

# How We Got Here: Race, Police Use of Force, and the Road to George Floyd

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## Introduction

America has a problem with race. It always has—From the colonial origins of America as a slave colony<sup>1</sup> to a constitutional founding divided over race.<sup>2</sup> There was the Civil War,<sup>3</sup> Reconstruction and its demise,<sup>4</sup> the Jim Crow and “separate but equal” era,<sup>5</sup> the civil rights movement of the 1950s and 1960s,<sup>6</sup> and—during the Covid-19 pandemic—racial disparity and disproportionate impact in terms of who is infected and economically burdened.<sup>7</sup> Arguably, there are two Americas, separate and unequal.

But America also has a problem with police. One of the defining problems of policing is effectively limiting officer discretion to ensure that law enforcement officials do not use state authority in an arbitrary and capricious fashion, especially in treating people of different racial or ethnic backgrounds unequally.<sup>8</sup> The problem of policing is especially troublesome when it comes to use of force—deadly or not—when it is used in a racially arbitrary way. This is the story of how over the last 30 or more years, Amadou Diallo, Rodney King, Michael Brown, Jamar Clark, Eric Garner, Breonna Taylor, and many other people of color who were victims of excessive force by the police. It is the story of how race, police, and the use of force are connected to produce a situation that happened on and after May 25, 2020 in Minneapolis, Minnesota when George Floyd—an unarmed Black male—died while exclaiming, “I can’t breathe” under the knee of a Minneapolis police officer, while three other officers looked on and did nothing.<sup>9</sup> It is the story of what appears to be another instance of excessive use of force by the police against a person of color. But maybe what was different this time were the demonstrations and reaction that resulted across the world. Many were surprised by it. They should not have been. The question should not have been why George Floyd and the reaction to it happened, but why it did not happen sooner?

This Article seeks to explain how we got to killing of George Floyd. Specifically, it looks at how America arrived at this point of racially arbitrary use of force by the police. This Article contends that the law—especially the decisions of the Supreme Court and political choices made by politicians—has helped to enable the relatively unchecked use of force against people of color. It also contends that at many points in American history there were policy choices that could have been made to address the underlying racism and social-economic conditions that fueled the use of

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<sup>1</sup> See e.g., BETTY WOOD, *THE ORIGIN OF AMERICAN SLAVERY* (1997); BETTY WOOD, *SLAVERY IN COLONIAL AMERICA 1619–1776* (2005); EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1974); ROBBIE FRANKLYN ETHRIDGE, *FROM CHICAZA TO CHICKASAW: THE EUROPEAN INVASION AND THE TRANSFORMATION OF THE MISSISSIPPIAN WORLD 1540–1715* (2010).

<sup>2</sup> SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

<sup>3</sup> EUGENE D. GENOVESE, *THE POLITICAL ECONOMY OF SLAVERY* (1965); BARRINGTON MOORE, JR., *THE SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY* 111-159 (1966).

<sup>4</sup> ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019); ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1866–1877* (1988).

<sup>5</sup> C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

<sup>6</sup> TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–1965* (1998).

<sup>7</sup> HEALTH EQUITY CONSIDERATIONS AND RACIAL AND ETHNIC MINORITY GROUPS, CTR FOR DISEASE CONTROL AND PREVENTION (July 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.

<sup>8</sup> LLOYD E. OHLIN & FRANK J. REMINGTON, *DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY* (1993); SHAWN D. BUSHWAY & BRIAN FORST, *DISCRETION IN THE CRIMINAL JUSTICE SYSTEM* (2011).

<sup>9</sup> Evan Hill, Ainaro Tiefenthaler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

force against people of color, but in each instance, the policy triggering device,<sup>10</sup> policy window,<sup>11</sup> or issue-attention cycle closed<sup>12</sup> and either nothing happened or a wrong turn was taken. Thus, George Floyd was no surprise, but the question is whether this time it will be different or whether we are already at a post-George Floyd moment when it comes to race, police, and the use of force?<sup>13</sup>

## I. A Brief History of Racism in America

### A. *The Political and Constitutional Foundations of American Racism*

To understand America's problem of racism would require more space and discussion than this Article can fully describe. Yet to appreciate how racism, policing, and the use of force are joined, a brief discussion of race in America is necessary.

It is impossible to understand America's history without a discussion of racism. For too long, as the *New York Times* 1619 Project has contended, the racist origins of the United States have been underplayed in textbooks and historical accounts of the United States.<sup>14</sup> These racial origins begin with the British and other European countries' colonization of North America. Although the continent was populated by millions of Native-Americans, the lands were treated under international law then as *terra nullius* and open to the right of first occupancy and control.<sup>15</sup> Almost immediately, the colonization came with the destruction and killing of native occupants, whose lives and ties to their lands were ignored.

The slave trade really defines the settlement of the part of North America that would become the United States. Some say the defining founding character of the U.S. was the spirit of religion and liberty,<sup>16</sup> or that the country was characterized by a "general equality of conditions,"<sup>17</sup> Alexis de Tocqueville noted the significance of race and slavery.<sup>18</sup> Few, if any, accounts of American political thought, especially its founding, note the importance of race. Puritan-religious, liberal, republican, and other founding values are noted, but they fail to appreciate the reality of a racial contract and practices to the United States.<sup>19</sup>

Settlement of the colonies brought with it slaves. Indentured servants who were mostly White were enslaved for several years before securing their freedom. However, the African slave trade provided significant economic support to the colonies, without hope for freedom.<sup>20</sup> The basic

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<sup>10</sup> Roger W. Cobb & Charles D. Elder, *The Politics of Agenda-Building: An Alternative Perspective for Modern Democratic Theory*, 33 J. POL. 892 (1971) (describing how unexpected events can alter the policy landscape).

<sup>11</sup> JOHN KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2007) (proposing that changing the policy agenda requires a confluence of policy, problem, politics streams, and a policy entrepreneur willing to move an issue).

