Shukur, *supra* note 11, at 51 (“As compared to reformist interventions, PIC abolition is more responsive to the tacit demands of black resisters who violently combat racially subordinating policing.”); *id.* at 52 (“[B]lack resisters to the capture of arrest compel society to respond to black dissenting violence against racial subordination as it never has before in the United States: by eradicating racial subordination and all of its punitive effects.”). Abolitionist attorneys may utilize the voluntariness requirement to reduce the harm of criminalization while bringing the harmful and racially subordinating dimensions of policing to the fore in resisting criminal proceedings. This litigation strategy may form part of a just transition to the abolitionist future envisioned in my other work.

requirements of criminal responsibility—voluntariness—is not treated as such in resisting cases.³⁸

More broadly, this Article reveals how criminal courts gratuitously perpetuate cycles of harm by ignoring the structural causes of resistance to arrest. These structural causes include the sheer violence of arrest, which is especially acute in communities beset by racially subordinating policing.³⁹ By not requiring prosecutors to prove voluntariness, courts ease the state's path to compounding the harm of police violence with the harm of criminal punishment.

In contrast an explicit, essential voluntariness requirement would force factfinders to confront the violent, punitive, and racially subordinating features of punitive arrests.⁴⁰ Those judges and juries would then have the obligation to acquit involuntary resisters, shielding said resisters from the harms of criminalization and incarceration. Such shifts from perpetuating to disrupting cycles of harm are crucial for mitigating the adverse effects of violence exposure.

This Article proceeds in four parts. Part I is a descriptive inquiry into the voluntariness requirement. Part II then engages with psychological and other scientific literature to illustrate how arrests can elicit involuntary resistance. Next, Part III explains how the lack of an explicit, essential voluntariness element adversely affects resisters with credible claims of involuntariness. Ultimately, Part IV calls for an essential, explicit voluntariness element and addresses some of the anticipated concerns related thereto. This Article is part of

³⁸ This Article does not address the issue of voluntary, deliberate resistance to arrest, which will be the subject of future research. It also does not discuss the various reasons why people comply with arrest. Nor does it discuss cases in which people are falsely arrested for resisting; such cases are discussed elsewhere in the scholarship. Scott Holmes, *Resisting Arrest and Racism - the Crime of "Disrespect"*, 85 UMKC L. REV. 625 (2017); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1348 (2012) (“[B]ulk-urban policing crimes such as loitering, trespassing, disorderly conduct, and resisting arrest create the highest risk of wrongful conviction. By definition, these offenses require no physical or concrete evidence other than an officer’s assertion that the defendant has engaged in relatively common types of behavior.”). Instead, this Article centers cases in which people involuntarily resist arresting officers and are subsequently prosecuted for resisting. The intention, in part, is to reveal how a fundamental requirement for criminal culpability—the voluntariness requirement—is subverted in the face of credible claims of involuntary resistance.

³⁹ DOJ, INVESTIGATION OF MPD, *supra* note 23, 9-30 (detailing MPD’s practice of using excessive force and engaging in racially discriminatory police practices); DOJ, INVESTIGATION OF LMPD, *supra* note 23, 11-19, 38-53 (same regarding LMPD); DOJ, INVESTIGATION OF BPD, *supra* note 23, 47-115 (Same regarding BPD); INVESTIGATION OF FPD, *supra* note 23, 28-41, 62-78 (Same regarding FPD); Bernard Harcourt, COOPERATION 152 (2023) (noting that the supposed “harms” that are the subject of criminal punishment “are themselves artifacts of the present social condition and racial hierarchies”).

⁴⁰ This would be reminiscent of the fugitive slave trials of the Antebellum Era, during which defense attorneys brought “the militant appeal [for the abolition of slavery] in the street” into the courtroom. Cover, *supra* note 1, at 212.

a larger project that argues that the state and society should reduce the harm of punitive arrests, while shifting to non-punitive means of ensuring safety.

I. THE VOLUNTARINESS REQUIREMENT

Generally, a person may only be held criminally responsible if they engage in voluntary conduct (*actus reus*) accompanied by a guilty mental state (*mens rea*).⁴¹ *Actus reus*'s voluntariness requirement is designed to limit criminal culpability to those whom proponents of criminal punishment deem "truly responsible."⁴² As explained by Oliver Wendell Holmes, "The reason for requiring an act is, that an act implies a choice, and that it is felt to be impolitic and unjust to make a man answerable for harm, unless he might have chosen otherwise."⁴³ Roscoe Pound similarly opined that "the starting point of the criminal law . . . [is] that a criminal was a person possessed of free will who, having before him a choice between right and wrong, had freely and deliberately chosen to go wrong."⁴⁴ For these reasons and others, most commentators treat the voluntariness requirement as axiomatic.⁴⁵

Until now, there has been no scholarly inquiry into what role, if any, the voluntariness requirement currently plays in resisting cases. This, despite the omnipresent possibility that these cases may arise out of involuntary flight-or-fight responses to arresting officers. For instance, a person who had no conscious desire to resist may be prosecuted for having reflexively jerked away from an arresting officer who tried to force them to the ground.⁴⁶ The criminalization of such reflexive resistance, however, contravenes the voluntariness requirement. In order to fully explore the use, misuse, and disuse of

⁴¹ Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1016 (1932) (describing *mens rea* as "the mental factor necessary to prove criminality."); Model Penal Code § 2.01 cmt. at 216 (Official Draft and Revised Comments 1985) ("[T]he demand that an act or omission be voluntary can be viewed as a preliminary requirement of culpability.").

⁴² Farrell et al., *supra* note 17, at 1554.

⁴³ Oliver Wendell Holmes, *THE COMMON LAW* 46 (Rutledge 2005) (1881).

⁴⁴ Roscoe Pound, *CRIMINAL JUSTICE IN AMERICA* 126-27 (1930).

⁴⁵ See, e.g., Farrell et al., *supra* note 17, at 1545 ("As any first-year law student can explain, the 'voluntary act requirement' is a foundational component of criminal law."); Denno, *supra* note 17, at 354 ("[T]he [voluntariness] requirement, like culpability, is axiomatic and therefore one of the pillars of the criminal law."); Hollander-Blumoff, *supra* note 17, at 513 ("The *actus reus* requirement includes an insistence that an action be voluntary"). The intention is not to supplant the *mens rea* element, but to draw more attention to *actus reus*, which exists alongside *mens rea*.

⁴⁶ See *State v. Forkpa*, 2020 WL 6707659, at 6 (Tenn. Crim. App. Nov. 16, 2020) (affirming resisting arrest conviction where the accused person "moved his left arm forward, 'tensed up,' and began to pull away from the officers as Sergeant Perry attempted to place the cuff on the Defendant's other wrist."); *Id.* at 7 (listing similar Tennessee appellate cases affirming convictions for de minimis resistance).

the voluntariness requirement in resisting cases, some more background information about the requirement is needed.

Most states have explicitly recognized the voluntariness requirement.⁴⁷ For instance, Arizona state law provides, “The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform a duty imposed by law which the person is physically capable of performing.”⁴⁸ It defines a voluntary act as “a bodily movement performed consciously and as a result of effort and determination.”⁴⁹ Arizona’s definition suffices for the purposes of this inquiry because it captures the subjective and objective dimensions of voluntariness and is substantially similar to other states’ definitions.⁵⁰

These statutory voluntariness requirements are largely derived from—or reflected in—the Model Penal Code’s (MPC’s) provisions on voluntariness. Section 2.01(1) of the MPC provides, “A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.”⁵¹ The commentary accompanying this provision candidly concedes that the MPC’s definition of “voluntary” is partial and indirect, consisting only of descriptions of what does not constitute a voluntary act:

- (a) a reflex or convulsion;
- (b) a bodily movement during unconsciousness or sleep;
- (c) conduct during hypnosis or resulting from hypnotic suggestion;
- (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.⁵²

The prominence of consciousness in the MPC’s voluntariness provisions reveals the subjective dimension of the voluntariness

⁴⁷ *Supra* note 15.

⁴⁸ Ariz. Rev. Stat. Ann. § 13-201.

⁴⁹ Ariz. Rev. Stat. Ann. § 13-105.

⁵⁰ *See, e.g.*, N.Y. Penal Law § 15.00 (McKinney) (defining a “voluntary act” as “a bodily movement performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it.”); Del. Code Ann. tit. 11, § 243 (West) (“‘Voluntary act’ means a bodily movement performed consciously or habitually as a result of effort or determination, and includes possession if the defendant knowingly procured or received the thing possessed or was aware of the defendant’s control thereof for a sufficient period to have been able to terminate possession.”); Colo. Rev. Stat. Ann. § 18-1-501 (West) (“‘Voluntary act’ means an act performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it.”).

⁵¹ MODEL PENAL CODE § 2.01.

⁵² MODEL PENAL CODE and COMMENTARIES § 2.01 cmt. 2 (“Subsection (2) defines ‘voluntary’ partially and indirectly by describing movements that are excluded from the meaning of the term.”).

requirement. By referencing both body movements during sleep and movements not produced by effort or determination, the MPC tacitly adopts a dual meaning of *conscious* as (1) “[a]wake, alert, and aware of what is happening in the immediate vicinity; not in a state of sleep, trance, or coma,” and (2) “aware of and giving due weight to something.”⁵³ In keeping with the MPC, courts and commentators often cast *consciousness* as central to voluntariness determinations.⁵⁴

In addition to its subjective dimension, the voluntariness requirement has an objective dimension. For instance, the MPC describes a case in which a French migrant was deported from England, forcibly taken back to England against her will, and then convicted of criminal unlawful reentry. The MPC explains that the voluntariness requirement would have shielded this migrant from criminal responsibility because the migrant was incapable of not being forcibly taken back to England.⁵⁵

Similarly, in some jurisdictions, people who are arrested and jailed while they happen to be in possession of a controlled substance cannot be convicted for bringing said substance into the jail.⁵⁶ This, even though these people may have been both conscious and aware of their possession of the controlled substance. In these jurisdictions, such people are not criminally culpable because they effectively had no choice but to introduce the substance into the jail as a result of their involuntary jailing.⁵⁷ Hence, they “committed no *actus reus*.”⁵⁸ The objective circumstances of their capture and confinement vitiate the voluntariness of their bringing the controlled substance into the jail. It

⁵³ Colman, A. *Conscious*, in *A DICTIONARY OF PSYCHOLOGY* (Oxford University Press 2015). Retrieved 5 May 2023, from <https://www.oxfordreference.com/view/10.1093/acref/9780199657681.001.0001/acref-9780199657681-e-1799>.

⁵⁴ *Supra* note 34.

⁵⁵ MODEL PENAL CODE and COMMENTARIES § 2.01 cmt. 1. This reasoning squares with *People v. Grant*, in which the Supreme Court of Illinois explains that lack of control by the conscious mind defines only “[c]ertain involuntary acts.” *People v. Grant*, 71 Ill. 2d 551, 558, 377 N.E.2d 4, 8 (1978) (emphasis added). *See also* *Martin v. State*, 31 Ala. App. 334, 335 (Ala. Ct. App. 1944) (“[A]n accusation of drunkenness in a designated public place cannot be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer.”).

⁵⁶ *State v. Eaton*, 143 Wash. App. 155, 157 (2008), *aff’d*, 168 Wash. 2d 476 (2010).

⁵⁷ *See, e.g.*, *Eaton*, 143 Wash. App. 155 (vacating conviction of a person who was convicted of bringing a controlled substance into jail after a controlled substance was found on the person during a search incident to arrest at a jail); *State v. Cole*, 142 N.M. 325 (2007) (same); *but see* *State v. James*, 74 N.E.3d 769 (Ohio Ct. of App. 2016) (affirming contraband conviction because the accused did not inform the officers that he was in possession of a controlled substance during his arrest and jailing); *State v. Gneiting*, 167 Idaho 133 (2020) (same).

⁵⁸ *Eaton*, 143 Wash. App. at 157; *Cole*, 142 N.M. 325 (“We conclude that, under these circumstances, the *actus reus* element of the crime is not met because Defendant did not voluntarily enter the detention facility.”).

follows that more than consciousness is at play when determining voluntariness; the objective circumstances surrounding the conduct in question are also pertinent.

Michael Corrado contends that a voluntary act is one that “the actor must have been able to avoid choosing” to carry out.⁵⁹ In doing so, he argues that the voluntariness inquiry should not center on whether the actor “had only one alternative, but rather [whether] the other alternatives were so far beyond what we normally require of a person that the law will not account of them as genuine alternatives.”⁶⁰ Similarly, others contend that “an actus reus element is voluntary whenever the defendant could have done otherwise,” which is “related to the ability to choose or do otherwise.”⁶¹ Likewise, HLA Hart explains, “What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities.”⁶² At least one state appellate court has also gauged voluntariness by the ability to do otherwise.⁶³

This focus on the ability or opportunity to do otherwise may be unconvincing to those who argue that not having any choice but to commit an act does not necessarily make that act involuntary.⁶⁴ Indeed, it is conceivable that a person may be forced to commit an act that they intended to commit anyway.⁶⁵ But, if such a person unquestionably could not have acted otherwise, then there is an obvious, significant reason to doubt that their act was voluntary. If, as several state appellate courts have held, voluntariness should be

⁵⁹ Corrado, *supra* note 17, at 1557.

⁶⁰ *Id.* at 1548.

⁶¹ Farrell et al., *supra* note 17, at 1579.

⁶² HLA Hart, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 152 (Oxford, Oxford University Press, 1968); *see also* Michael S. Moore, *Relating Neuroscience to Responsibility, Comments on Hirstein, Sifferd, and Fagan's Responsible Brains*, 16 CRIMINAL LAW AND PHILOSOPHY 289-98, 293 (2022) (contending that, in order for a person to be held criminally responsible for action A, they “must have *been able* to have chosen and done other than A.”) (emphasis in original); Federica Coppola, THE EMOTIONAL BRAIN AND THE GUILTY MIND 13-14 (2021) (“[C]ulpability hinges upon the fair opportunity to do otherwise.”).

⁶³ *State v. Tippetts*, 180 Or. App. 350, 357 (2002) (explaining that Oregon’s statutory voluntariness requirement was to “require more than awareness,” that is, to “require[] some evidence that the defendant had the ability to choose to take a particular action.”).

⁶⁴ Yaffe, *supra* note 17, at 181 (citing Frankfurt, H. “Alternate Possibilities and Moral Responsibility,” in H. Frankfurt, THE IMPORTANCE OF WHAT WE CARE ABOUT, (1988)).

⁶⁵ *Id.* at 14-15.

affirmatively proven by the prosecution,⁶⁶ then the inquiry should not be whether the accused can disprove voluntariness beyond any doubt. Instead, the inquiry should be whether the prosecution can prove voluntariness beyond a reasonable doubt.⁶⁷

Another critique of the focus on choice is that it would “lead to an infinite regress: a voluntary act would depend on an internal decision, and this decision would itself depend on a prior internal conscious decision to make the first decision, and so on.”⁶⁸ Such a choice-centric determination would be unworkable and infinite, especially if required in every criminal case. This critique merely demonstrates the difficulty of assigning criminal responsibility based on choice, but it does not explain why an ability to do otherwise is not essential for a finding of voluntariness in criminal proceedings.⁶⁹

Some may contend that the mens rea element renders the voluntariness requirement cumulative and inessential.⁷⁰ Indeed, there is significant overlap between *intentionality* and *voluntariness*.⁷¹

But the mens rea element is not coterminous with—or inclusive of—the voluntariness requirement, in part, because it does not fully account for the subjective component of the requirement. Not all mens rea elements require intentionality. Some mens rea elements, for example, only require *awareness*, *knowledge*, or *recklessness*.⁷² To

⁶⁶ See, e.g., *People v. Reg.*, 60 N.Y.2d 270, 276 (1983) (“[E]lements’ of an offense: include ‘a culpable mental state (mens rea) and a voluntary act (actus reus) (Penal Law, § 15.10).’”); *People v. Fardan*, 82 N.Y.2d 638, 645 (1993) (“the People remain responsible for proving the fundamental elements of mens rea and actus reus beyond a reasonable doubt.”); *People v. Martino*, 970 N.E.2d 1236, 1240 (Ill. App. 2 Dist., 2012) (reversing conviction of aggravated battery because the prosecution did not prove the voluntariness of the acts at issue beyond a reasonable doubt); *Valenzuela v. State*, 943 S.W.2d 130, 132 (Tex. App. 1997) (“[T]he burden lies with the State to prove that the accused acted voluntarily.”); *State v. Sanders*, 117 Haw. 322, *3 (Ct. App. 2008) (“The involuntary act defense presented here, like the ignorance-or-mistake-of-fact defense . . . , is a non-affirmative defense that the State must disprove beyond a reasonable doubt.”); *State v. Allum*, 2009 MT 15, ¶ 12 (noting “numerous cases that establish a ‘voluntary act’ as an essential element of any criminal offense.”); Farrell et al., *supra* note 17, at 1612 (“[V]oluntariness must be treated as an essential element of every crime.”). But, in other jurisdictions, prosecutors do not have an explicit burden to prove voluntariness. Denno, *supra* note 17, 396-399 (listing states with no explicit voluntariness requirement).

⁶⁷ *Infra* Part IV.

⁶⁸ Pardo et al., *supra* note 17, at 128.

⁶⁹ See Michael S. Moore, ACT AND CRIME 115 (1993) (further discussing the infinite regression objection and responses thereto).

⁷⁰ See Hart, *supra* note 62, at 107 (“[I]n most cases the lack of knowledge or foresight will be enough to exclude liability, and it will not be necessary to bring in any doctrine concerning involuntary movement”).

⁷¹ Moore, *supra* note 69, at 120 (conceiving *volition* as “a species of intention.”).

⁷² Or. Rev. Stat. Ann. § 163.208 (West) (“A person commits the crime of assaulting a public safety officer if the person intentionally *or* knowingly causes physical injury to the other

perhaps state the obvious, a person may be aware of their involuntary conduct.⁷³ For example, a person may be aware that they are reflexively grabbing onto somebody in front of them in response to being shoved from behind, but this awareness does not make their act of grabbing voluntary.

Even a finding that a person had an intentional mental state does not necessarily equate to a finding that their conduct was voluntarily performed. In order to satisfy the voluntariness requirement, there has to be a nexus between the accused person's mental state and the conduct in question. For example, in *Brown v. State*, the accused person had argued at trial that he fired a gun as a direct result of being bumped by another person.⁷⁴ Despite record evidence corroborating this defense, the trial court denied the accused person's request for a voluntariness instruction.⁷⁵ On appeal, the prosecution argued that the issue of voluntariness was subsumed by the "intentionally and knowingly" mens rea element of murder.⁷⁶ But the appellate court rejected this argument. Specifically, the court found that, mens rea notwithstanding, the accused person was entitled to a voluntariness instruction.⁷⁷ As explained by the court, "the issue of the voluntariness of one's conduct, or bodily movements, is separate from the issue of one's mental state."⁷⁸ Regardless of whether the accused person intended to fire the gun, the factfinder would have had to acquit him if it reasonably doubted that the shooting was a conscious manifestation of this intent, as opposed to an involuntary consequence of his being bumped by another person. Thus, the trial court should have issued the voluntariness instruction.

But, while courts are constitutionally mandated to treat mens rea as an essential element for all but strict liability criminal offenses,⁷⁹

person...) (emphasis added); Or. Rev. Stat. Ann. § 161.085 (West) (defining mens rea of *knowingly* as "with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists."); Tippetts, 180 Or. App. at 356 ("[A] voluntary act requires something more than awareness. It requires an ability to choose which course to take—i.e., an ability to choose whether to commit the act that gives rise to criminal liability."); Cleveland, OH Code § 615.08(a) (2006) ("No person, recklessly or by force, shall resist or interfere with a lawful arrest of himself or herself or another.").

⁷³ Epstein-Ngo, *supra* note 23, at 38 (using a self-reporting questionnaire to assess involuntary stress responses after the fact).

⁷⁴ *Brown*, 955 S.W.2d at 277.

⁷⁵ *Id.*

⁷⁶ *Id.* at 280.

⁷⁷ *Id.*

⁷⁸ *Id.* (internal quotation marks and brackets omitted); see also *State v. Lara*, 183 Ariz. 233, 235, 902 P.2d 1337, 1339 (1995) ("[I]ntent is one of our culpable mental states descriptive of *mens rea*, not *actus reus*.").

⁷⁹ *United States v. Berrios-Centeno*, 250 F.3d 294, 297 (5th Cir. 2001) ("By any standards, the mens rea element is 'material' or 'essential.'") (citing *Morissette v. United States*, 342 U.S. 246, 250).

the Supreme Court has not explicitly required courts to do the same for the voluntariness requirement. To be sure, in *Morissette v. United States*, the Supreme Court affirmed “the central thought that wrongdoing must be conscious to be criminal.”⁸⁰ *Morissette* suggests that the putative moral principles embedded in the criminal law prohibit criminalizing involuntary conduct.

The Court has also previously invalidated a criminal law that was not narrowly tailored to proscribe voluntary conduct. In *Robinson v. California*, the Court held that a state law that criminalized drug addiction unconstitutionally permitted cruel and unusual punishment.⁸¹ The Court found, in part, that drug addiction is “an illness which may be contracted innocently or involuntarily,” and thus should not be subject to criminal sanction.⁸² Voluntariness, then, bore on the *Robinson* court’s determination that the criminal proscription at issue was in contravention of the Eighth Amendment.

If voluntariness is an essential element of criminal responsibility—as some commentators and courts maintain⁸³—then the doctrinal treatment of involuntary resistance also has Fifth, Sixth, and Fourteenth Amendment implications. The Due Process Clause of the Fourteenth Amendment proscribes the state from depriving a person of their liberty unless the prosecution proves every essential element of the charged offense.⁸⁴ Moreover, the Fifth Amendment places a burden on prosecutors to prove these elements beyond a reasonable doubt.⁸⁵ Finally, the Due Process Clause requires trial courts to instruct juries on each essential element of the charged offense.⁸⁶

It follows that people accused of resisting law enforcement may be constitutionally entitled to have a factfinder determine whether the prosecutor has proved voluntariness beyond a reasonable doubt. If the

⁸⁰ *Morissette*, 342 U.S. at 252.

⁸¹ *Robinson v. California*, 370 U.S. 660, 666 (1962).

⁸² *Id.* at 667; *see also* *Jones v. City of Los Angeles*, 444 F.3d 1138, 1136 (9th Cir. 2006), vacated on other grounds, 505 F.3d 1006 (9th Cir. 2007) (holding that the Eighth Amendment proscribes a municipality from criminally punishing “homeless individuals for involuntarily sitting, lying, and sleeping in public.”); *Martin v. City of Boise*, 902 F.3d 1031, 1035 (9th Cir. 2018), opinion amended and superseded on denial of reh’g, 920 F.3d 584 (9th Cir. 2019) (holding that Eighth Amendment proscribes a municipality from criminally punishing “homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them.”).

⁸³ *Supra* note 17.

⁸⁴ *See, e.g.*, *Patterson*, 432 U.S. at 210; *Leland*, 343 U.S. at 795.

⁸⁵ *See, e.g.*, *In re Winship*, 397 U.S. at 364; *Cool*, 409 U.S. at 104.

⁸⁶ *Evanchyk v. Stewart*, 340 F.3d 933, 939 (9th Cir. 2003) (citing *United States v. Gaudin*, 515 U.S. 506, 509–10 (1995); *Osborne v. Ohio*, 495 U.S. 103, 122–24 & n. 17, (1990); *Sandstrom v. Montana*, 442 U.S. 510, 521–24 (1979); *In re Winship*, 397 U.S. 358, 364 (1970)).

charged offense is a felony, the accused may be entitled to having a jury make this determination, at the trial court's instruction.

But the Supreme Court has not yet explicitly determined whether the criminalization of all involuntary conduct is unconstitutional. *Robinson* proscribed the criminalization of one's *status*, such as the "'status' of narcotic addiction,"⁸⁷ but not one's involuntary *conduct*. In *Powell v. Texas*, a plurality of the Court refused to extend *Robinson* to prohibit criminalization of being in public while exhibiting symptoms of the *condition* of chronic alcoholism.⁸⁸ The *Powell* plurality expressed a reticence to create "a constitutional doctrine of criminal responsibility," concluding that "doctrine[s] of criminal responsibility" must remain "the province of the States."⁸⁹ This reticence suggests the Court is unlikely to determine whether the Constitution requires prosecutors to affirmatively prove voluntariness beyond a reasonable doubt.

The Court's failure to explicitly recognize voluntariness as an essential element of criminal responsibility is particularly glaring in resisting cases because, as discussed in Part II, the fearsome, violent dimensions of arrests may elicit involuntary resistance.

II. POLICE VIOLENCE AND INVOLUNTARY RESISTANCE

Police violence—such as the use of canines, pepper spray, or non-consensual capture—may elicit involuntary resistance. Using insights from psychology, neuroscience, and evolutionary biology, this Part uncovers how the violence of an arrest may elicit involuntary resistance.⁹⁰ In doing so, this Part brings the need for the voluntariness requirement in resisting cases into sharper relief.

⁸⁷ *Robinson*, 370 U.S. at 666.

⁸⁸ *Powell v. State of Tex.*, 392 U.S. 514, 536 (1968).

⁸⁹ *Id.* at 534. The Court again expressed similar concerns in *Kahler v. Kansas*, a case in which it determined Kansas's insanity test was not in contravention of the constitution. 140 S. Ct. 1021, 1028 (2020) ("Defining the precise relationship between criminal culpability and mental illness...is a project for state governance, not constitutional law."). The *Kahler* court, however, did not address the petitioner's Eighth Amendment claim because it was not preserved for appellate review. *Id.* at 1027, n. 4. The Supreme Court, however, *has* proscribed explicitly instructing juries that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." *Sandstrom*, 442 U.S. at 526.

⁹⁰ I acknowledge that—aside from Olivett et al., *supra* note 23—there are not many psychological or other scientific studies that have determined that arrests may precipitate involuntary resistance. This is, in great part, due to the near impossibility of replicating the conditions of an arrest in a lab. As psychologists Arne Öhman and Susan Mineka explain, "Because of self-evident ethical constraints, the level of aversiveness that human research participants can be exposed to is rather limited." Öhman et al., *supra* note 2, at 492; *see also* Bertram et al., *supra* note 23, at 4. Indeed, it is hard to imagine scientists siccing canines on, deploying pepper spray in the face of, or forcibly handcuffing research subjects. Even if this

Researchers at the National Institute of Mental Health have cast arrest as a form of community violence.⁹¹ People who are exposed to community violence may react by engaging in coping strategies, involuntary stress responses, or both.⁹² *Coping strategies* are conscious and volitional. *Involuntary stress responses*, in contrast, “are not under one’s conscious control” and “may consist of physiologically based reactivity to stress that is innate or automatic in nature”⁹³ *Automatic* in this context means “elicited independent of cognition,” before one is able to refrain.⁹⁴

Like survivors of other forms of violence, people may reflexively and involuntarily resist an arresting officer.⁹⁵ The findings detailed below suggest that involuntary stress responses may occur during an arrest, hence *involuntary resistance*. These findings comport with multiple state court findings that police officers may induce a person to flee just by pursuing them.⁹⁶

Involuntary stress responses have emotional, physiological, and behavioral components.⁹⁷ The psychological and other scientific

were possible, research participants in scientific studies differ from arrestees in that “[t]hey [research participants] know that they are participating in a kind of a make-believe situation that never is allowed to become dangerous.” Öhman et al., *supra* note 2, at 513. People who are arrested have no such assurances— au contraire, their arrest could possibly end in their death. Nevertheless, studies tracking people’s responses to pictures of aggressive humans and guns—in addition to more coercive experiments on animals—shed light on the emotional, physiological, and behavioral dimensions of human involuntary stress responses. Öhman et al., *supra* note 2, 498, 504; Bastos et al., *supra* note 23, at 260; Perusini et al., *supra* note 23, at 422 (referencing study that “showed that viewing unpleasant stimuli generates defensive reactions [in humans].”); Bertram et al., *supra* note 23, at 2 (“On the behavioral level, many . . . defensive responses, are highly consistent across animals.”).

⁹¹ Richters J. E., Saltzman W. *Survey of Exposure to Community Violence: Self-Report Version* (National Institute of Mental Health 1990); See also William Blackstone, 3 Commentaries on the Law of England *120 (Chicago 1979) (“The least touching of another’s person willfully, or in anger, is a battery, for the law cannot draw the line between different degrees of violence.”).

⁹² Epstein-Ngo, *supra* note 23, at 38; *Id.* at 39 (explaining the need to distinguish between coping strategies and involuntary stress responses).

⁹³ *Id.* at 39; see also Kozłowska et al., *supra* note 23, at 264 (“For humans, the activation of defense responses—the sudden change in motor and physiological state—may be experienced as overwhelming, and beyond conscious control.”).

⁹⁴ Öhman et al., *supra* note 2, at 504

⁹⁵ Olivett et al., *supra* note 23 at 7.

⁹⁶ *Com. v. Thibeau*, 384 Mass. 762, 764 (1981) (finding that flight from a police officer does not per se constitute reasonable suspicion because “otherwise, the police could turn a hunch into a reasonable suspicion by inducing the conduct justifying the suspicion.”); *State v. Beauchesne*, 151 N.H. 803, 814, 868 A.2d 972, 981 (2005) (same); *People v. Thomas*, 660 P.2d 1272, 1275 (Colo. 1983), *overruled* by *People v. Archuleta*, 980 P.2d 509 (Colo. 1999) (same).

⁹⁷ Kozłowska et al., *supra* note 23, at 268 (“Flight-or-fight responses are active defense responses— coordinated patterns of emotional-behavioral-physiological response—that are activated when animals are confronted with imminent danger, such as being actively pursued or attacked by a predator.”).

findings detailed below suggest that each of these components are capable of arising in the context of an arrest.⁹⁸

The intention here is not to detail and adjudicate empirical debates related to stress responses—such tasks are beyond the scope of this Article and are better left to experts in psychology, neuroscience, and evolutionary biology. Rather, the following presents a *prima facie* case that the violence of an arrest may elicit involuntary resistance. The plausibility of this claim militates in favor of making voluntariness an explicit, essential element of resisting offenses.