<sup>12</sup> Anthony Downs, *Up and Down with Ecology—the Issue-Attention Cycle*, 28 PUB. INT. 38 (1972) (noting a five-stage process where the public gets excited by a policy issue and then the interest fades).

<sup>13</sup> David Schultz, *George Floyd and the Fourth Racial Turning Point in American Politics*, IMPAKTER (Jan. 11, 2021), <https://impakter.com/george-floyd-and-the-fourth-racial-turning-point-in-american-politics/>.

<sup>14</sup> *The 1619 Project*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html>.

<sup>15</sup> See e.g., Ethridge, *supra* note 1; Bruce Buchan, *Traffick of Empire: Trade, Treaty and Terra Nullius in Australia and North America: 1750-1800*, 5 HIST. COMP. 386 (2007); see also JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, para. 36 (1693) (1690) (describing North America as vacant land).

<sup>16</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* vol. 1. 12-32 (1961) (1835).

<sup>17</sup> *Id.* at 37-46 (1961); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* vol. 2. 37-40 (1961) (1840).

<sup>18</sup> TOCQUEVILLE, *supra* note 16, at 423-26.

<sup>19</sup> See David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AMER. J. OF L. HIST. 464 (1993) (reviewing the different founding values).

<sup>20</sup> Genovese, *supra* note 3.

economy of the British colonies was importation of slaves from Africa at a cheap price, who then provided inexpensive labor to produce goods shipped to England, from which heavy profits were exacted. Money was made in selling slaves and in selling the profits of the goods made by slaves. Couple this with the taking of lands from Native-Americans, and one finds the economic basis of British North America was heavily indebted to profits rooted in White supremacy.

The reasons supporting American colonial demands for independence from England are disputed. History books point to disputes over taxes and demands for political voice.<sup>21</sup> Some historians claim that England was abusing rights the North Americans should have enjoyed as English citizens.<sup>22</sup> Others claim King George III abused his power<sup>23</sup> or that the isolation of North America from England forged a distinct political identity and ideology that led to calls for separation.<sup>24</sup> Yet others assert that the economic elites in North America broke with those in England,<sup>25</sup> and some even contend that fears that England was going to end the slave trade prompted calls for independence.<sup>26</sup> Whatever the reasons, the Declaration of Independence stated the case for independence, and despite the first line of the second paragraph asserting that “all men are created equal,” that was not the case in the colonies. It ignored the reality of slavery and the contradiction it posed for the constitutional founders.<sup>27</sup>

Slightly more than a decade after independence, the constitutional framers again had to address slavery. In drafting the present U.S. Constitution as a replacement for the Articles of Confederation, “fear” was the word of the day.<sup>28</sup> There were fears among the different participants that a different group would get the upper hand in the new government.<sup>29</sup> Bigger states feared one type of representation in the new Congress would shift power to the smaller states. Northern and southern states were rivals, as were the free and slave states. Both of these types of states feared a national government that embraced either emancipation or slavery would challenge their way of life. As Richard Hofstadter and other historians point out, the Framers were politicians who sought compromises to secure their objectives.<sup>30</sup> Other historians point to the fact that the Framers were wealthy businessmen and slaveholders whose economic fortunes were hurt by the Articles of Confederation government.<sup>31</sup> The point is that race and slavery were central issues of concern in 1787.

The resulting Constitution is enshrouded in racism. The disputes between the slave and free states led to the adoption of the three-fifths compromise, which counted slaves in that ratio for the purposes of representation and taxation.<sup>32</sup> This compromise also affected representation in

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<sup>21</sup> See e.g., ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* v. I, 46–48 (1991); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 24–28 (1985); DUMAS MALONE, *EMPIRE FOR LIBERTY: THE GENESIS AND GROWTH OF THE UNITED STATES OF AMERICA* 121–37 (1960); ALAN TAYLOR, *AMERICAN REVOLUTIONS: A CONTINENTAL HISTORY, 1750–1804*, 94–100 (2016).

<sup>22</sup> Thomas Jefferson, *A Summary View of the Rights of British America*, in MERRILL PETERSON, *THOMAS JEFFERSON* 103 (1984).

<sup>23</sup> CARL L. BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* (1942).

<sup>24</sup> GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, 162–88 (1972); PERRY MILLER, *ERRAND INTO THE WILDERNESS* 1–16 (1981); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

<sup>25</sup> CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1941).

<sup>26</sup> See RUTH BLUMROSEN & ALFRED BLUMROSEN, *SLAVE NATION* (2005); GERALD HORNE, *THE COUNTER-REVOLUTION OF 1776: SLAVE RESISTANCE AND THE ORIGINS OF THE UNITED STATES OF AMERICA* (2014); ALAN GILBERT, *BLACK PATRIOTS AND LOYALISTS: FIGHTING FOR EMANCIPATION IN THE WAR FOR INDEPENDENCE* (2012); DUNCAN J. MACLEOD, *SLAVERY, RACE, AND THE AMERICAN REVOLUTION* 9 (1974).

<sup>27</sup> See generally STANLEY M. ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* (1968) (discussing the problem of reconciling slavery with liberal values).

<sup>28</sup> RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION & THE MEN WHO MADE IT* 12–15 (1973).

<sup>29</sup> Kelly, *supra* note 21, at 82–103; Malone *supra* note 21, 233–35.

<sup>30</sup> Hofstadter, *supra* note 28 at 12–16.

<sup>31</sup> CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1941).