A. *Emotional Dimension*

The emotion of fear plays a central role in activating an involuntary stress response.⁹⁹ Put plainly, fear motivates people to avoid and escape danger.¹⁰⁰ Fearsome threats are capable of eliciting a reaction that “is mostly not under direct voluntary control but rather is activated extremely rapidly and automatically, independent of intentions, and often without conscious awareness.”¹⁰¹

Two subtypes of fears may activate the stress response system: *in-born fears* of evolutionarily relevant threats and *learned fears* of novel threats.¹⁰² As explained below, an arrest involves both types of fearsome stimuli. Particular attention is paid to how a learned fear of an arresting officer may be especially pronounced among black or brown people who are subjected to racially subordinating policing. Ultimately, whether a fearsome stimulus evokes an involuntary stress

⁹⁸ Elsewhere, psychologists have stress responses in relation to community violence exposure. Epstein-Ngo, *supra* note 23, at 39.

⁹⁹ Öhman et al., *supra* note 2, at 483 *see also* Frijda et al, *supra* note 23, at 207 (“emotions of some intensity tend to induce impulsive actions that are not preceded by deliberation, nor are they intentional in the strict sense.”); Coppola, *supra* note 62, at 93 (“Emotions are automatic survival responses to relevant environmental challenges. . .”) (citing J. Ledoux, *Feelings: What Are They and How Does the Brain Make Them?*, 144 DAEDALUS, JOURNAL OF AMERICAN ACADEMY OF ARTS AND SCIENCES 96, 100 (2015).

¹⁰⁰ Öhman et al., *supra* note 2, at 483.

¹⁰¹ *Id.* at 505; *see also* Kozłowska et al., *supra* note 23, at 264 (“For humans, the activation of defense responses—the sudden change in motor and physiological state—may be experienced as overwhelming, and beyond conscious control.”); Epstein-Ngo, *supra* note 23, at 39 (“initial responses to stress may or may not be within a person’s conscious awareness or under an individual’s control.”). Öhman et al. refer specifically to the *fear module*, which they define as “a relatively independent behavioral, mental, and neural system that is specifically tailored to help solve adaptive problems prompted by potentially life-threatening situations in the ecology of our distant forefathers.” *Id.* at 484. Herein, I use *stress response* to refer to fear module activation, defensive responses, the defense cascade, and flight-or-fight responses.

¹⁰² Öhman et al., *supra* note 2, at 487; Rafael Yuste, *supra* note 23 at 360-62 (discussing the neurological underpinnings of innate and learned fears).

response depends on one's "evolutionary preparedness" and life experiences.¹⁰³

In-born fears relate to survival threats that our species's evolutionary forebears encountered, such as venomous snakes, hostile human adversaries, and bodily pain.¹⁰⁴ People are essentially primed to rapidly react to such fearsome stimuli because avoidance thereof was essential to our evolutionary forebears' survival.¹⁰⁵ Specifically, in-born fears aid in survival by motivating avoidance of and escape from primordial deadly threats.¹⁰⁶

An arrest may evoke in-born fears because it involves at least two evolutionarily relevant threats: a deadly human adversary and bodily pain.¹⁰⁷ People, therefore, may be predisposed to fear arresting officers. This fear may, in turn, serve as an emotional driver of involuntary resistance.¹⁰⁸

This is not to say that people are invariably fearful of arresting officers, or that such fear invariably results in fearful reactions. People's perceptions differ: one person may perceive an event as threatening, while another may not.¹⁰⁹ Even when two people perceive the same event as threatening, their response to the threatening event may differ.¹¹⁰

The difference in individuals' perceptions and responses are attributable, in part, to differences in life experiences.¹¹¹ Fear learning entails a form of conditioning in which stimuli of a cultural origin (as opposed to an evolutionary origin) is associated with danger, death, or

¹⁰³ Öhman et al., *supra* note 2, at 488; Michael et al., *supra* note 23, at 208 ("This perception is a function of prey's phylogenetic and ontogenetic experiential history with regards to the environmental stimuli present at the time of imminence determination.").

¹⁰⁴ Öhman et al., *supra* note 2, 483-86 ("fears and social phobia originated from a second evolved behavioral system related to conspecific attack and self-defense"); *id.* at 505 (describing angry faces as "biologically fear-relevant stimuli"); Bertram et al., *supra* note 23, at 2 (including "aggressive conspecific[s] and bodily pain as "threatening stimuli that are relevant for most species").

¹⁰⁵ Öhman et al., *supra* note 2, at 483

¹⁰⁶ *Id.* at 483.

¹⁰⁷ *Id.* at 486 ("fears and social phobia originated from a second evolved behavioral system related to conspecific attack and self-defense"); *id.* at 505 (describing angry faces as "biologically fear-relevant stimuli"); Bertram et al., *supra* note 23, at 2 (including "aggressive conspecific[s] and bodily pain as "threatening stimuli that are relevant for most species").

¹⁰⁸ Such fearfulness may also form a part of the "expressive dimension[]" of an act of resistance. *See* Alice Ristroph, *The Constitution of Police Violence*, 64 *UCLA L. REV.* 1182, 1228 (2017) ("It [resistance to police officers] expresses a desire for self-preservation, for dignity, for liberation from intrusions perceived to be arbitrary or unjust.").

¹⁰⁹ Breedlove et al., *supra* note 23, at 490

¹¹⁰ *Id.* at 490

¹¹¹ Northoff, *supra* note 23, at 133; Öhman et al., *supra* note 2, at 487 (explaining that "other conditions such as the presence of other aversive stimuli or a pre-existing state of fear or anxiety in the organism may enhance the likelihood of an evolutionarily primed stimulus to elicit fear.").

trauma.¹¹² A person may even learn to fear an object or event vicariously—that is, without ever having encountered it.¹¹³

For instance, a person may fear snakes or spiders without knowing what dangers they pose, but this same person may not fear guns until they learn about the dangers thereof. They may develop a fear of guns, even if they are never shot or never come into contact with a gun. Indeed, multiple studies have found that even pictures of guns pointed away from a viewer may elicit a stress response in the viewer.¹¹⁴ That is, guns are known to be so deadly that the mere sight of one may evoke a desire to flee, even if the gun is not aimed at the viewer.¹¹⁵ In sum, an object or event associated with danger, death, or trauma may be the subject of a learned fear sufficient to trigger an involuntary stress response.¹¹⁶

The environment in which the arrest occurs may consist of an atmosphere of state violence, in which law enforcement officers are perceived as acutely fearsome threats.¹¹⁷ An arrest entails being captured by a gun-wielding person whose aim, in part, is often to subject the person arrested to criminal punishment.¹¹⁸ Moreover, arresting officers may use potentially deadly force against those who violently resist arrest. An arrest, then, involves multiple culturally relevant fearsome stimuli, including guns, patrol vehicles, and law enforcement officers. Even people who have never encountered a law enforcement officer may learn to fear them through vicarious accounts of harmful encounters with law enforcement.¹¹⁹

¹¹² Öhman et al., *supra* note 2, 487, 499, 504. Conditioned fears should not be conflated with conditioned, habitual responses. The former is an emotion that is learned. In contrast, the latter is a behavioral response that stems from a habit of engaging in—or training to specifically engage in—said behavior.

¹¹³ *Id.* at 498 (discussion about vicarious fear conditioning); Epstein-Ngo, *supra* note 23, at 43 (finding that both personal victimization and witnessing community violence was positively associated with involuntary stress responses).

¹¹⁴ Öhman et al., *supra* note 2, 491-92; Bastos et al., *supra* note 23, at 256 (“We conclude that exposure to threat [gun] directed-away pictures might have led to a pre-disposition to active escape, that is, resembling the ‘flight’ stage of defense cascade.”).

¹¹⁵ *Id.*; Bastos et al., *supra* note 23, at 256

¹¹⁶ Bastos et al., *supra* note 23, 257-60.

¹¹⁷ Holmes et al., *supra* note 23, at 63 (“Unpleasant interactions with the police condition citizens to fear them.”).

¹¹⁸ Law enforcement officers may arrest civilians for aggravated crimes like murder, or petty infractions like not wearing a seatbelt. *Atwater v. Lago Vista*, 532 U.S. 318 (2001) (finding that an arrest for a seatbelt violation was constitutional).

¹¹⁹ Holmes et al., *supra* note 23, at 66 (“Vicarious accounts shared by citizens inculcate and reinforce pejorative stereotypes and beliefs depicting police as dangerous, and they educate others on precautions to avoid problems when dealing with police officers.”).

This learned fear may give rise to an appraisal of arresting officers as deadly, fearsome threats.¹²⁰ Such appraisals are largely automatic—although they may or may not be subsequently interspersed with conscious, deliberative processes.¹²¹ Put differently, a person does not have to consciously choose to fear law enforcement officers in order to experience fear upon seeing them. Automatically, a person may retrieve and process information regarding prior contact with law enforcement, the arresting officer, the context of the arrest, and the circumstances of the arrest.

The dimensions of such automatic appraisals may include the anticipated effects of the encounter, the ability to cope with the encounter, and whether the encounter obstructs the person's needs.¹²² Pertinent needs include bodily autonomy, healthy attachments with loved ones, and self-esteem.¹²³ An arrest—and the incarceration it prefigures—necessarily place these needs in jeopardy.¹²⁴

Such fearful appraisals may be especially common in municipalities plagued by unconstitutional and racially subordinating policing.¹²⁵ Over the past fifteen years, the Civil Rights Division of the United States Department of Justice (DOJ) has produced myriad reports detailing various police departments' unconstitutional patterns and practices, such as using excessive force,¹²⁶ conducting unlawful

¹²⁰ Frijda et al. define “appraisal” as “[T]he information that confers personal meaning to brute perceived events, which is drawn from environmental stimuli plus their temporal and spatial context, plus that drawn from actually interacting with the event, and that which is drawn from stored, associated information.” Frijda et al., *supra* note 23, at 3. Elsewhere, Frijda defines appraisal as “the information processes that enrich incoming event information, providing with meaning that makes the event relevant to the individual...[and] amounts to retrieving information on what can be expected from the event...and [] what he or she may do to cope or deal with that [event].” Frijda, *supra* note 23, at 206. *See also* Coppola, *supra* note 62, at 117 (“[T]he reason for and way in which people appraise and respond to salient stimuli with specific emotional and behavioural reactions depends on the socio-environmental context.”).

¹²¹ Frijda, *supra* note 23 at 206.

¹²² Frijda et al., *supra* note 23, at 3.

¹²³ *Id.* at 3.

¹²⁴ The collateral consequences of criminal conviction may include the loss of housing, social relationships, social status, employment, earning potential, and cognitive and emotional functioning. Eve Hanan, *Incapacitating Errors: Sentencing and the Science of Change*, 97 *DENVER LAW REVIEW* 151, 142-53 (2019).

¹²⁵ Holmes et al., *supra* note 23, at 63 (“[T]he police charged with protecting citizens from the wrongdoers among them are yet another symbol of danger to many citizens of such [disadvantaged minority] neighborhoods.”); *id.* at 61 (“[I]n some important respects the police constitute a marauding band invading the territory of an outgroup.”); *id.* at 63 (“[u]npleasant interactions with the police condition citizens to fear them.”).

¹²⁶ DOJ, INVESTIGATION OF MPD, *supra* note 23, 9-30; DOJ, INVESTIGATION OF LMPD, *supra* note 23, 11-19; DOJ, INVESTIGATION OF CPD, *supra* note 23, 22-45; DOJ, INVESTIGATION OF BPD, *supra* note 23, 74-115; INVESTIGATION OF FPD, *supra* note 23, 28-41.

searches,¹²⁷ and engaging in racially discriminatory law enforcement practices.¹²⁸

Tellingly, many of these investigations were precipitated by highly publicized killings of black people, such as George Floyd in Minneapolis,¹²⁹ Laquan McDonald and Rekia Boyd in Chicago,¹³⁰ Michael Brown in Ferguson,¹³¹ Breonna Taylor in Louisville,¹³² and Freddie Gray in Baltimore.¹³³ Amid this spate of police killings of black people, the Federal Bureau of Investigation has produced multiple reports detailing white supremacists' ongoing infiltration of law enforcement agencies.¹³⁴

Violent, invasive, and racially subordinating policing does not just exist in the pages of DOJ reports; instead, it is a part of the lived

¹²⁷ DOJ, INVESTIGATION OF CPD, *supra* note 23, 22-26; C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 30 (2011) [hereinafter DOJ, INVESTIGATION OF NOPD]; DOJ, INVESTIGATION OF BPD, *supra* note 23, 24-39.

¹²⁸ DOJ, INVESTIGATION OF MPD, *supra* note 23, 9-30; DOJ, INVESTIGATION OF LMPD, *supra* note 23, 38-53; DOJ, INVESTIGATION OF NOPD, *supra* note 127, 31-50; DOJ, INVESTIGATION OF BPD, *supra* note 23, 47-73; DOJ, INVESTIGATION OF FPD, *supra* note 23, 62-78.

¹²⁹ DOJ, INVESTIGATION OF MPD, *supra* note 23, at 1.

¹³⁰ DOJ, INVESTIGATION OF CPD, *supra* note 23, at 19.

¹³¹ DOJ, INVESTIGATION OF FPD, *supra* note 23, 27.

¹³² DOJ, INVESTIGATION OF LMPD, *supra* note 23, at 2.

¹³³ DOJ, INVESTIGATION OF BPD, *supra* note 23, at 19. Similarly, on July 27, 2023, the DOJ announced its investigation of the City of Memphis and the Memphis Police Department. Dept. of Justice, Civil Rights Div., *Justice Department Announces Pattern or Practice Investigation of the City of Memphis and the Memphis Police Department*, <https://www.justice.gov/opa/pr/justice-department-announces-pattern-or-practice-investigation-city-memphis-and-memphis>. While announcing the investigation, United States Attorney General Merrick Garland noted that people of Memphis were still hurting after the tragic death of Tyre Nichols," a black man who was beaten to death by Memphis police officers. *Id.*

Investigation of the Ferguson Police Department 47, 55 (2015) (Ferguson Report), online at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

¹³⁴ FED. BUREAU OF INVESTIGATION, COUNTERTERRORISM POLICY DIRECTIVE AND POLICY GUIDE 89 (2015), <https://archive.org/details/CounterterrorismPolicyDirectiveAndPolicyGuide/page/n35/mode/2up> (“[d]omestic terrorism investigations focused on militia extremists, white supremacist extremists, and sovereign citizen extremists have identified active links to law enforcement officers”); COUNTERTERRORISM DIV., FED. BUREAU OF INVESTIGATION, WHITE SUPREMACIST INFILTRATION OF LAW ENFORCEMENT 3 (2006), [<https://perma.cc/R2BP-UZ8H>] (finding that “white supremacist groups have historically engaged in strategic efforts to infiltrate and recruit from law enforcement communities” and “[w]hite supremacist presence among law enforcement personnel is a concern,” in part, because it “can result in [] abuses of authority.”).

experience, collective memory,¹³⁵ and historical trauma¹³⁶ of communities menaced by law enforcement. Elsewhere, I explore the history of anti-black policing, from Antebellum slave patrols to modern racially subordinating policing.¹³⁷ Today, people who experience or witness police violence, invasive police searches, and evidently racist policing may become conditioned to appraise law enforcement to be a hostile, fearsome threat to their liberty and lives.¹³⁸

A young black man, for example, may have such an appraisal if he has previously witnessed police officers capturing and shackling people who look like him against their will, if his parents have told him that police officers are likely to target and brutalize him because of his race and gender,¹³⁹ or if he has watched videos of police officers

¹³⁵ Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2106 (2017) (“Collective memories are based on some combination of personal experience, observing and hearing about the experiences of others, passing accumulated wisdom from parent to child, observing interactions in public space, seeing (or not seeing) murals and other forms of public commemoration, watching television, scrolling through social media, and sharing all of these personal and vicarious experiences in the community.”).

¹³⁶ Andie K.S. Conching and Zaneta Thayer, *Biological Pathways for Historical Trauma to Affect Health: A Conceptual Model Focusing on Epigenetic Modifications*, 230 *SOCIAL SCIENCE & MEDICINE* 74 (2019) (defining historical trauma as “collectively experienced trauma in an ancestral generation that is associated with poor mental and physical health outcomes in descendant generations.”).

¹³⁷ Shukur, *supra* note 11.

¹³⁸ In 2021, a team of research psychologists found that “Black Americans are reportedly more distrusting of members of law enforcement [than white Americans], perceive higher levels of racial bias, and are more prone to report negative encounters characterized by discrimination and injustice.” Leslie A. Anderson, Margaret O’Brien Caughy & Margaret T. Owen, “*The Talk*” and Parenting While Black in America: Centering Race, Resistance, and Refuge, 48 *J. BLACK PSYCH.*, no. 3-4, Sep. 2022, at 475, 476; Rod. K. Brunson & Ronald Weitzer, *Police Relations with Black and White Youths in Different Urban Neighborhoods*, 44 *URBAN AFFAIRS REV.* no. 6, July 2009, at 864 (finding that white youth in the researchers’ study “had a less troubled relationship with and more positive views of the police than Black youth.”). Myriad empirical studies have made similar findings. Bell, *supra* note 135, 2069-72 (compiling empirical evidence supporting the conclusion that black people are more likely to view the police as illegitimate and trustworthy than whites). As Monica Bell explains, “objective structural conditions (including officer behaviors and the substantive criminal law)” may give birth to a “subjective orientation” in which black and brown communities view police and courts as “illegitimate, unresponsive, and ill equipped to ensure public safety.” *Id.*, at 2067.

¹³⁹ The scourge of racially subordinating policing may compel black and brown parents to have “The Talk” with their children. During The Talk, black and brown parents teach their children about “racial profiling and diffusing negative perceptions and stereo-types to avoid being hurt or killed by police during routine activities, such as driving or walking down the street.” Tracy R. Whitaker & Cudore L. Snell (2016) *Parenting while powerless: Consequences of “the talk”*, *Journal of Human Behavior in the Social Environment*, 26:3-4, 303-309. The Talk may also understandably contribute to said youth mistrusting law enforcement officers. This mistrust may partially determine resistance to law enforcement.

murdering civilians who look like him. For instance, Keenan Anderson, a young black man, repeatedly exclaimed, “They’re trying to George Floyd me!” as he resisted the Los Angeles Police Department officers who repeatedly electrified him with a Taser gun.¹⁴⁰ As Keenan faced imminent capture, the highly publicized killing of George Floyd was at the top of his mind. Hours later, Keenan tragically died after suffering cardiac arrest.¹⁴¹

In *Commonwealth v. Warren*, the Supreme Judicial Court of Massachusetts found that “where the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculation cannot be divorced from...a pattern of racially profiling black males in the city... .”¹⁴² The court went on to note that, under the circumstances, a black male’s flight “is not necessarily probative of a suspect’s state of mind or consciousness of guilt.”¹⁴³ The court recognized that the appraisal of police as racially subordinating may induce a black man to flee from an officer.¹⁴⁴ Black women may have similar appraisals, as they are also subjected to racially subordinating policing.¹⁴⁵

Such fearful appraisals are not limited to black people. One recent study found that, from 2013 to 2019 annual rates of police killings of Pacific Islanders and indigene people in the United States were roughly on par with those suffered by black people.¹⁴⁶ This study also noted that the spillover effects of such fatal police violence “may be

The intention here is not to disparage parents who have The Talk, but instead to limn one means by which social conditions that necessitate The Talk may precipitate resistance. Indeed, the Talk is necessary in the wake of racial harms like the 15-year-old black boy, Bobby Moore, who, in 2011, was killed while fleeing a white police officer who had previously attended a Klu Klux Klan meeting, or the McCurtain County Commissioner in Oklahoma who, in April 2023, waxed poetic—with the county sheriff—about when whites could “take a damn black guy and whoop their ass and throw him in the cell,” and wishing he could “[t]ake them [two black reporters] down to Mud Creek and hang them up with a damn rope.” Radley Balko, Opinion, ‘If You Don’t Get at That Rot, You Just Get More Officers Like Josh Hastings,’ WASH . POST (Nov. 2, 2018); Richard Luscombe, “Oklahoma officials recorded making racist and threatening remarks.” Guardian News & Media Limited (Apr 18 2023). In this atmosphere of violent racial subordination, the Talk is necessary, even if it is fear inducing.

¹⁴⁰ Bella, Timothy. “BLM co-founder’s cousin dies after police repeatedly use Taser, video shows.” *Washington Post*, 12 Jan. 2023.

¹⁴¹ *Id.*

¹⁴² *Com. v. Warren*, 475 Mass. 530, 539 (2016).

¹⁴³ *Id.* at 540.

¹⁴⁴ *Id.* at 538 (“Were the rule otherwise, the police could turn a hunch into a reasonable suspicion by inducing the [flight] justifying the suspicion.”) (quoting *Com. v. Stoute*, 422 Mass. 782, 665 N.E.2d 93 (1996)).

¹⁴⁵ Galán, C.A., Auguste, E.E., Smith, N.A. and Meza, J.I. (2022), *An Intersectional-Contextual Approach to Racial Trauma Exposure Risk and Coping Among Black Youth*. 32(2) J RES ADOLESC., 588.

¹⁴⁶ Schwartz GL, Jahn JL, *Disaggregating Asian American and Pacific Islander Risk of Fatal Police Violence* 5. PLOS ONE. 2022 Oct 10;17(10):e0274745. The rates for white, Latine, and Asian people, however, were much lower.

even more significant in smaller ethnic groups” and may impact the mental health of “community members with the same racial/ethnic background as descendants.”¹⁴⁷

This not to say that Latine people are exempt from actual or vicarious experiences that condition them to fear law enforcement. Undocumented Latine people are among those impacted by anti-immigration policies and practices that breed pervasive fear of capture and deportation.¹⁴⁸ This fear is reinforced by exploitative employers who threaten to report undocumented workers to law enforcement if they request back pay.¹⁴⁹

Police violence may also condition some Latine people to fear law enforcement. Weeks after Raul de la Cruz, a neurodivergent Latino, was shot by New York City police officers, Cruz’s 9-year-old cousin confronted officers, exclaiming, “You’re abusers! Really, you’re abusers! ... You wanted to kill him!”¹⁵⁰ The shooting of her cousin, then, may have shaped this child’s perception of police officers as abusive.

This is not to suggest that only black or brown people may fear law enforcement. Again, any person, regardless of race, may have an in-born fear of an aggressive adversary attempting to capture their bodies. And certainly a white person may learn to fear police officers and the guns they wield. The prevalence of racially subordinating policing, however, may uniquely condition black and brown people to fear policing and arrests.

In addition to fearing racial violence, fears of sexual violence at the hands of law enforcement officers may pervade, especially among black women, who are disproportionately affected by police sexual violence.¹⁵¹ Police sexual violence has a long history in the United States.¹⁵² Such violence may take various forms, such as sexual

¹⁴⁷ *Id.* at 7.

¹⁴⁸ Lindsay Pérez Huber, “*Como Una Jaula De Oro*” (*It’s Like A Golden Cage*): *The Impact of DACA and the California Dream Act on Undocumented Chicanas/Latinas*, 33 *CHICANA/O-LATINA/O L. REV.* 91, 108 (2015) (describing state “laws sought to severely restrict the lives of the undocumented by enforcing immigration stops and authorizing the detaining of those that could not provide identification, creating a climate of fear and hostility.”).

¹⁴⁹ *Id.* at 116.

¹⁵⁰ Democracy Now!, *Family Demands Justice for Raul de la Cruz, Bronx Resident Critically Wounded by NYPD* (April 10, 2023), https://www.democracynow.org/2023/4/10/headlines/family_demands_justice_for_raul_de_la_cruz_bronx_resident_critically_wounded_by_nypd.

¹⁵¹ Galán, *supra* note 145, at 588.

¹⁵² Invisible No More, Database, <http://invisiblenomorebook.com/database/> (detailing over 600 cases of police sexual violence from 1945 through 2018); Andrea J. Ritchie, Outlook, *How Some Cops Use the Badge to Commit Sex Crimes*, *WASH. POST* (Jan. 12, 2018), https://www.washingtonpost.com/outlook/how-some-cops-use-the-badge-to-commit-sex-crimes/2018/01/11/5606fb26-ef3-11e7-b390-a36dc3fa2842_story.html.

harassment, forcible touching, sexual extortion, and rape.¹⁵³ Degrading misgendering and cross-gender strip searches of transgender people may also condition fear of arrests.¹⁵⁴

Such culturally relevant learned fears may be among the drivers of involuntary resistance to arrest. As such, they should be taken into account in prosecutions arising out of acts of resistance.

B. Behavioral Account

A person may experience an automatic defensive behavioral response during an encounter with an arresting officer.¹⁵⁵ The perceived imminence of the threat may play a pivotal role in precipitating such responses.¹⁵⁶ Imminence is measured by the “physical, temporal, and probabilistic closeness to contact.”¹⁵⁷ There are three key types of defensive responses: pre-encounter, post-encounter, and circa-strike.¹⁵⁸ Pre-encounter defensive behavior consists of precautionary actions taken when a threat does not pose an immediate danger and is not near.¹⁵⁹ Post-encounter defensive responses are taken once the threat is seen or otherwise perceived to be near.¹⁶⁰ Circa-strike defensive responses are taken just before, during, and immediately after the threat makes contact.¹⁶¹ The more

¹⁵³ Andrea J. Ritchie, *Shrouded in Silence: Police Sexual Violence: What We Know and What We Can Do About It* 4-5, *Interrupting Criminalization*, 2021, interruptingcriminalization.com/breaking-the-silence. The fact that hundreds of police officers have been arrested for sexual misconduct does not erase the harm these officers have caused survivors of police sexual violence, their loved ones, or their communities. Ritchie, *supra* note 152.

¹⁵⁴ *See* Order, *Marquez-Martinez v. USA*, No. 5:18-CT-3118 (E.D. N.C. July 9, 2019) ECF No. 68 (denying the federal government’s motion to dismiss an undocumented Latine transwoman’s claim that the cross-gender strip searches of her while in federal custody constituted tortious assault and battery).

¹⁵⁵ *See* Olivett et al., *supra* note 23 (detailing a series of psychological experiments in which participants more often exhibited automatic defensive responses when shown images of uniformed police officers than when they were shown images of civilians in street clothes).

¹⁵⁶ Fanselow et al., *supra* note 23, 202, 208. Fanselow et al.’s findings were based on studies of laboratory rats. Mobbs et al. made substantially similar findings in studies of humans. Mobbs et al., *When Fear Is near: Threat Imminence Elicits Prefrontal-Periaqueductal Gray Shifts in Humans*, *supra* note 23, 1082 (“Our results show a dynamic configuration of threat responses that include the PAG and are akin to what might be predicted from animal models of defensive avoidance.”).

¹⁵⁷ Perusini et al., *supra* note 23, at 419.

¹⁵⁸ Fanselow et al., *supra* note 23, 188-202; Mobbs et al., *When Fear Is near: Threat Imminence Elicits Prefrontal-Periaqueductal Gray Shifts in Humans*, *supra* note 23, 1080.

¹⁵⁹ Fanselow et al., *supra* note 23, at 188; Mobbs et al., *When Fear Is near: Threat Imminence Elicits Prefrontal-Periaqueductal Gray Shifts in Humans*, *supra* note 23, at 1080

¹⁶⁰ Fanselow et al., *supra* note 23, at 191.

¹⁶¹ *Id.* at 202.

imminent the threat, the more likely a target is to lose control over their defensive response thereto.¹⁶²

Once a deadly threat is seen or otherwise determined to be near, a target may freeze, that is, become immobile.¹⁶³ This instinctive immobility helps targets avoid detection and prepare to escape the detected threat.¹⁶⁴ It is as if “the freezing animal is tensed up and ready to explode into action if the freezing response fails it.”¹⁶⁵

If an escape is available, then the dominant defensive reaction is typically to flee.¹⁶⁶ The probability of the target attacking the threat, however, is maximal just before and as contact is made, which is when the target is least likely to control their behavior.¹⁶⁷ Once such a defensive reaction is triggered, it may continue until the threat or fear subsides.¹⁶⁸

An arrest necessarily involves capture at the hands of an arresting officer. And, as discussed in Part III, some arrests involve the use of acute police violence, such as canine attacks and the use of chemical weapons like pepper spray. This violence may cause a person to experience an automatic defensive response that continues throughout the duration of the arrest.

C. *Physiological Account*

The physiological account of involuntary stress responses reveals how the violence preceding or co-occurring with an arrest may cause an arrestee to reflexively resist.

¹⁶² Mobbs et al., *From Threat to Fear: The Neural Organization of Defensive Fear Systems in Humans*, *supra* note 23, at 12241 (“Thus, when the subjects thought there was a low probability of shock, they had more controlled locomotor behaviors, yet the knowledge they were likely to be caught increased locomotor errors.”); Bastos et al., *supra* note 23, at 260 (discussing observation that “as contact between predator and prey is about to take place, the probability of prey jump-attack is maximal . . .”); Bastos et al., *supra* note 23, at 260; Perusini et al., *supra* note 23, at 421.

¹⁶³ Perusini et al., *supra* note 23, at 421.

¹⁶⁴ Bastos et al., *supra* note 23, at 260 (discussing the theory that “immobility under attack embeds a concomitant action preparation to be released when escape opportunity is evoked.”).

¹⁶⁵ Fanselow et al., *supra* note 23, at 202.

¹⁶⁶ Bastos et al., *supra* note 23, at 253

¹⁶⁷ *Id.* at 260 (discussing observation that “as contact between predator and prey is about to take place, the probability of prey jump-attack is maximal . . .”); Bastos et al., *supra* note 23, at 260; Perusini et al., *supra* note 23, at 421.

¹⁶⁸ See Öhman et al., *supra* note 2, at 506 (“Once activated, fear runs its course with limited possibilities for cognitive interference.”); Frijda, *supra* note 23 (“Control precedence includes persistence over time, overcoming obstacles and interruptions, and attentional selectivity. . . . It is why impulsive actions often fail to reckon with harmful or disadvantageous consequences they might entail, but that could have been foreseen if one had taken the time and the cognitive trouble to do so.”).

People are generally equipped with a stress response system, which has evolved over the course of hundreds of millions of years.¹⁶⁹ This system is “reflexively wired” to move us away from danger.¹⁷⁰ Our evolutionary forebears needed this reflexive wiring in the wild, where a few milliseconds’ difference in defense activation could mean the difference between life and death.¹⁷¹ The reflexivity of this system does not allow for a “complete cognitive analysis” before the defensive action is carried out.¹⁷² Further, once an automatic, reflexive stress response is elicited, it is difficult to stop.¹⁷³ This is due to the primordial “need to rely on time-proven strategies rather than recently evolved cognitions to deal with rapidly emerging and potentially deadly threats.”¹⁷⁴

Once a person detects a threat, neural activity increases in forebrain structures, such as the amygdala.¹⁷⁵ The amygdala are a pair of masses that are pivotal in regulating emotions, including the emotion of fear.¹⁷⁶ Forebrain structures are involved in gathering information about a threat, associating the threat with danger, predicting possible outcomes of the threatening event, considering contingencies, and accounting for uncertainty.¹⁷⁷ They allow a target to “choose the most effective and resourceful strateg[ic]” response to the threat.¹⁷⁸ But these forebrain processes are relatively slow compared to those of some other brain regions.¹⁷⁹ Accordingly, in the face of an extreme threat, high-level forebrain processes may be inhibited as other brain regions attempt to elicit a rapid defensive response.¹⁸⁰

The more imminent the fearsome threat becomes—by, for

¹⁶⁹ Nesse et al., *supra* note 23, at 97; Öhman et al., *supra* note 2, at 502; Perusini et al., *supra* note 23, at 421.