<sup>32</sup> Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 *RUTGERS L. J.* 3 (2013); see, e.g., Kelly, *supra* note

Congress,<sup>33</sup> and the dispute over slavery was central to the adoption of the electoral college.<sup>34</sup> The exclusion of voting rights from the Constitution meant state law prevailed, leaving slaves without rights, including the franchise to vote. Finally, the Constitution permitted the slave trade until 1808,<sup>35</sup> and left undefined who “persons” were for the basis of rights.<sup>36</sup> As Thurgood Marshall said, “We the people” certainly did not mean all the people.<sup>37</sup>

### B. *Racism in Nineteenth Century America*

Antebellum United States was two countries—one free and one slave, but united by the problem of slavery.<sup>38</sup> Southern states enforced laws that threatened those of African descent, and the Supreme Court said in *Dred Scott v. Sandford* that enslaved Africans were property.<sup>39</sup> State laws—mostly but not exclusively in the South—imposed harsh penalties on slaves and gave masters wide latitude to sell and treat them as they wished.<sup>40</sup> Laws prevented slaves from testifying in court or enjoying rights Whites possessed.<sup>41</sup> Fugitive slave laws compelled the North to return slaves to their masters.<sup>42</sup> The expansion of slavery into the West forced major debates in Congress and adoption of legislation such as the Kansas-Nebraska Act and the Missouri Compromise.<sup>43</sup>

At its core, the Civil War was about slavery.<sup>44</sup> It was, as Barrington Moore, Jr. argued, about rival visions of American capitalism:<sup>45</sup> one vision based on slave labor and the other based on wage labor. Post-Civil War Reconstruction was an effort by Republicans to address the long-term effects of slavery, with several civil rights acts, three constitutional amendments, and federal troops in the South to enforce the law.<sup>46</sup> The disputed 1876 presidential election awarded the presidency to the Republican Rutherford Hayes, but it came at the expense of withdrawing federal troops from the South and ending Reconstruction—an era that saw many African-Americans elected to Congress and other offices in the South.<sup>47</sup> The 1876 election ushered in the Jim Crow era, which extended second-class status for Blacks for at least another 100 years.<sup>48</sup> Laws denied the right to vote.<sup>49</sup> The Supreme Court dismantled civil rights laws.<sup>50</sup> In *Plessy v. Ferguson*,<sup>51</sup> the Supreme Court officially canonized the second-class status in the “separate but equal” doctrine that produced the former but not the latter. People of color were relegated to inferior schools and accommodations and denied employment and other rights Whites enjoyed.

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21, at 93–95.

<sup>33</sup> Kelly, *supra* note 21, at 93–95.

<sup>34</sup> GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA (2011); Akhil Reed Amar, *The Troubling Reason the Electoral College Exists*, TIME (Nov. 26, 2018), <https://time.com/4558510/electoral-college-history-slavery/>.

<sup>35</sup> U.S. CONST., ART. 1, § 9, CL1.

<sup>36</sup> *The Meaning(s) of “The People” in the Constitution*, 126 HARV. L. REV. 1078 (2013).

<sup>37</sup> Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337 (1987).

<sup>38</sup> Kelly, *supra* note 21, at 241–63.

<sup>39</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 395 (1857).

<sup>40</sup> Kelly, *supra* note 21, at 241–45.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 246–47.

<sup>43</sup> *Id.*

<sup>44</sup> JAMES MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION (1990).

<sup>45</sup> BARRINGTON MOORE, JR., THE SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY 111–59 (1966).

<sup>46</sup> ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

<sup>47</sup> ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988); WILLIAM H. REHNQUIST, THE CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004).

<sup>48</sup> C. VANN WOODWARD, THE STRANG CAREER OF JIM CROW (1955).

<sup>49</sup> *Id.* at 83–86, 141–42.

<sup>50</sup> Kelly, *supra* note 21, at 355–60.

<sup>51</sup> *Plessy v. Ferguson*, 163 U.S. 537, 547 (1896).

### C. *The Color Line of the Twentieth Century*

The Supreme Court was not a friend to people of color, at least not in 1900. As W.E.B. DeBois pointed out, racism would be the problem of the twentieth century, and it was.<sup>52</sup> At the close of World War II, Gunnar Myrdal wrote of the “American dilemma” with race.<sup>53</sup> Election law struggled with the “white primary” cases and whether people of color could be excluded,<sup>54</sup> and despite *Buchanan v. Warley*,<sup>55</sup> which declared that racially explicit zoning was unconstitutional; racial covenants were a means to circumvent this until the Court made them unenforceable in *Shelley v. Kraemer*.<sup>56</sup>

The 1954 *Brown v. Board of Education*<sup>57</sup> case supposedly ended separate but equal, and, along with Rosa Parks’ refusal to go to the back of the bus in 1955, ushered in the beginning of the civil rights movement of the 1950s and 1960s.<sup>58</sup> It is impossible to tell the story of the United States at this time that does include Rosa Parks, Fannie Lou Hamer, Martin Luther King, Jr., the crossing of the Edmund Pettus bridge, George Wallace blocking the entrance of the University of Alabama, President Eisenhower sending troops to Little Rock, Arkansas to force integration, and the passage of the 1964 Civil Rights Act, 1965 Voting Rights Act, and the 1968 Fair Housing Act.<sup>59</sup>

The story of contentious race relations in the United States does not end in 1968. While significant progress was made on racial equity issues, especially with voting,<sup>60</sup> much has not been accomplished. America remains a nation of significant racial disparities even to this day. Schools are as segregated as they were in 1954.<sup>61</sup> Disparities in health and health care,<sup>62</sup> housing,<sup>63</sup> and wealth demonstrate racial divides.<sup>64</sup> Neighborhoods remain segregated.<sup>65</sup> There is not a viable means to enforce the Voting Rights Act because the Supreme Court has disabled its coverage formula—a central provision to ensure equal voting rights.<sup>66</sup> Voter intimidation and suppression on the basis of race is an issue.<sup>67</sup>

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<sup>52</sup> W. E. B. DU BOIS, *THE SOULS OF BLACK FOLK* 10, 29 (1903).

<sup>53</sup> GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

<sup>54</sup> DAVID SCHULTZ, *ELECTION LAW AND DEMOCRATIC THEORY* 209–10 (2014).

<sup>55</sup> *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

<sup>56</sup> *Shelley v. Kraemer*, 334 U.S. 1, 18 (1948).

<sup>57</sup> *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

<sup>58</sup> See generally SARA BULLARD & JULIAN BOND, *FREE AT LAST: A HISTORY OF THE CIVIL RIGHTS MOVEMENT AND THOSE WHO DIED IN THE STRUGGLE* (1994) (describing the impact the Voting Rights Act had on improving voting among people of color in the South).

<sup>59</sup> *Id.*

<sup>60</sup> See, e.g., CHANDLER DAVIDSON, *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990* (1994).

<sup>61</sup> See, e.g., Gary Orfield, Erica Frankenberg, Jongyeon Ee & John Kuscera, *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, UCLA CIV. RIGHTS PROJECT (May 15, 2014), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future> (contending that sixty years after *Brown v. Board of Education*, U.S. public schools are as segregated as then).

<sup>62</sup> Martha Hostetter & Sarah Klein, *In Focus: Reducing Racial Disparities in Health Care by Confronting Racism*, THE COMMONWEALTH FUND (Sept. 27, 2018), [https://www.commonwealthfund.org/publications/newsletter-article/2018/sep/focus-reducing-racial-disparities-health-care-confronting?gclid=CjwKCAiAnIT9BRAmEiwANaoE1Zwj6ImD8B6uD9RhYnwebiNpk-ibxX9\\_VpVbCJpOlbenTirSbWAZHhoCZbUQAvD\\_BwE](https://www.commonwealthfund.org/publications/newsletter-article/2018/sep/focus-reducing-racial-disparities-health-care-confronting?gclid=CjwKCAiAnIT9BRAmEiwANaoE1Zwj6ImD8B6uD9RhYnwebiNpk-ibxX9_VpVbCJpOlbenTirSbWAZHhoCZbUQAvD_BwE).

<sup>63</sup> Michela Zonta, *Racial Disparities in Home Appreciation*, CTR. FOR AM. PROGRESS (July 15, 2019), <https://www.americanprogress.org/issues/economy/reports/2019/07/15/469838/racial-disparities-home-appreciation/>.

<sup>64</sup> Elise Gould & Valerie Wilson, *Black Workers Face Two of the Most Lethal Preexisting Conditions For Coronavirus—Racism and Economic Inequality*, ECON. POL’Y INST. (June 1, 2020), <https://www.epi.org/publication/black-workers-covid/>.

<sup>65</sup> Tomas Monarrez, *Segregated Neighborhoods, Segregated Schools?*, URB. INST. (Nov. 29, 2018), <https://www.urban.org/features/segregated-neighborhoods-segregated-schools>.

<sup>66</sup> *Shelby County v. Holder*, 570 U.S. 529, 556 (2013).

<sup>67</sup> See *Veasey v. Abbott*, 796 F.3d 487, 509 (5th Cir. 2015) (ruling that a discriminatory identification law violated the Voting Rights Act).

If racial disparities were the problem of the twentieth century, they certainly are the problem of the twenty-first century too. But why?

## II. Race, Segregation, and Policing

### A. *The Kerner Commission and the Road Not Taken*

Racism across America spurred a civil rights movement but also bred frustration which resulted in demonstrations and riots across the country from 1965–1967.<sup>68</sup> In cities such as Los Angeles (1965), Chicago (1966), and Newark (1967), urban cores and neighborhoods with high percentages of African-Americans were looted, burned, and destroyed in race riots.<sup>69</sup> In 1967, seeking answers to why, President Lyndon Johnson created the National Advisory Commission on Civil Disorders, better known as Kerner Commission after Governor Otto Kerner of Illinois who was its chair.<sup>70</sup> It released its report in early 1968 after gathering evidence and testimony for seven months.<sup>71</sup>

The Kerner Commission famously declared in its summary:

This is our basic conclusion: Our Nation is moving toward two societies, one black, one white-separate and unequal. Reaction to last summer's disorders has quickened the movement and deepened the division. Discrimination and segregation have long permeated much of American life; they now threaten the future of every American.<sup>72</sup>

Our nation of two Americas is the separation of races into two societies where those who are White have economic opportunities, whereas those who are Black do not. Moreover, the causes of this segregation are not the neutral products of policies and market choices. They are the explicit result of public policy choices made by White America.

Segregation and poverty have created in the racial ghetto a destructive environment totally unknown to most [W]hite Americans. What [W]hite Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, [W]hite institutions maintain it, and [W]hite society condones it.<sup>73</sup>

The Kerner Commission described how housing discrimination in credit, lending, leasing, and selling was segregating the United States.<sup>74</sup> It described how business disinvestment in neighborhoods produced a lack of economic opportunity and jobs<sup>75</sup> and how government induced

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<sup>68</sup> See, e.g., PETER B LEVY, *THE GREAT UPRISING: RACE RIOTS IN URBAN AMERICA DURING THE 1960S* (2018) (generally describing the wave of riots and urban disorder in the United States during the 1960s).

<sup>69</sup> *Id.*

<sup>70</sup> STEVEN M. GILLON, *SEPARATE AND UNEQUAL: THE KERNER COMMISSION AND THE UNRAVELING OF AMERICAN LIBERALISM* (2018) (describing the political and social context of the Kerner Commission).

<sup>71</sup> NATIONAL ADVISORY COMMISSION ON CIVIL DISORDER, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* (1968) (hereinafter Kerner Commission).

<sup>72</sup> *Id.* at 1.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 115–23.