¹⁷⁰ Öhman et al., *supra* note 2, at 483 (“Mammalian evolution has required the successful development of defense systems to cope with dangers that threatened to disrupt the transport of genes between generations.”); *id.* at 503; Löw et al., *supra* note 23, at 870 (“As with animals...the reflex was potentiated when viewers were confronted with an aversive cue”); Romero, *supra* note 23, at 547.

¹⁷¹ Öhman et al., *supra* note 2, at 503.

¹⁷² *Id.* at 502.

¹⁷³ *Id.* at 485.

¹⁷⁴ Öhman et al., *supra* note 2, at 485.

¹⁷⁵ Breedlove et al., *supra* note 23, at 480; Mobbs et al., “From Threat to Fear: The Neural Organization of Defensive Fear Systems in Human,” *supra* note 23, at 12241.

¹⁷⁶ Breedlove et al., *supra* note 23, at 47, 480.

¹⁷⁷ *Id.*; Mobbs et al., *From Threat to Fear: The Neural Organization of Defensive Fear Systems in Humans*, *supra* note 23, at 12241; Bertram et al., *supra* note 23, at 4.

¹⁷⁸ Bertram et al., *supra* note 23, at 4.

¹⁷⁹ Mobbs et al., *From Threat to Fear: The Neural Organization of Defensive Fear Systems in Humans*, *supra* note 23, at 12241.

¹⁸⁰ *Id.*, 1082-83; Mobbs et al., *From Threat to Fear: The Neural Organization of Defensive Fear Systems in Humans*, *supra* note 23, 12242; Perusini et al., *supra* note 23, at 422.

example, moving closer to its target—the more the target’s midbrain structures such as the periaqueductal gray (PAG) may predominate.¹⁸¹ If a person is physically harmed during a violent encounter, then they may experience a polysynaptic reflexive response.¹⁸² A person experiencing this reflexive response to pain may involuntarily extend and contract various muscles.¹⁸³

Midbrain structures are involved in producing rapid reflexive behaviors, such as freeze, flight, or fight.¹⁸⁴ One team of neuroscientists explains, “It is known that overactivity of the mid-brain PAG results in maladaptive responses such as panic, which manifest as uncoordinated behavior and *loss of control*.”¹⁸⁵ These physiological processes may unfold within a fraction of a second.¹⁸⁶

This physiological account of involuntary stress responses remains controversial among scholars who doubt that existing neuroscience sufficiently accounts for complex human behaviors.¹⁸⁷ It is, therefore, important to remember that, in addition to the physiological account of involuntary stress responses, there is also a behavioral account, which is detailed in the previous section.¹⁸⁸

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Given the foregoing, the voluntariness requirement is particularly salient in resisting cases. Arresting officers may evoke myriad fears and arrests may elicit automatic defensive responses beyond the resisters’ conscious control. And yet, trial courts do not treat voluntariness as an essential element of resisting offenses. Part III provides paradigmatic examples of trial courts failing to put

¹⁸¹ Mobbs et al., *When Fear Is near: Threat Imminence Elicits Prefrontal-Periaqueductal Gray Shifts in Humans*, *supra* note 23, 1080-82; Mobbs et al., *From Threat to Fear: The Neural Organization of Defensive Fear Systems in Humans*, *supra* note 23, 12236-37; Perusini et al., *supra* note 23, at 422.

¹⁸² Rafael Yuste, *supra* note 23, 270-71.

¹⁸³ *Id.*

¹⁸⁴ Mobbs et al., *When Fear Is near: Threat Imminence Elicits Prefrontal-Periaqueductal Gray Shifts in Humans*, *supra* note 23, 1080.

¹⁸⁵ Mobbs et al., *From Threat to Fear: The Neural Organization of Defensive Fear Systems in Humans*, *supra* note 23, 12241 (emphasis added).

¹⁸⁶ Romero, *supra* note 23, at 548.

¹⁸⁷ See Morse, *Criminal Law and Common Sense*, *supra* note 34, at 61 (“Despite the astonishing advances in neuroimaging and other neuroscientific methods, we still do not have sophisticated causal knowledge of how the brain works generally, and we have little information that is legally relevant.”); *but see* Moore, *supra* note 62, at 297 (concluding that “[n]euroscience can deepen our understanding of when persons are responsible and what enables them to be the responsible creatures that they are . . .”). I recognize that the fact that neural activity may increase in a certain brain structure before or during an act does not mean that said structure solely causes the act.

¹⁸⁸ See Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 Ohio St. J. Crim. L. 397, 405 (2006) (“If the person meets the behavioral criteria for responsibility, the person should be held responsible, whatever the brain evidence may indicate, such as the presence of an abnormality.”).

prosecutors to a burden of proving voluntariness in resisting cases; this despite meaningful evidence corroborating resisters' claims that the violence accompanying their arrest caused them to resist involuntarily.

III. SUBVERSION OF (IN)VOLUNTARINESS IN RESISTING CASES

This Part details the means by which the voluntariness requirement is subverted in resisting cases.

Jurisdictions formally allocate the burden of proving or disproving voluntariness in at least three different ways: (1) prosecutors are formally tasked with proving voluntariness beyond a reasonable doubt;¹⁸⁹ (2) prosecutors are tasked with proving voluntariness beyond a reasonable doubt only if a court determines that evidence in the record calls into question the voluntariness of the conduct at issue;¹⁹⁰ or (3) prosecutors are not explicitly tasked with affirmatively proving voluntariness.¹⁹¹

In *People v. Newton* (1970), for example, a state appellate court reversed Black Panther Party co-founder Huey Newton's conviction for killing a police officer.¹⁹² The appellate court found that the trial court impermissibly refused to issue a jury instruction on unconsciousness, despite credible evidence that the officer shot Newton first, causing Newton to "lose consciousness and go into [a]

¹⁸⁹ See *supra* note 66.

¹⁹⁰ See, e.g., *Baird v. State*, 604 N.E.2d 1170, 1176 (Ind. 1992) ("[O]nce evidence in the record raises the issue of voluntariness, the state must prove the defendant acted voluntarily beyond a reasonable doubt."); *Alford v. State*, 866 S.W.2d 619, 624 n. 8 (Tex. Crim. App. 1993) (en banc) ("[T]he State need not prove voluntariness unless the evidence raises the issue of accident, in which case the State must disprove the theory of accident beyond a reasonable doubt."); *State v. Almaguer*, 303 P.3d 84, 91 (Ariz. Ct. App. 2013) ("An instruction that the state must prove the defendant committed a voluntary act is appropriate only if there is evidence to support a finding of bodily movement performed unconsciously and without effort and determination[.]").

¹⁹¹ *Deer*, 175 Wash. 2d at 734 (holding that one can be found liable for a strict liability offense, such as rape of a child, even if one was asleep when the offense occurred); *Jones*, 137 N.C. App. at 231 (affirming trial court placing the burden on the accused to prove unconsciousness or automatism); *Denno*, *supra* note 17, 396-399 (listing states with no explicit voluntariness requirement). The state of Georgia, for example, does not list voluntariness in its general culpability statute and has only recognized voluntariness-related defenses involving claims that the accused has an "unconsciousness disorder." *Smith v. State*, 284 Ga. 33, 35 (2008). There are no readily available means of discerning how often resisting cases turn on the issue of voluntariness. Resistance-related appellate cases involving contestations of voluntariness are scarce. Acquittals due to findings of involuntariness may not result in appellate opinions because prosecutors generally cannot appeal acquittals. In addition, misdemeanor offenses may be dismissed during plea negotiations, or be less likely to be appealed because they carry less severe sentences than felony offenses. This paucity of appellate cases could also evince that prosecutors are generally not tasked with proving voluntariness in resisting cases, even when the law may require them to do so.

¹⁹² *People v. Newton*, 8 Cal. App. 3d 359 (Ct. App. 1970).

reflex shock condition”¹⁹³ More recently, however, resisters challenging voluntariness have not fared as well as Newton.

Below, I examine three cases in which accused persons credibly claimed their resistance was involuntary. These cases involve black or brown people who actually resisted arresting officers, contested voluntariness, and brought their cases to trial. The voluntariness requirement was subverted in each of these cases. That is, the requirement was not treated as an essential element of the charges against them. Each of the resisters was convicted despite meaningful evidence suggesting that their resistance was involuntary.

These cases demonstrate how trial courts’ failure to require prosecutors to affirmatively prove voluntariness prejudices resisters with credible involuntariness defenses.

A. *State v. Lomchanthala*

The Introduction briefly discusses the trial of Pariss Lomchanthala, a Pacific Islander man who was convicted of felony assault on an officer. Pariss’s case demonstrates the inadequacies of voluntariness requirements enumerated in general culpability statutes and pattern jury instructions.¹⁹⁴

By the time Pariss began resisting arrest, he was already being attacked by a police canine. The arresting officer later recalled, “The suspect [Pariss] was resisting and we fell back and to the ground, with Jett [the canine] still biting the suspect’s leg. . . . I chose to allow Jett to keep biting the suspect as a distraction while we fought,” and “[Pariss] started yelling, ‘Ok, Ok, he’s biting me, he’s biting me.’ However, the suspect [Pariss] continued to fight with me.”¹⁹⁵ The dog scratched and bit Pariss repeatedly, leaving his arms, legs, and back riddled with scratches and bite marks.¹⁹⁶

Soon, more officers arrived on the scene. One officer grabbed the top of Pariss’s eye sockets while another knelt on Pariss’s head.¹⁹⁷ It was only after Pariss was captured that the canine was ordered to stop attacking.¹⁹⁸ Pariss was later charged with resisting arrest and assaulting a public safety officer.¹⁹⁹

¹⁹³ *Id.* at 402-03.

¹⁹⁴ Or. Rev. Stat. Ann. § 161.095 (West); Or. Rev. Stat. Ann. § 161.085 (West).

¹⁹⁵ Smith Supp. Report, *supra* note 3, at 2 (“The suspect was resisting and we fell back and to the ground, with Jett still biting the suspect’s leg. . . . I chose to allow Jett to keep biting the suspect as a distraction while we fought.”).

¹⁹⁶ Photo. No. PC280045_SCSMITH, Incident # SMP12017712 – Supp. Report (May 13, 202, Salem Police Dept.).

¹⁹⁷ Gamble Supp. Report, *supra* note 4, at 1.

¹⁹⁸ *Id.*

¹⁹⁹ <https://webportal.courts.oregon.gov/portal/>.

Under Oregon state law “[t]he minimum requirement for criminal liability” is the performance of a voluntary act or omission, with a voluntary act being defined as “a bodily movement performed consciously.”²⁰⁰ Prior to Pariss’s arrest, the Court of Appeals of Oregon explained that the legislative intent underlying Oregon’s statutory voluntariness requirement was to “require more than awareness,” that is, to “require[] some evidence that the defendant had the ability to choose to take a particular action.”²⁰¹ For instance, a person may not be held criminally liable in Oregon’s state courts for bringing contraband into a jail if they were arrested and taken to jail while they happened to have contraband on them.²⁰² In theory, no criminal liability can be assigned in Oregon state courts if a prosecutor does not satisfy their burden to prove voluntariness.²⁰³ A fifty-state survey revealed that only eight have a voluntariness pattern jury instruction—with Oregon being one of the eight.²⁰⁴ Pariss, then, was seemingly well positioned to challenge voluntariness.

At his jury trial, Pariss sought to argue that his resistance was involuntary, given the violent circumstances of his arrest.²⁰⁵ Pariss’s arrest involved both evolutionarily relevant and culturally relevant fearsome threats, such as the attacking canine and arresting officer. Before releasing the police canine, the arresting officer believed Pariss was going to “flee or fight.”²⁰⁶ As explained in Part II, *flight* and *fight* are two predominant forms of involuntary stress responses.

Once the canine began biting him, Pariss might have lost control of his actions. Pariss’s instinct to resist may have predominated as the arresting officer began fighting him, the canine continued attacking, and Pariss’s “body became lodged against a sign post.”²⁰⁷ The officer in Pariss’s case admitted that the police canine continuously attacked Pariss throughout the attempted arrest.²⁰⁸ Thus, his contestation of voluntariness was credible. It would strain credulity to conclude that

²⁰⁰ Or. Rev. Stat. Ann. § 161.095 (West); Or. Rev. Stat. Ann. § 161.085 (West).

²⁰¹ Tippetts, 180 Or. App. at 357 (reversing a conviction for contraband because the prosecutor did not present “any evidence from which a reasonable juror could find that defendant had such a choice.”).

²⁰² *Id.*

²⁰³ Tippetts, 180 Or. App. at 356.

²⁰⁴ Or. UCrJI No. 1065; Mt. UCrJI No. 2-110; PIK Crim. 4th 52.075; DE UCrJI No. 4.25; CO UCrJI No. F:391; RAJI (Criminal) 3d Standard Criminal 35; Hawaii . UCrJI No. 7.16; NY UCrJI No.

²⁰⁵ Lomchanthala, 267 Or. App. at 540.

²⁰⁶ Oregon v. Lomchanthala, 2013 WL 8481316 (Or.App.), 3.

²⁰⁷ Lomchanthala, 267 Or. App. at 542-43.

²⁰⁸ Smith Supp. Report, *supra* note 3, at 2 (“The suspect was resisting and we fell back and to the ground, with Jett still biting the suspect’s leg. . . . I chose to allow Jett to keep biting the suspect as a distraction while we fought.”).

no reasonable jury could doubt the voluntariness of a person's reaction to being bitten and clawed by a canine.

And yet, Pariss's jury was not apprised of the prosecutor's duty to prove voluntariness; this, despite Pariss's request for a voluntariness jury instruction and evidence corroborating his contestation of voluntariness.²⁰⁹ In denying his request, the trial court claimed that the instruction "'introduce[d] additional terms' that were unrelated to other instructions or to the elements of the charged offense."²¹⁰ The trial court wrongfully disregarded Oregon's general statutory voluntariness requirement. The jury then found Pariss guilty and the court sentenced him to twenty-two months in prison.²¹¹

Unlike the trial court, the appellate court acknowledged that voluntariness was, in fact, an element of the offense.²¹² Moreover, it did not reject the possibility "that a rational jury could . . . find that a person was 'aware' of engaging in certain conduct without voluntarily engaging in that conduct."²¹³ Nevertheless, the appellate court did not find that the trial court erred in refusing to issue the requested voluntariness instruction. Rather, the appellate court effectively ignored the trial court's erroneous decision not to issue the instruction.

Ultimately, the court affirmed Pariss's conviction, finding that there was no evidence controverting the arresting officers' testimony that they saw Pariss fighting and "not flailing wildly."²¹⁴ The appellate court, then, failed to give due consideration to the fearsome and painful circumstances of Pariss's arrest, which were capable of impairing his ability to refrain from resisting. Instead, the appellate court wrongfully weighed the evidence in favor of the prosecution despite myriad evidence supporting Pariss's contention of voluntariness.²¹⁵

Pariss's case demonstrates that a state's recognition of the voluntariness requirement does not guarantee that a court will issue a voluntariness instruction when requested.