<sup>75</sup> *Id.* at 123–31.

segregation cut many people of color off from opportunities elsewhere.<sup>76</sup> Taken as a whole, the report described the construction of the ghetto.<sup>77</sup> It was, as Massey and Denton argued, transforming America into one where segregation intersected race and class.<sup>78</sup> William Julius Wilson saw it as the disappearance of work and jobs.<sup>79</sup> It was what demographers called the creation of high and concentrated poverty areas where individuals were socially isolated and cut off from the rest of society.<sup>80</sup> To other researchers, the construction of the ghetto meant a “culture of poverty” and a sense of helplessness for those who lived in those areas.<sup>81</sup> Those residents were cut off from social capital, economic networks, and other amenities of society that Whites enjoyed.<sup>82</sup> The result was economic anger born of institutional racism.<sup>83</sup>

The Kerner Commission painted a bleak racist picture of the United States, contrasting with President Johnson’s efforts to move his Great Society and civil rights policies through Congress. The report called for extensive additional civil rights legislation and the creation of additional investments in education, housing, and economic opportunities.<sup>84</sup> Despite commissioning the report, President Johnson rejected its findings. He, along with subsequent presidents, turned instead to a police and law and order solution to the problems of the ghettos instead of focusing on the root, racist causes.

Richard Nixon’s election in 1968 further rejected the Kerner Commission report. As well stated in Daniel Patrick Moynihan’s famous 1970 memorandum to President Nixon, “The time may have come when the issue of race could benefit from a period of ‘benign neglect.’”<sup>85</sup> While at the time the phrase and the memorandum were supposed to be a criticism of supposedly failed Great Society programs, it came to symbolize simply what it said—we should ignore racism and hope it will go away.

However, neglect can never be benign. Instead, the lessons of urban unrest at the center of the Kerner Commission report were rejected, and a different path was taken—a rigid and punitive criminal justice law and order route.

## B. *Race in America: The Law-and-Order Route*

### 1. Richard Nixon and 1968

The United States in 1968 could have taken the Kerner Commission recommendations and treated urban disorder as a problem of racism and social justice. It chose not to. Instead, it elected Richard Nixon who ran as a law-and-order candidate.<sup>86</sup> This election is reminiscent of Donald

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<sup>76</sup> *Id.* at 133–43.

<sup>77</sup> *Id.*

<sup>78</sup> DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

<sup>79</sup> WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996).

<sup>80</sup> *See, e.g.*, PAUL A. JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY* (1997) (describing the extent of concentrated poverty across the United States); *see also*, EDWARD GOETZ, *CLEARING THE WAY: DECONCENTRATING THE POOR IN URBAN AMERICA* (2003) (documenting the impact of concentrated poverty upon the urban poor).

<sup>81</sup> *See* Oscar Lewis, *Culture of Poverty*, in *ON UNDERSTANDING POVERTY: PERSPECTIVES FROM THE SOCIAL SCIENCES*, 187 (Daniel Patrick Moynihan ed. 1969).

<sup>82</sup> *Id.*

<sup>83</sup> Kerner Commission, *supra* note 71, at 1.

<sup>84</sup> *Id.* at 229–65.

<sup>85</sup> Daniel Patrick Moynihan, *Memorandum for the President*, 7 (Jan. 16, 1970), <https://www.nixonlibrary.gov/sites/default/files/virtuallibrary/documents/jul10/53.pdf>.

<sup>86</sup> Terence McArdle, *The ‘Law And Order’ Campaign That Won Richard Nixon the White House 50 Years Ago*, WASH. POST (Nov. 5 2018), <https://www.washingtonpost.com/history/2018/11/05/law-order-campaign-that-won-richard-nixon-white-house-years-ago/>.

Trump's 2020 campaign which heavily leaned on law-and-order rhetoric after George Floyd's death and the subsequent demonstrations and riots.<sup>87</sup>

Nixon ran for president in the middle of protests against the Vietnam War on college campuses across the country. He ran as civil rights protests mounted and in the middle of the urban "race riots" that swept across the nation. The "silent majority," as he called them, were White Americans fearful of all these changes and disruptions going on.<sup>88</sup> His solution was to appeal to their fears by emphasizing law and order as his biggest priority.

What did it mean to run as a law-and-order candidate? First, his approach to dealing with the urban unrest was to treat it as a crime problem.<sup>89</sup> This meant hiring more police officers, implementing tougher sentences for offenders, and building more prisons.<sup>90</sup> Second, it meant pursuing a war on drugs.<sup>91</sup> Specifically, Nixon saw drug use as a crime problem instead of a shifting of social mores. Therefore, society needed to prosecute drug users.<sup>92</sup> Third, he saw the urban protests and riots as part of an overall rising crime problem and, like many conservatives, criticized the Supreme Court under Chief Justice Earl Warren for issuing too many decisions that protected the rights of those accused of crimes.<sup>93</sup> In effect, decisions such as *Miranda v. Arizona*<sup>94</sup> and *Mapp v. Ohio*<sup>95</sup> were seen as handcuffing police in their ability to abate crime. Nixon vowed to place law and order justices on the Supreme Court to reverse the Warren Court's legacy.<sup>96</sup>

In part, Nixon had the opportunity almost immediately when he replaced Earl Warren with Warren Burger as Chief Justice during his first year in office.<sup>97</sup> Nixon eventually had the opportunity to replace several other Justices, all as part of a process to realign the Court toward his vision of law and order.<sup>98</sup> Nixon, followed later by Ronald Reagan and Bill Clinton especially, made drugs and crime major planks of his campaigns.<sup>99</sup> This criminal law approach had clear racial impacts.<sup>100</sup>

## 2. Militarized Police Forces

But 1968 was also significant in another way for race and policing; it heralded the beginning of police militarization to a degree not seen before.

Historically, two facts have always been true regarding policing. One was that early police reformers such as August Vollmer organized and professionalized police along the lines of a

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<sup>87</sup> Donald Trump, President of the United States, Statement by the President, (June 1, 2020), <https://www.c-span.org/video/?472684-1/president-deploy-military-states-halt-violent-protests>.

<sup>88</sup> Richard Nixon, President of the United States, Address to The Nation On The War In Vietnam ("Silent Majority" Speech) (Nov. 3, 1969), <http://web.mit.edu/21h.102/www/Primary%20source%20collections/Vietnam/Nixon,%20Silent%20Majority.htm>.

<sup>89</sup> Michael Flamm, *Politics and Pragmatism: The Nixon Administration and Crime Control*, 6 WHITE HOUSE STUD. 2, 151 (2006).

<sup>90</sup> *Id.*

<sup>91</sup> Dan Baum, *Legalize it All: How to Win the War on Drugs*, HARPER'S MAG. (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/>.

<sup>92</sup> *Id.*

<sup>93</sup> Chris Schmidt, *The Forgotten Backlash Against the Warren Court*, (Dec. 30, 2014), <http://blogs.kentlaw.iit.edu/iscotus/forgotten-backlash-warren-court/>; Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective* 31 TULSA L. J. 31 (1995).

<sup>94</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>95</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>96</sup> *See, e.g.*, BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT*, 189–96 (1979) (describing Richard Nixon's plan to replace liberal Warren Court Justices with law and order conservatives).

<sup>97</sup> MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT*, 1–17 (2017).

<sup>98</sup> *Id.*

<sup>99</sup> NINA M. MOORE, *THE POLITICAL ROOTS OF RACIAL TRACKING IN AMERICAN CRIMINAL JUSTICE*, 166–219 (2015).

<sup>100</sup> *Id.*



military model.<sup>101</sup> They created a military model of organization, complete with hierarchical ranks and a command and control structure similar to that of the army.<sup>102</sup> Second, the historic origin of the police is intertwined with race.<sup>103</sup> In the late nineteenth century, municipal police departments in the North were formed in part to control immigrant populations,<sup>104</sup> while in the South they were organized to control freed men and former slaves.<sup>105</sup> Policing was a way of maintaining ethnic and racial discipline.<sup>106</sup>

This legacy cannot be forgotten when it comes to examining 1968. As noted, Johnson rejected the Kerner Commission findings. But even before that decision he had declared a “war on crime” in 1965.<sup>107</sup> He had proposed the Law Enforcement Assistance Act, which called for grants to local governments so that they could purchase bulletproof vests, helicopters, tanks, rifles, gas masks, and other military-grade hardware.<sup>108</sup> The legislation culminated in the Omnibus Crime Control and Safe Streets Act of 1968 which created the Law Enforcement Assistance Administration, an agency meant to help the police in the investigation and prosecution of crime.<sup>109</sup> The Act also eased wiretap requirements, sought to modify the *Miranda* warning requirements, and increased federal funding for the FBI and local governments.<sup>110</sup>

The significance of using “war” as a metaphor for crime and the adoption of this legislation should not be understated. It rejected the view that urban disorder was a consequence of racism and poverty.<sup>111</sup> The militarization of police must be considered in the historical context of law enforcement disproportionately targeting people of color. Effectively, it set up a situation where police had significant authority to take actions which had a disparate—and often intentional—impact on Blacks and other people of color.

### 3. Race: Law and Order from Nixon to Clinton

Johnson handed Nixon the legal and administrative infrastructure to wage a war on crime.<sup>112</sup>

As noted, other public officials did the same. In New York, Governor Nelson Rockefeller treated drugs as a criminal matter instead of considering social or medical programs.<sup>113</sup> As President, Bill Clinton signed the 1994 Violent Crime Control and Law Enforcement Act which included several major provisions,<sup>114</sup> such as an expansion of the number of crimes eligible for the

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<sup>101</sup> See, e.g., WILLARD OLIVER, *AUGUST VOLLMER: THE FATHER OF AMERICAN POLICING* (2017); GENE E. CARTE & ELAINE H. CARTE, *POLICE REFORM IN THE UNITED STATES: THE ERA OF AUGUST VOLLMER* (1975).

<sup>102</sup> Julian Go, *The Imperial Origins of American Policing: Militarization and Imperial Feedback in the Early 20th Century*, 125 *AMER. J. SOC.* 1193 (2020).

<sup>103</sup> See generally SAMUEL WALKER, *THE POLICE IN AMERICA: AN INTRODUCTION* (1996) (discussing the history and context of the police generally); *Refunding the Community: What Defunding MPD Means and Why it is Urgent and Realistic*, *INEQ. INQUIRY* (Mar. 18, 2021), <https://lawandinequality.org/2021/03/18/refunding-the-community-what-defunding-mpd-means-and-why-it-is-urgent-and-realistic/>.

<sup>104</sup> Julian Go, *The Racist Origins of U.S. Policing Demilitarization Will Require Decolonization*, *FOR. AFF.* (July 16, 2020), <https://www.foreignaffairs.com/articles/united-states/2020-07-16/racist-origins-us-policing>.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 2* (2017).

<sup>108</sup> *Id.* at 129–31.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 276–307.

<sup>112</sup> *Id.* at 307–33.

<sup>113</sup> Jessica Neptune, *Harshes in the Nation: The Rockefeller Drug Laws and the Widening Embrace of Punitive Politics*, 26 *SOC. HIST. OF ALCOHOL & DRUGS* 170 (2012).

<sup>114</sup> Violent Crime Control and Law Enforcement Act, Pub. L. No. 103–322 (1994).

federal death penalty, an assault weapons ban, an expansion and lengthening of sentences for violent and drug offenders, and elimination of some rehabilitation measures for inmates.<sup>115</sup> The 1994 legislation was the largest crime bill in American history. It reflected the “broken windows” theory of crime that had been popularized by James Q. Wilson in the 1980s which declared that the way to prevent crime escalation was to get tough on small offenses.<sup>116</sup> This theory, along with the 1994 crime bill, represented a significant punitive trend in law enforcement.<sup>117</sup> Moreover, it was adopted alongside many “three strikes” and mandatory minimum sentencing laws across the country.<sup>118</sup> The result of these laws was a dramatic expansion of prisons and incarceration, with people of color bearing a disproportionate burden, often for minor drug offenses.<sup>119</sup>