In addition, Pariss's case is an example of the mens rea element's failure to account for the full breadth of involuntary conduct. In

²⁰⁹ Lomchanthala, 267 Or. App. at 540.

²¹⁰ *Id.* at 540-41.

²¹¹ *Id.* at 540-41; App. Opening Br., Case No. A152232 (Or. App., May 10, 2013).

²¹² Lomchanthala, 267 Or. App. at 540.

²¹³ *Id.* at 542.

²¹⁴ *Id.*

²¹⁵ The year following the issuance of the *Lomchanthala* opinion, the Court of Appeals of Oregon further eroded the voluntariness requirement by (1) holding that "a defendant can consciously perform an act in the absence of alternatives" in *State v. Hess*, 273 Or. App. 26, 35, 359 P.3d 288, 293 (2015); and (2) holding that voluntariness instructions only need to be issued if there is evidence in the record of involuntariness in *State v. Beck*, 269 Or. App. 304, 311, 344 P.3d 140, 144 (2015).

Oregon, a person needs only to knowingly cause injury to a public safety officer in order to be found guilty of felony assault on a public safety officer.²¹⁶ The state defines *knowingly* as “with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists.”²¹⁷ A resister, then, may be convicted of felony assault of a police officer if the resister *knew* that they were assaulting a police officer, even if the resister did not *intentionally* assault the officer. Hence, the jury in Pariss’s case did not have to grapple with the possibility that Pariss was unable to refrain from resisting arrest as the canine attacked him. Instead, they only had to find that Pariss knew that the person he struggled against was a police officer, as if Pariss’s conduct occurred in a vacuum.

If, however, voluntariness were treated as an essential element—like *mens rea* was—then the trial court would have been required to instruct the jury on voluntariness, and the jury would have been forced to grapple with the acute violence of Pariss’s arrest.

B. *State v. Riojas*

Courts may also subvert the voluntariness requirement by shifting the burden to the accused, thereby requiring the accused to prove involuntariness. The following is an example of this means of subversion.

On a summer night in southwest Washington State, Mersadeze Riojas, a young Latina, was partying at a warehouse with some friends. At some point, police officers were dispatched to the warehouse to investigate a report of underage drinking, fighting, and “possibly a gun.”²¹⁸ When the police officers arrived at the warehouse, they heard people yelling and bottles breaking just before a young white woman who looked intoxicated ran out of the warehouse followed closely by Mersadeze, who also appeared to be intoxicated.²¹⁹ The white woman, Bailee Culver, told the officers, “Those Mexican girls are chasing me and . . . throwing bottles at me and I don’t know why.”²²⁰

²¹⁶ Or. Rev. Stat. Ann. § 163.208 (West) (“A person commits the crime of assaulting a public safety officer if the person intentionally or knowingly causes physical injury to the other person, knowing the other person to be a peace officer.”).

²¹⁷ Or. Rev. Stat. Ann. § 161.085 (West).

²¹⁸ Riojas, 184 Wash. App. 1013.

²¹⁹ *Id.* *1.

²²⁰ *Id.* at *1-2.

Mersadeze calmed down after a Latino police officer approached her.²²¹ Mersadeze told the officer that Bailee had “gone after” her friends, which is why Mersadeze chased her.²²² Shortly thereafter, a white male police officer approached Mersadeze. At this point Mersadeze embellished her story by claiming that Bailee had chased her with a knife.²²³ The Latino officer then went to investigate other partygoers, leaving Mersadeze with the white officer.²²⁴

The white officer then escalated the encounter. He asked Mersadeze “why she had been fighting,” to which Mersadeze responded that she “had *not*” been fighting.²²⁵ Mersadeze later testified that the officer began asking accusatory questions.²²⁶ Because both Bailee—who said those “Mexican girls are chasing me”—and the interrogating officer were white, Mersadeze believed that the white officer was treating Mersadeze like a suspect rather than a victim on account of her race.²²⁷ Mersadeze said “fuck this” and walked away.²²⁸ When the white officer told her she was being detained, Mersadeze responded “fuck you,” and continued to walk away.²²⁹

Next, the white officer grabbed Mersadeze’s arm, without warning.²³⁰ She later explained that when he grabbed her arm “she felt pain . . . [and] was very surprised by the action.”²³¹ Mersadeze then swung her other arm, hitting the white officer in the lip in the process.²³² She later testified that her response to the officer’s painful arm grab was an “automatic reaction” commensurate with her self-defense class training. Specifically, Mersadeze had been trained to “try to pull away” from someone who grabs you from behind and “hit their arm down.”²³³ The white officer later testified that Mersadeze’s striking him was “pretty much an ‘instantaneous thing.’”²³⁴

²²¹ Tony Buhr, *A Gang Savvy Detective*, UNION-BULLETIN (Dec. 6, 2017), https://www.union-bulletin.com/news/a-gang-savvy-detective/article_b598b994-dabd-11e7-9e19-9b88ca100c52.html; Riojas, 184 Wash. App. 1013.

²²² *Id.* at *1.

²²³ *Id.* at *2.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* (“Ms. Riojas would later testify that the sergeant’s questions were ‘[a]ccusatory . . . so I told him believe what he wants, obviously he is white, he is going to believe [Ms. Culver] because she is white.’”).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Washington v. Riojas*, 2013 WL 4051960 at 14 (Wash.App. Div. 3) [hereinafter “Riojas Appellant Br.”].

²³² *Riojas*, 184 Wash. App. 1013.

²³³ *Riojas Appellant Br.*, *supra* note 231, at 13.

²³⁴ *Id.* *9.

According to one witness, a struggle then ensued that ended with the white officer and another officer slamming Mersadeze to the ground, causing her face to hit the pavement.²³⁵ Mersadeze was then arrested and charged with felony assault on a law enforcement officer.²³⁶

Washington's criminal culpability statute does not contain a voluntariness requirement, but its courts have recognized this requirement.²³⁷ At least one aspect of Washington courts' conception of involuntariness is broader than that of the MPC's. Whereas the MPC excludes unconscious habitual conduct from the scope of involuntary conduct, Washington's courts have specifically held that automatic conditioned responses are involuntary.²³⁸ For example, an involuntariness defense is available to a veteran whose military training caused them to automatically strike someone who startled them from behind.²³⁹

Prosecutors, however, are not required to affirmatively prove voluntariness in Washington. Instead, the state's courts have construed contestations of voluntariness as a "lack of volition" affirmative defense.²⁴⁰ The Supreme Court has held that "[p]roof of nonexistence of all affirmative defenses has never been constitutionally required[.]"²⁴¹ Thus, states are permitted to require the accused to prove an affirmative defense, often by a preponderance of evidence. Accordingly, the trial court was permitted to place the burden regarding voluntariness on Mersadeze and not the prosecution.

The lack-of-volition affirmative defense did not ensure a determination of Mersadeze's claim of involuntariness. Mersadeze intended to argue that her striking the police officer was not a

²³⁵ *Id.* at *11.

²³⁶ Wash. Rev. Code Ann. § 9A.36.031 (West) ("Assault in the third degree is a class C felony.").

²³⁷ Riojas, 184 Wash. App. 1013, *9 (2014) (recognizing that Washington State's courts have "analyzed a defense of conditioned response as bearing on voluntariness as a component of a crime's actus reus.").

²³⁸ MODEL PENAL CODE and Commentaries § 2.01 (excluding unconscious but habitual conduct from the scope of involuntariness); MODEL PENAL CODE and Commentaries § 2.01 cmt. 2, n. 29 (noting that some states, unlike the MPC, do not explicitly exclude habitual conduct from scope of involuntary conduct); Utter, 4 Wash. App. at 143 (recognizing military veteran's defense that his violent act was an automatic response conditioned by his military training was cognizable, but affirming his conviction because he failed to provide sufficient evidence in support of his volitional defense).

²³⁹ Utter, 4 Wash. at 143.

²⁴⁰ Riojas, 184 Wash. App. at 9 (citing *State v. Deer*, 175 Wash. 2d at 733).

²⁴¹ *Patterson*, 432 U.S. at 210; *Dixon*, 548 U.S. at 17 ("[W]e presume that Congress intended the petitioner to bear the burden of proving the defense of duress by a preponderance of the evidence."); *see also Stanley*, 596 F.2d at 333 ("[W]e find no constitutional violation occurred by placing the burden of proof on petitioner to prove his insanity by a preponderance of the evidence.").

conscious action, but instead a non-conscious reflexive response borne of her self-defense training.²⁴² To prevail on this affirmative defense, Mersadeze had to prove by a preponderance of evidence that she was in an unconscious or automatistic state at the time of the conduct giving rise to her prosecution.²⁴³

To be sure, Mersadeze had evidentiary support for her affirmative defense. The officer who arrested Mersadeze was an evolutionarily and culturally relevant fearsome threat. By escalating the encounter, the officer may have evoked an in-born fear of aggressive men. Indeed, one team of researchers detected physiological threat responses in women who were shown a short video simulation of an attacking man.²⁴⁴ Mersadeze faced this threat in real life, as the male arresting officer grabbed her. In addition to posing a physical and gendered threat, the white officer who grabbed Mersadeze after the white woman told him “those Mexican girls are chasing me” posed a racial threat. As this fearsome threat—that is, the arresting officer—forcefully grabbed her from behind, the fearful Mersadeze might have lost control of her actions and reflexively struck the officer, especially if she was primed to do so by her self-defense training.

Further, the arresting officer testified that she reacted instantaneously to his grabbing her from behind without warning.²⁴⁵ Instantaneity suggests another marker of involuntariness, automaticity, which is a basis for exculpation under Washington’s lack of volition affirmative defense.²⁴⁶

But while trying to satisfy her burden of proof, Mersadeze encountered an evidentiary obstacle: the trial court’s exclusion of Mersadeze’s pertinent testimony about her self-defense training, which would have supported her argument that her resistance was an automatic conditioned response to being assaulted from behind.²⁴⁷ The reason the court provided for this exclusion was that Mersadeze did not present expert testimony regarding automatism.²⁴⁸ Mersadeze may not have been put to this weighty burden if the prosecutor had the burden of proving her resistance was voluntary.

Having found that Mersadeze did not satisfy her burden of proof, the trial court did not issue a voluntariness jury instruction.²⁴⁹ The jury,

²⁴² *Id.* at 7, 9.

²⁴³ *State v. Gardner*, 184 Wash. App. 1021 (2014).

²⁴⁴ Bertram et al., *supra* note 23, at 4.

²⁴⁵ *Riojas Appellant Br.*, *supra* note 231, at 9.

²⁴⁶ *Id.* at *9 (describing the lack of volition affirmative defense as necessitating an “unconscious or automatistic act”).

²⁴⁷ *Id.* at *9.

²⁴⁸ *Riojas*, 184 Wash. App. at 1013, *10. (2014).

²⁴⁹ *State v. Riojas*, Jury Instructions, Cause No. 12-1-00250-6 (Nov. 20, 2012, Wash. Sup. Ct., Walla Walla).

then, was not required to grapple with the fact that Mersadeze was a Latina so concerned for her safety that she took a self-defense class—and then was painfully grabbed from behind by a white man at night. Instead, the jury was presented a decontextualized version of the arrest.

Moreover, the mens rea requirement did not require Mersadeze's prosecutor to prove voluntariness. In Washington, the crime of assaulting a law officer requires a mens rea of intent. But, unlike Oregon, Washington does not define *intent* as entailing a "conscious objective."²⁵⁰ Instead, it defines *intent* as an "objective or purpose to accomplish a result."²⁵¹ This capacious language may be (mis)read to cover even reflexive actions, such as jerking one's arm away from an officer who places handcuffs on too tight. Hence, without a voluntariness instruction, the jury could have voted to convict Mersadeze despite having reasonable reasons to doubt whether she consciously chose to resist the officers who assaulted her. In short, the mens rea element failed to capture the breadth of subjective and objective determinants of involuntary conduct.

Mersadeze was found guilty as charged and sentenced to twenty days in custody (although she was permitted to go to work), a year of community supervision, and a thousand dollars in fines and fees.²⁵² An appellate court affirmed her conviction, finding that Mersadeze was not "*qualified* to express an opinion on the automatic nature of her response."²⁵³

C. *Mayfield v. State*

In some resisting cases, trial courts may subvert the voluntariness requirement by letting it go unremarked during criminal proceedings. An example of this means of subversion may be found in the prosecution of Jerome Mayfield.

²⁵⁰ Or. Rev. Stat. Ann. § 161.085 (West)

²⁵¹ Wash. Rev. Code Ann. § 9A.08.010 (West).

²⁵² Riojas, 184 Wash. App. 1013 at 1, 13; *State v. Riojas*, Attachment to Not. of App., Cause No. 12-1-00250-6 (Jan. 11, 2013, Wash. Sup. Ct., Walla Walla).

²⁵³ *Id.* (emphasis in original). The appellate court also affirmed the denial of Mersadeze's request for a self-defense instruction, noting that Washington does not "permit[] citizens to claim a right of self-defense against law enforcement officials who are performing their duty in good faith and who do not place citizens in an imminent threat of serious bodily injury." *Id.* at *4, 12 (quoting *State v. Mierz*, 127 Wash. 2d 460, 482 (1995)). Thus, the court tacitly communicated that the "good citizen" does not resist police violence not likely to cause a serious bodily injury. See I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 654 (2018) ("Embedded in the Supreme Court's criminal procedure jurisprudence—at times hidden in plain sight, at other times hidden below the surface—are asides about what it means to be a 'good citizen.'").

After Jerome, a black man in Georgia, was told that he was being arrested for driving under the influence and with a broken windshield, Jerome resisted and ran away from multiple arresting officers.²⁵⁴ Once the officers caught up to Jerome, he “aggressively came toward” one of the officers, who then pepper sprayed him, twice.²⁵⁵

After being pepper sprayed, Jerome struggled against both the effects of the pepper spray and the arresting officers as they tried to capture and shackle his body.²⁵⁶ An officer then aimed his firearm at Jerome, who continued to struggle against the officers.²⁵⁷ Jerome was arrested and charged with a host of criminal charges, including two counts of felony obstruction of a law enforcement officer for kicking an officer in the groin and struggling with another officer. The acts giving rise to these charges occurred just after Jerome was pepper sprayed, and as he was presumably still experiencing the effects of the pepper spray.²⁵⁸

At trial, Jerome argued that “his physical resistance was a disoriented or involuntary response to the pepper spray.”²⁵⁹ This argument was credible. Pepper spray may induce “acute burning pain” on one’s skin, eye swelling, inflammation of mucus membranes, choking, sneezing, shortness of breath, chest tightness, disorientation, fear, hyperventilation, and—notably—loss of body motor control.²⁶⁰ In rare cases, pepper spray can be fatal. In 2015, a team of researchers noted that “[s]ince 1993, over 70 in-custody deaths ha[d] involved the use of OC [pepper] spray during the arrest process.”²⁶¹

But neither Georgia’s criminal culpability statute nor its pattern jury instructions contains an explicit voluntariness requirement.²⁶² Georgia’s felony obstruction statute also does not contain any such requirement.²⁶³ As a result, a person may be found criminally culpable in Georgia without any explicit determination of whether their conduct was voluntary.

²⁵⁴ Mayfield Warrant, *supra* note 17; Mayfield, 276 Ga. App. at 545.