The tough-on-crime approach revealed another issue—racial profiling. While profiling originally began as a tool to detect airplane hijacking suspects, it turned into a law enforcement tool that focused on people of color as likely criminal suspects.<sup>120</sup> As noted above,<sup>121</sup> policing may have always targeted people of color as criminal suspects, but the 1990s saw racial profiling rise to a level of national debate.<sup>122</sup> Profiling practices clearly illustrated the degree to which race drove policing and crime control.<sup>123</sup> Despite a nascent national debate on the problems of racial profiling at the beginning of the twenty-first century, the terrorist attacks on September 11, 2001 all but ended the debate on the subject.<sup>124</sup>

This tough-on-crime approach was accompanied by two other trends: an expansion of police authority by the Supreme Court<sup>125</sup> which relaxed rules regarding searches, and expanded police authority for appropriate use of force.<sup>126</sup>

### C. *Rediscovering Race and the Problems of Policing*

By the second decade of the twenty-first century, several things were clear. First, the 40-plus year war on crime had given the police significant authority to address crime.<sup>127</sup> Second, this

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<sup>115</sup> See, e.g., WILLIAM R. KELLY, CRIMINAL JUSTICE AT THE CROSSROADS: TRANSFORMING CRIME AND PUNISHMENT (2015); Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1 (2008) (reviewing the main provision of this act and assessing its racial impact).

<sup>116</sup> George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>; JAMES Q. WILSON, THINKING ABOUT CRIME (1975) (arguing against rehabilitation and in favor of an incapacitation approach to punishment).

<sup>117</sup> Tonry & Melewski, *supra* note 115, at 1.

<sup>118</sup> David Schultz, *No Joy in Mudville Tonight: Impact of “Three Strike” Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 CORNELL J. OF L. & PUB. POL’Y 557 (2000).

<sup>119</sup> MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA (2012) (generally describing the racial impact of the “get tough on crime” approach).

<sup>120</sup> MILTON HEUMANN & LANCE CASSAK, GOOD COP, BAD COP: RACIAL PROFILING AND COMPETING VIEWS OF JUSTICE 9–40 (2007).

<sup>121</sup> Walker, *supra* note 103.

<sup>122</sup> See generally Heumann & Cassak, *supra* note 120, at 98–121; Moore, *supra* note 99, at 218–22; Tonry, *supra* note 119; DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002); DAVID HARRIS, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION’S HIGHWAYS (1999); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296 (2001) (reviewing the legal and social consequences of racial profiling in law enforcement in the United States).

<sup>123</sup> David A. Harris, *Racial Profiling: Past, Present, and Future*, ABA CRIM. JUST. MAG. (Jan. 21, 2020), [https://www.americanbar.org/groups/criminal\\_justice/publications/criminal-justice-magazine/2020/winter/racial-profiling-past-present-and-future/](https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2020/winter/racial-profiling-past-present-and-future/).

<sup>124</sup> Heumann & Cassak, *supra* note 120, at 153–187; Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice’s 2003 Guidelines*, 50 LOY. L. REV. 67 (2004).

<sup>125</sup> See generally, JOHN DECKER, REVOLUTION TO THE RIGHT: CRIMINAL PROCEDURE JURISPRUDENCE DURING THE BURGER-REHNQUIST COURT ERA (1992); Christopher E. Smith, *The Rehnquist Court and Criminal Justice: An Empirical Assessment*, 19 J. CONT. CRIM. JUST. 161 (2003).

<sup>126</sup> *Infra* Part III below.

<sup>127</sup> JOHN DECKER, REVOLUTION TO THE RIGHT: CRIMINAL PROCEDURE JURISPRUDENCE DURING THE BURGER-REHNQUIST COURT ERA (1992); Christopher E. Smith, *The Rehnquist Court and Criminal Justice: An Empirical Assessment*, 19 J. CONT. CRIM.

war on crime had a racial component to it.<sup>128</sup> There were clear signs in the 1990s of a problem with police use of force. For example, there was the taped police beating of Rodney King in 1991 and subsequent acquittal of the officers for use of excessive force that resulted in six days of rioting in 1992 in Los Angeles.<sup>129</sup> Despite this incident, it appeared to have done little to trigger a lasting national debate on race, policing, and use of force. There was also the 1999 shooting of unarmed Amadou Diallo by four New York City police officers where they fired 41 bullets to kill him. The officers were acquitted of all criminal charges.<sup>130</sup>

What did appear to change the debate was the 2014 police shooting of a Black teenager named Michael Brown in Ferguson, Missouri. Brown was shot multiple times by police who claimed he had resisted arrest, while witnesses contended that Brown was surrendering when shot. Michael Brown's killing spurred multiple days of protests in Ferguson and initiated the emergence of the Black Lives Matter movement. The officers were not charged with the shooting, and a subsequent Justice Department investigation for civil rights violations also cleared the officers.<sup>131</sup>

However, the same Justice Department report revealed a pattern of police abuse in Ferguson. As stated in the Report:

This investigation has revealed a pattern or practice of unlawful conduct within the Ferguson Police Department that violates the First, Fourth, and Fourteenth Amendments to the United States Constitution, and federal statutory law.<sup>132</sup>

The Report indicated that the City used the police and the courts as a way of generating revenue, targeting people of color to achieve this purpose.<sup>133</sup> It also went on to contend that various police practices in Ferguson, such as racial profiling or targeting, undermined its support among people of color.<sup>134</sup>

Michael Brown was only the start of a renewed concern about police use of force against people of color. Eric Garner, Freddie Gray, Jamal Clark, and Philando Castile all became the faces of other persons of color killed by police use of force. Each case generated significant public attention regarding whether police were targeting people of color. Some studies contended there was no targeted,<sup>135</sup> and few changes in public policy regarding police use of force ensued. The question, of course, is why?

### **III. The Supreme Court and Use of Force: Insulating Police Misconduct**

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JUST. 161 (2003).

<sup>128</sup> Moore, *supra* note 99, at 63–100; MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* (2012).

<sup>129</sup> See, e.g., LOU CANNON, *OFFICIAL NEGLIGENCE: HOW RODNEY KING AND THE RIOTS CHANGED LOS ANGELES AND THE LAPD* (1999) (discussing the events surrounding the police beating of Rodney King and the aftermath).