²⁵⁵ Mayfield, 276 Ga. App. at 545.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ MF Yeung & William YM Tang, “Clinicopathological Effects of Pepper (Oleoresin Capsicum) Spray”, 21 HONG KONG MEDICAL JOURNAL 6, 544-46 (2015).

²⁶¹ *Id.* at 547.

²⁶² Ga. Code Ann. § 16-2-1 (West) (“A ‘crime’ is a violation of a statute of this state in which there is a joint operation of an act or omission to act and intention or criminal negligence.”); 2 Council of Superior Court Judges of Georgia, Suggested Pattern Jury Instructions § J(1) (4th ed. 2021).

²⁶³ Ga. Code Ann. § 16-10-24 (West).

To be sure, at least one Georgia appellate court has reversed a conviction on voluntariness grounds. But this case, *Smith v. State*, narrowly recognizes a voluntariness defense for people with “unconsciousness disorders.”²⁶⁴ In *Smith*, the appellate court reversed a conviction because the accused person was denied a voluntariness instruction, despite claiming that he was sleepwalking when he engaged in the conduct at issue.²⁶⁵ In explaining its decision, the court noted that “the Model Penal Code provides that a person who commits an act during unconsciousness or sleep has not committed a voluntary act.”²⁶⁶ Thus, an involuntary act under *Smith* is one carried out while the actor is not awake or aware of their surroundings.

Jerome’s conduct, however, does not fit under this narrow definition of involuntariness; he was undoubtedly conscious when he resisted the arresting officers. But Jerome still may not have consciously chosen to resist the officers, instead, his resistance may have been reflexive or otherwise non-conscious.

The involuntariness defense effectively being foreclosed, Jerome argued that the prosecution had not satisfied its burden of proving the requisite mens rea, intent.²⁶⁷ Georgia, however, does not require a finding that an act be consciously carried out in order to find that the act was intentional.²⁶⁸ A jury, then, could find a person guilty for conduct the jury believes the accused was not in conscious control of but intended to perform.

Ultimately, Jerome’s defense was unavailing and the jury found Jerome guilty of both counts of felony obstruction.²⁶⁹ For each count of obstruction, Jerome was sentenced to five years in prison without the possibility of parole, to be served consecutively; effectively, he

²⁶⁴ *Smith*, 284 Ga. at 35.

²⁶⁵ *Id.* at 33.

²⁶⁶ *Id.* (reversing conviction because the accused was not granted a voluntariness instruction even though there was evidence suggesting involuntariness and the MPC “provides that a person who commits an act during unconsciousness or sleep has not committed a voluntary act”). While the court repeatedly references the voluntary act requirement in *James v. State*, it does not define “voluntary act,” and ultimately determines that the accused person’s passive protection of a concealed weapon while being transported by law enforcement did not constitute an act. 112 S.E. 899, 900 (1922).

²⁶⁷ *Mayfield*, 276 Ga. App., 545–46 (“He argued that his physical resistance was a disoriented or involuntary response to the pepper spray and therefore he lacked the required criminal intent.”).

²⁶⁸ Georgia does not define intent or willfulness in its criminal statutes, and there is no case law requiring a preliminary finding of consciousness in order to find intent.

²⁶⁹ *State v. Mayfield*, Straight Time Sentence, Case No. 03-FCR-238-T (Ga. Sup. Ct., Franklin Co., April 4, 2004) (“*Mayfield Sentencing Document*”). Jerome was also found guilty of making a terroristic threat in contravention of GA ST § 16-11-37 because, once he arrived at jail, he threatened to kill one of his arresting officers. *Mayfield*, 276 Ga. App. at 545.

was sentenced to ten years' incarceration for resisting arrest at gunpoint after being pepper sprayed multiple times.²⁷⁰

This result may have been different if voluntariness had been treated as an essential element of the charges; the jury would have had to grapple with the possibility that Jerome was unable to refrain from resisting as he suffered from the effects of the pepper spray. The State of Georgia's failure to enshrine an explicit voluntariness element in its resisting offenses enabled the subversion of the voluntariness requirement in Jerome's case.

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The juries in the foregoing cases should have been required to determine whether there was reasonable doubt regarding the voluntariness of the resistance at issue. Instead, the resisters were convicted without any such determination. This, despite the circumstances of each of the cases casting doubt on the voluntariness of the resisters' actions.

In each of the foregoing cases the resister's ability to consciously control their response to the arresting officer may have been impaired by a reflexively-wired compulsion to protect themselves from bodily harm. The sheer violence of these arrests calls into question the voluntariness of these resisters' defensive responses.

These cases demonstrate that a state's mere recognition of the voluntariness requirement does not ensure that juries will be permitted to make a determination on credible claims of involuntariness. Moreover, granting trial courts discretion to disallow direct contestations of voluntariness—by, for example, denying requests for voluntariness jury instructions—increases the risks of credible contestations of voluntariness going unheard. Put differently, granting trial courts such discretion does not ensure that pertinent voluntariness determinations will be made in resisting cases.

Unlike the resisters in the foregoing cases, most accused people do not contest *mens rea*, assert affirmative defenses, or request jury

²⁷⁰ Mayfield Sentencing Document, *supra* note 269. Jerome was sentenced to an additional five-year consecutive sentence for threatening his arresting officer after his arrest. *Id.* Tellingly, at the same trial, Jerome was not charged with driving under the influence. Moreover, he was found not guilty of refusing to submit to a breathalyzer test and driving with a broken windshield. *State v. Mayfield*, State, Case No 03-FR00238, Disposition and Sentence (Ga. Sup. Ct., Franklin Co., April 4, 2004). That is, Jerome was ultimately sentenced to a decade in prison for resisting officers who pulled him over on suspicion of criminal activity that he would ultimately be acquitted of. *Mayfield*, 276 Ga. App. at 545 (noting the arresting officers initially pulled Jerome over after "receiv[ing] a broadcast to be on the look up for a possible impaired driver" and "observ[ing] that [Jerome's] vehicle had a broken windshield."). Jerome was incarcerated on May 7, 2003 and released from prison on May 5, 2018. Ga. Dept. of Corr., *Find an Offender: Jerome Mayfield*, accessible at <https://services.gdc.ga.gov/GDC/OffenderQuery/jsp/OffQryRedirector.jsp>.

instructions at trial—because the overwhelming majority of these cases end in guilty pleas. Over ninety percent of state and federal criminal cases end in plea bargains, which predominantly entail accused people pleading guilty in exchange for relatively less severe sentences that, in some instances, may secure their release from a lengthy period of pretrial incarceration.²⁷¹ The lack of adequate safeguards protecting involuntary resisters may significantly contribute to perceptions that the odds of an acquittal at trial are remote. As a result, prosecutors may feel emboldened to pursue criminal charges against involuntary resisters. Relatedly, the subversion of the voluntariness requirement diminishes the bargaining position of involuntary resisters during criminal prosecutions. This may lead more resisters to plead guilty than would otherwise.

There is, therefore, a need for interventions that reduce and eliminate the harmful criminalization and punishment of involuntary resisters.

IV. ELEVATING THE VOLUNTARINESS REQUIREMENT

This Part argues that voluntariness should be made an explicit, essential element of resisting offenses. That is, statutes criminalizing resistance should be amended to explicitly include voluntariness as an essential element. Elevating the voluntariness requirement would force factfinders to make a determination on the pivotal issue of voluntariness in resisting trials. In this way, an explicit, essential voluntariness element would provide involuntary resisters more protection against the harms of criminalization and incarceration.

If actus reus, alongside mens rea, is one of the “the traditional elements of the underlying crime that render an individual criminally liable,”²⁷² then the burden should be on the state to prove voluntariness.²⁷³ As the Supreme Court held in *Mullaney v. Wilbur*, “no unique hardship on the prosecution [] would justify requiring the defendant to carry the burden of proving a fact so critical to criminal culpability.”²⁷⁴ Voluntariness is one such fact.

²⁷¹ Erica Goode, *Stronger Hand for Judges in the “Bazaar” of Plea Deals*, N.Y. Times, Mar. 23, 2012, at A12 (“97 percent of federal cases and 94 percent of state cases end in plea bargains, with defendants pleading guilty in exchange for a lesser sentence.”).

²⁷² Leila Nadya Sadata & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 459 n. 271 (2000).

²⁷³ Corrado, *supra* note 17, at 1555 (“An issue that bears on the definition must be proved by the state beyond a reasonable doubt, while it is within the discretion of the legislature to decide who will bear the burden as to affirmative defenses, and what that burden will be.”)

²⁷⁴ 421 U.S. 684, 702 (1975).

An explicit, essential voluntariness element would force prosecutors to prove voluntariness beyond a reasonable doubt.²⁷⁵ It would also force prosecutors and factfinders to confront the fearsome, racially subordinating dimensions of punitive policing, which play a key role in precipitating fearful, involuntary resistance.

The call to make voluntariness an explicit element of resisting offenses departs from commentators who advocate for affirmative partial defenses for people whose capacity for rationality is episodically substantially diminished due to stress or grief;²⁷⁶ whose neurodivergence is “rationality-diminishing”;²⁷⁷ or whose alleged criminal conduct was “semi-voluntary.”²⁷⁸ These partial defenses would not be exculpatory; instead, they would allow accused persons to effectively be found guilty, but partially responsible.²⁷⁹

Such calls for affirmative partial defenses are rooted in fears that broader defenses may “open the floodgates to bogus claims.”²⁸⁰ These fears are overblown. Patently incredible contestations of voluntariness are unlikely to prevail in criminal court. If voluntariness were an explicit element, resisters would only be acquitted on voluntariness grounds if a factfinder—that is, a judge or jury—found a reasonable reason to doubt that the resistance at issue was voluntary.

Myriad lawmakers and courts already treat factfinders as fit to determine voluntariness. For instance, if an accused person argues that their unlawful behavior was a result of involuntary intoxication, then factfinders may be tasked with determining the voluntariness of the

²⁷⁵ *Supra* notes 83-86; *see also* *State v. Sanchez*, 393 S.W.3d 798, 803 (Tex. App. 2012) (prohibiting trial courts from “deviat[ing] from [] statutorily-mandated language by adding or deleting language”).

²⁷⁶ Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 299 (2003) (calling for a “guilty but partial responsible” affirmative defense for those whose capacity for rationality is substantial diminished at the time of the alleged criminal conduct); *see also* Coppola, *supra* note 62, at 215 (calling for a “situational generic partial excuse,” which would entail the accused proving that their conduct was the result of objectively and subjectively distressing circumstances).

²⁷⁷ E. Lea Johnston & Vincent T. Leahey, *Psychosis, Heat of Passion, and Diminished Responsibility*, 63 B.C. L. REV. 1227, 1271 (2022) (calling for a “diminished responsibility” affirmative defense that requires proof that the accused was mentally differently abled).

²⁷⁸ Denno, *supra* note 17, at 361 (calling for a partial excuse for those whose criminal acts were semi-involuntary and involuntary but evincing future dangerousness).

²⁷⁹ Morse, *supra* note 276, at 299.

²⁸⁰ Johnston, 63 B.C. L. REV. at 1272. Part of the federal government’s basis for not adopting an explicit voluntariness requirement to criminal culpability was the worry that such a prosecutorial burden could result in the “evasion of limitations placed on defenses such as intoxication and mental illness through inquiries as to voluntariness.” Final Report of the National Commission on Reform of Federal Criminal Laws, Proposed New Federal Criminal Code § 301 cmt. at 27 (1971).

intoxication.²⁸¹ Similarly, factfinders are charged with determining whether someone charged with an inchoate crime voluntarily abandoned their attempt to commit the crime.²⁸² Factfinders are also charged with determining whether possession of a weapon or controlled substance was voluntary.²⁸³ In addition, factfinders may determine whether an alleged confession was voluntarily made.²⁸⁴

In some jurisdictions, factfinders are already empowered to determine the voluntariness of allegedly criminal behavior, either as a general matter or when evidence of involuntariness is in the trial record.²⁸⁵ For example, the Hawai'i Pattern Jury Instructions, approved by the state's Supreme Court, provides, in pertinent part, "In any prosecution it is a defense that the conduct alleged in the charged offense does not include a voluntary act. . . . The burden is upon the prosecution to prove beyond a reasonable doubt that the Defendant's conduct as to the [] charge included a voluntary act. . . ." ²⁸⁶ Other states

²⁸¹ See, e.g. Del. Code Ann. tit. 11, § 423 (West) (providing for an involuntary intoxication defense); FL ST CR JURY INST 3.6(e)(1) ("if you find that the defendant was involuntarily intoxicated to the extent of being incapable of forming [a premeditated design to kill] [the intent to (specific intent charged)], or if you have a reasonable doubt about it, you should find the defendant not guilty of (crime charged or appropriate lesser-included offenses)"); NM R CR UJI 14-5106 ("An issue you must consider in this case is whether the defendant was intoxicated and if so, whether the intoxication was involuntary.").

²⁸² *McClover v. State*, 125 So. 3d 926, 927 (Fla. Dist. Ct. App. 2013) ("It is a defense to a charge of criminal attempt. . . that, under circumstances manifesting a complete and voluntary renunciation of his or her criminal purpose, the defendant: (a) [a]bandoned his or her attempt to commit the offense or otherwise prevented its commission.").

²⁸³ *State v. Chapa*, No. H-92-034, 1993 WL 323617, at *2 (Ohio Ct. App. Aug. 27, 1993) ("The court also instructed the jury that possession required a voluntary act on the part of the defendant."); *People v. Larry*, 218 Ill. App. 3d 658, 666, 578 N.E.2d 1069, 1074 (1991) ("[I]t was reversible error for the trial court to refuse to instruct the jury on voluntary possession."); *State v. Thomas*, 137 Haw. 207, *1 (Ct. App. 2016) ("[T]he jury instructions given by the Circuit Court properly precluded the jury from finding Thomas guilty absent a finding that he committed a "voluntary" or conscious act in possessing the drug.).

²⁸⁴ *State v. McDonald*, 187 Neb. 752, 755 (1972) ("Where the question of the voluntariness of an oral or written confession is in issue . . . It is the duty of the court not only to instruct as to what constitutes a voluntary confession, but also to instruct the jury to disregard the alleged confession if found to be involuntary.").

²⁸⁵ See, e.g., *Fardan*, 82 N.Y.2d at 645 ("the People remain responsible for proving the fundamental elements of mens rea and actus reus beyond a reasonable doubt."); *Martino*, 970 N.E.2d at 1240 (reversing conviction of aggravated battery because the prosecution did not prove the voluntariness of the acts at issue beyond a reasonable doubt); *Winstead*, 150 N.H. at 247 (affirming conviction where the evidence established "beyond a reasonable doubt the actus reus set out in a motor vehicle statute"); *State v. George*, 233 Ariz. 400, 403, 313 P.3d 543, 546 (Ct. App. 2013) ("The jury was properly instructed that it could find George guilty only if it found beyond a reasonable doubt that she committed a voluntary act"); *Baird*, 604 N.E.2d at 1176 ("[O]nce evidence in the record raises the issue of voluntariness, the state must prove the defendant acted voluntarily beyond a reasonable doubt."); *Alford*, 866 S.W.2d at 624 n. 8 ("[T]he State need not prove voluntariness unless the evidence raises the issue of accident, in which case the State must disprove the theory of accident beyond a reasonable doubt.").

²⁸⁶ *Hawaii* . UCrJI No. 7.16.

have similar pattern voluntariness instructions.²⁸⁷ Moreover, some state appellate courts have reversed or vacated criminal convictions due to trial courts' failure to issue voluntariness jury instructions or factfinders' failure to give due consideration to claims of involuntariness.²⁸⁸ Hence, making voluntariness an explicit, essential element would be consistent with myriad legislatures' and courts' tacit recognition that factfinders are competent to determine voluntariness.

An essential voluntariness element would better protect involuntary resisters from criminalization and incarceration than affirmative defenses, implied voluntariness requirements, and discretionary pattern jury instructions.²⁸⁹ Involuntary resisters would

²⁸⁷ Or. UCrJI No. 1065, Mt. UCrJI No. 2-110; PIK Crim. 4th 52.075; DE UCrJI No. 4.25; CO UCrJI No. F:391; RAJI (Criminal) 3d Standard Criminal 35; NY UCrJI No.

²⁸⁸ See, e.g., *People v. Newton*, 8 Cal. App. 3d 359 (Ct. App. 1970) (reversing criminal conviction due to failure to issue jury instruction on unconsciousness despite credible defense that a gunshot wound caused the accused to go into a "reflex shock condition."); *State v. Dinkel*, 311 Kan. 553, 465 P.3d 166 (2020) (reversing criminal conviction due to trial court's failure to issue a voluntariness instruction despite the accused's defense that her sexual contact with a minor was the result of her being raped by said minor); *Brown*, 955 S.W.2d 276 (reversing criminal conviction due to trial court's failure to issue a voluntariness instruction despite the accused's defense that the criminal conduct was a result of his being bumped by another person); *Tippetts*, 180 Or. App. 350 (reversing, in part, a conviction for possession of contraband that was involuntarily introduced into a county jail due to the accused person's arrest); *Eaton*, 143 Wash. App. 155, (same).

²⁸⁹ In some cases, the inclusion of the voluntariness requirement in a general culpability statute may actually make it harder for involuntary resisters to secure voluntariness jury instructions. For example, Texas's general culpability statute provides, "A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession." Tex. Penal Code Ann. § 6.01 (West). Texas courts have interpreted this statute to impose an affirmative burden on the state to prove voluntariness. *Valenzuela*, 943 S.W.2d at 132 ("[T]he burden lies with the State to prove that the accused acted voluntarily.") (citing *Lynn v. State*, 860 S.W.2d 599, 602 (Tex. App. 1993)). And yet, accused people are not entitled to a voluntariness jury instruction pursuant to this statute. This is because, under Texas state law, a contestation of voluntariness is merely an attempt to negate an element of an offense. And, while an accused person may be entitled to jury instructions on affirmative defenses, they are not entitled to such instructions to negate elements of an offense. *Id.* at 132 ("[T]he question of whether the defendant acted voluntarily, as opposed to involuntarily or accidentally, is not truly a defense but rather an element of the State's case in chief. And, when the accused raises that particular issue ... he is doing nothing more than trying to negate an element of the State's case. Thus, he is not entitled to an affirmative instruction on the matter.") (citations omitted). Moreover, the accused are only entitled to a voluntariness instruction if a judge determines that the evidence suggests the conduct at issue was involuntary. *Lynn*, 860 S.W.2d at 601 ("If the evidence does not raise the issue of involuntary conduct, the trial court need not include that instruction in its charge to the jury.") (citing *George v. State*, 681 S.W.2d 43, 47 (Tex.Crim.App.1984); *Williams v. State*, 630 S.W.2d 640, 644 (Tex.Crim.App.1982); *Gaona v. State*, 733 S.W.2d 611, 617 (Tex.App.—Corpus Christi 1988, pet. ref'd)); *Henry v. State*, No. 07-02-0021-CR, 2003 WL 194724, at *2 (Tex. App. Jan. 29, 2003) (affirming denial of voluntariness instruction because the accused could not point to record evidence suggesting involuntariness). As a result, even though prosecutors formally have a burden to affirmatively prove voluntariness, the accused effectively have the burden of proving involuntariness. Hence, a jurisdiction's recognition of the voluntariness requirement does not adequately protect involuntary resisters from criminalization and punishment

no longer have to shoulder the onerous burden of proving affirmative defenses. Trial courts would be required to issue voluntariness jury instructions. Most jurors would conscientiously follow voluntariness instructions by putting prosecutors to their burden of proof.²⁹⁰ And prosecutors forced to affirmatively prove voluntariness would decline more resisting cases than they would otherwise.²⁹¹

In addition, if the voluntariness requirement were elevated, appellate courts would be more likely to reverse convictions for resisting. Indeed, some of the most well-known appellate opinions discussing the voluntariness requirement reversed convictions of people whose conduct was actually or potentially evoked by police officers' uses of force.²⁹² More courts would similarly give the voluntariness requirement its due if it were elevated.

Making voluntariness an explicit element of resisting offenses may also spur more criminal defense attorneys to raise voluntariness challenges in resisting cases. Even without this reform, defense attorneys representing people accused of resisting should, when efficacious, challenge the voluntariness of the resistance in question. To avoid Mersadeze's fate, defense attorneys might retain experts in psychology or neuroscience to educate factfinders on involuntary stress responses and defensive automatic behaviors. Such experts could also opine on whether the circumstances of an arrest impaired a person's ability to choose alternative responses.

²⁹⁰ See Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward A Theory of Jury Interpretation of Criminal Statutes*, 96 Mich. L. Rev. 1199, 1234 (1998) ("Whatever a jury's capacity with regard to law application, considerable evidence suggests that jurors are conscientious about and committed to following instructions and correctly applying rules, and they believe they understand most instructions.").

²⁹¹ The reason for not pursuing a prosecution may vary. A prosecutor may decide that they cannot prove a particular resisting case beyond a reasonable doubt. A prosecutor could also determine that they categorically cannot prove the voluntariness of resistance or flight beyond a reasonable doubt. Alternatively, they may decide not to pursue such cases even if they determine that they can meet their burden to prove voluntariness. Why? Because they may conclude that punishing resistance to or flight from the violence of arrest is unjust. See generally, Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011); W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173 (2021).

²⁹² *Martino*, 970 N.E.2d 1236 (reversing conviction of aggravated battery because the evidence suggested that the battery was a result of the accused person being tased by a police officer); *Martin*, 31 Ala. App. at 335 (reverse conviction of public drunkenness because the accused person was only in public because officers took him from his home to the highway); *People v. Newton*, 8 Cal. App. 3d 359 (Ct. App. 1970) (reversing conviction for voluntary manslaughter because the trial court did not instruct the jury on unconsciousness, despite evidence that the accused person shot the decedent due to an unconscious reflexive reaction to being shot by the decedent first).

If a jurisdiction's general culpability statute only permits assigning criminal culpability for voluntary acts, defense attorneys should argue that this voluntariness requirement is an implied element of the offense, and that the prosecutor has the burden of proving voluntariness beyond a reasonable doubt. Similarly, if an appellate court in the jurisdiction has recognized the voluntariness requirement, then, again, defense attorneys should argue that this amounts to an implied element.

If, however, voluntariness were an explicit element of resisting offenses, then defense attorneys would not have to rely on general culpability statutes, obscure appellate opinions, or burdensome affirmative defenses. Resisters could testify about the fear they felt when the arresting officer attempted to capture their bodies, ordered a canine to attack them, grabbed them from behind, or pepper-sprayed them multiple times at gunpoint. Even if resisters did not testify, witnesses could provide testimony regarding the great fear that may have been evident from the resister's facial expressions, cries for help, or body language.

More broadly, elevating the voluntariness requirement would create more opportunities for factfinders to disrupt cycles of harm in communities impacted by violent and racially subordinating policing. As Fred Ginyard, Director of Organizing at the Philadelphia Bail Fund, explains, "[T]here's a cycle of violence and harm that's happening in our communities. And we need to take every opportunity to break that cycle."²⁹³

Police violence harms people who sustain physical and psychological injuries while involuntarily resisting arrest. A criminal conviction for resisting only compounds these harms. People like Jerome and Parris who are incarcerated for years due to their resistance may be exposed to elevated levels of violence in carceral facilities.²⁹⁴ Chronic exposure to such violence "may induce significant and long-standing alterations in the brain pathways that govern judgment; impulse control; empathetic responding; regulations of emotions; interpretation of stimuli, experience and social cues; [and] perception of threat."²⁹⁵ Moreover, the collateral consequences of a criminal conviction may include the loss of housing, social relationships, social

²⁹³ Jocelyn Simonson, *RADICAL ACTS OF JUSTICE* 48-49 (2023).

²⁹⁴ B Steiner and C Cain, *The Relationship Between Inmate Misconduct, Institutional Violence, and Administrative Segregation: A Systematic Review of the Evidence*, in *RESTRICTIVE HOUSING IN THE U.S.: ISSUES, CHALLENGES, AND FUTURE DIRECTIONS* (Washington DC, Department of Justice, National Institute of Justice, 2017) (noting that 7 to 20 percent of imprisoned people in the United States reported being violently victimized in a six-month period as compared to 2 percent of the total population in a one-year period.).

²⁹⁵ Federica Coppola, *supra* note 62, 117-18.

status, employment, earning potential, and cognitive and emotional functioning.²⁹⁶ Far from promoting a person's future welfare, criminalization and incarceration are harmful and can increase the likelihood that a person may reflexively resist a police officer or impulsively harm a civilian in the future.

Factfinders are in a powerful position to disrupt this cycle of harm. An essential voluntariness element would force factfinders to acknowledge and grapple with the fearsome, violent dimensions of punitive arrests; it would provide factfinders an opportunity acquit the accused in the face of doubts regarding the voluntariness of their resistance; and it may impel jurors to question the efficacy of punitive arrests as a safety-making strategy. But in order to ensure this interrogation occurs, the voluntariness requirement must be moved from the periphery of criminal adjudication to the center.

To be sure, acquitting a resister on voluntariness grounds would not reduce all of the potential physical or mental harms associated with their arrest and prosecution. Nor would it proactively protect people from police violence. Instead, it is but one of a suite of possible interventions that could reduce or eliminate such harms.

There is a risk, of course, that elevating the voluntariness requirement could further entrench and legitimate policing and prisons.²⁹⁷ Making voluntariness an explicit element of resisting offenses may further isolate and stigmatize those who do voluntarily resist law enforcement. It may also reinforce the belief that an acquittal somehow eviscerates the durable harms caused by punitive arrests, pre-trial incarceration, and criminal adjudication.²⁹⁸

But making voluntariness an essential element of resisting offenses—or all criminal offenses—would not increase funding for policing or incarceration, nor would it widen the net of either. Instead,

²⁹⁶ Eve Hanan, *Incapacitating Errors: Sentencing and the Science of Change*, 97 *Denver Law Review* 151, 142-53 (2019).

²⁹⁷ Amna A. Akbar, *Demands for A Democratic Political Economy*, 134 *HARV. L. REV. F.* 90, 104 (2020). As described by Amna Akbar, reformist reforms “aim to improve, ameliorate, legitimate, and even advance the underlying system.” *Id.* A key failure of reformist reforms, according to Angela Davis et al., is that they fail to “dismantle, or even address, the harms that are used to buttress the carceral state, including forms of gender and sexual violence.” Angela Y. Davis, Gina Dent, Erica Meiners, and Beth Richie. *ABOLITION. FEMINISM. NOW.* 88, (Haymarket Books, 2022). In contrast, non-reformist reforms “aim[] to unleash people power against the prevailing political, economic, and social arrangements and toward new possibilities.” Akbar, 134 *HARV. L. REV. F.* at 102. They, in the words of Ruth Wilson Gilmore, advance “changes that, at the end of the day, unravel rather than widen the net of social control through criminalization.” *Id.* at 242. While non-reformist reforms alone are not sufficient to realize a world without police or prisons, they are useful in stymieing the prison industrial complex as organizers and advocates work toward an abolitionist horizon. Akbar, 134 *Harv. L. Rev. F.* at 104.

²⁹⁸ Clair, Matthew and Woog, Amanda, *Courts and the Abolition Movement*, 110 *CAL. L. REV.* 1 (2022).

it would provide people prosecuted for experiencing involuntary stress responses with a vehicle to escape criminalization and incarceration. It would equip defense attorneys with a tool for securing their clients' liberty. It would force prosecutors, jurists, and jurors to acknowledge community violence and the impact this violence has on survivors. And, in resisting cases, contestations of voluntariness would help uncover, address, and reduce the harms used to buttress punitive policing.

The outcome in Pariss's, Mersadeze's, and Jerome's cases may have been different if voluntariness were an explicit, essential element of the resisting offenses levied against them.²⁹⁹ In Pariss's case, the jury might have found that, while Pariss was aware of his resistance, there was reason to doubt that he was voluntarily resisting as he was being attacked by the canine. Similarly, the jury might have decided there was a reasonable reason to doubt that Mersadeze consciously chose to instantaneously strike the officer when he forcefully grabbed her from behind. And Jerome's jury might have found that, even though he resisted the arresting officers, there was reasonable doubt regarding whether he was able to do otherwise as he was being arrested at gunpoint while suffering from the effects of two pepper spray deployments.

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Inigorating the voluntariness requirement in resisting cases would force jurors to contend with the context in which resistance unfolds, rather than just the resistant act itself. In addition to resisters' fearful emotions being relevant, the contextual factors that contribute to fearful appraisals of arresting officers would also be relevant. Juries could hear about the police violence the resister may have experienced or witnessed earlier in their lives or about how the violence a resister experienced during a previous incarceration increased their fear of policing and incarceration.

Resisters could thus use the logic and language of criminal law against the state to call into question the efficacy of punitive policing.³⁰⁰ The courtroom would then become a site of education about the criminogenic, harm-inducing dimensions of punitive policing and criminal punishment. Like abolitionist lawyers of the Antebellum Era who defended against cases brought under the Fugitive Slave Act, defense lawyers today could make "direct appeals

²⁹⁹ See Sanders, 117 Haw. 322 (vacating conviction because the accused person's request for a voluntariness instruction, pursuant to the state's general culpability statutes, was denied).

³⁰⁰ Simonson, *supra* note 293, at 11 (describing how organizers "use the legal logic and language of the criminal system—the master's tools—against the system").

to the conscience” and “appeals [that] require[] explicit consideration of the place of morality in the jury’s deliberations.”³⁰¹ A jury’s vote to acquit—due to insufficient proof of voluntariness—could be one of a host of collective actions that culminate in the eradication of punitive policing and the atmosphere of violence permeating the carceral state.

CONCLUSION

Punitive arrests are harmful, traumatic, and fearsome. Acute police violence, such as the use of police canines, pepper spray, or guns, may trigger uncontrollable defensive responses. Moreover, by evoking in-born fears of hostile human adversaries and learned fears of police and guns, an arrest may cause a person to reflexively resist, without having made a conscious decision to do so.

Currently, the state responds to this resistance by inflicting further harm on involuntary resisters in the form of criminal punishment. Making voluntariness an explicit element of resisting offenses would reduce involuntary resisters’ exposure to this harm. It would also amount to an acknowledgment that some—especially black and brown people—appraise arresting officers to be the violent capturers they are, and that such appraisals may elicit involuntary resistance. But justice does not solely consist of reducing the harm inflicted on survivors of arrests. Justice also entails eradicating the atmosphere of punitive violence that informs the appraisal of fear. This Article is a part of an ongoing effort to reveal, reduce, and ultimately eradicate the harms stemming from the violence of arrest.

³⁰¹ Cover, *supra* note 1, at 212.