<sup>130</sup> Jane Fritsch, *The Diallo Verdict: The Overview: 4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES (Feb. 26, 2020), <https://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html>.

<sup>131</sup> UNITED STATES DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* (Mar. 4, 2015).

<sup>132</sup> *Id.* at 1.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 16.

<sup>135</sup> Roland G. Fryer Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECO. 1210 (2019).

In general, state and local governments legislatively grant the police authority to act.<sup>136</sup> This authority is not unlimited.<sup>137</sup> Traditionally, one remedy for police abuse of authority was to sue individual officers under state tort law.<sup>138</sup> These suits would include assault and battery for excessive use of force, but could also include unjust imprisonment and other forms of liability for negligent behavior.<sup>139</sup> However, there were problems with this approach. First, state or local law might limit officer tort liability.<sup>140</sup> Second, suits against individual officers, if successful, were limited to monetary damages.<sup>141</sup> Police officers might have little in terms of assets for payouts, leaving victims largely unprotected.<sup>142</sup> Third, it is difficult to win a tort case when juries are reluctant to rule against police officers, especially if the plaintiff has been convicted of a crime.<sup>143</sup>

However, the Supreme Court changed the law on liability in *Monell v. Department of Social Services*.<sup>144</sup> The Court ruled that public officials could be held liable for 42 U.S.C. § 1983 violations, generally referred to as § 1983 suits. Section 1983 was originally part of the 1871 Civil Rights Act, adopted to address violent actions committed by members of the Ku Klux Klan after the Civil War.<sup>145</sup> Section 1983 creates a class of constitutional torts against state and local government officials who have violated the Constitution.<sup>146</sup> Prior to *Monell* it was difficult to sue police officers for violations of the Constitution. This decision made it easier. In *Bivens v. Six Unknown Named Agents*,<sup>147</sup> the Supreme Court held that individuals could directly sue the federal government for violations of their constitutional rights. The scope of § 1983 issues is broad.

Under *Monell*, the Supreme Court ruled that municipalities are responsible for acts of their police involving the use of excessive force that have been shown to be the product of official policy or organizational custom and practice. Individuals charging a law enforcement official with a constitutional violation under § 1983 must make four showings: (1) that the plaintiffs were among the persons intended to be protected under the statute; (2) that the defendant—the police officer—had been acting under the color of the law; (3) that there was an alleged violation of a constitutional right; and (4) that the alleged violation reached a constitutional level.

Generally, it is easy to meet the first requirement. Just about everyone is an individual protected under § 1983. With respect to the second prong, to establish that the officer was acting under the color of the law, plaintiffs had to show that the police were following official department policy. One could do this by pointing to explicit or unofficial policies. To further prove the second prong, one must show that the police officer was acting as an officer and not as a private actor. The question of what constitutes the color of law is highly litigated; a few factors critical to answering the question include whether officers were in uniform, whether they were driving personal or departmental cars, and whether they were using their department-issued weapons or personal arms. Finally, a § 1983 suit demands that the claim allege a violation of rights so severe it rises to constitutional status. Generally, claims center on the First, Third, Fifth, Sixth, Eighth, and Fourteenth Amendments. *Monell* now made it possible to sue officers, and the jurisdictions

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<sup>136</sup> VICTOR E. KAPPELER, CRITICAL ISSUES IN POLICE CIVIL LIABILITY 79 (2006).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 17–30.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691-94 (1978).

<sup>145</sup> Kappeler, *supra* note 136, at 39–55.

<sup>146</sup> *Id.* at 55–63.

<sup>147</sup> *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

they worked for, as a Fourth Amendment violation. Two cases established the framework for claims of police use of excessive force.

The Supreme Court outlined the elements to be used in analyzing a § 1983 claim for excessive use of *deadly* force in *Tennessee v. Garner*.<sup>148</sup> The *Garner* court ruled that excessive use of deadly force claims are analyzed under the Fourth Amendment's Search and Seizure Clause. The test in this case mandates a balancing of interests to determine police liability: the nature of the intrusion on the individual's Fourth Amendment right is balanced against the interests the government cites to justify the intrusion. Under this test, the individual's interest is substantial: not to die. To overcome citizen interest, police must show that the officer believed that the suspect posed an immediate threat of serious physical harm to officers or others. What is "immediate"? What is "serious"? *Serious* generally means that the suspect is armed with a deadly weapon. *Immediacy* looks to several factors, including the following: how proximate to the past crime was force used? Is mere possession of a weapon enough? Is past dangerousness a valid issue? These are questions that are fact-specific and dependent on the circumstances. However, the closer in time the crime or the suspect's use of force, potentially the more justified the officer was in using excessive force to seize the person.

The Supreme Court ruled on claims of excessive use of *nondeadly* force in *Graham v. Connor*.<sup>149</sup> In the *Graham* test, use of nondeadly force is examined under the Fourth Amendment, with the law asking whether the force employed by the police was supported by objective reasonableness. The standard assesses the situation from the perspective of a reasonable officer and avoids using 20/20 hindsight. Factors determining reasonableness include: was the suspect an immediate threat to officers or others? What was the severity of the crime? Was the suspect actively resisting arrest? Was the suspect attempting to escape? Again, these are all fact-specific to a particular case, left up to a jury or trial judge to determine.

*Monell*, *Garner*, and *Graham* are important cases on police use of force and liability. On the one hand, they hold out the possibility of holding law enforcement officials and their jurisdictions responsible for using excessive force. Yet the standard established by the latter two cases made it very difficult to find police responsible for abuses of force. Few juries are willing to second-guess law enforcement officials, and the constitutional standards here made it difficult to find liability. Similarly, the standards articulated in *Garner* and *Graham* complicated the use of criminal law against police. It is difficult to get criminal convictions against the police for all the reasons noted above with civil suits. The standards in these cases effectively became part of the limited liability that helps shield police from criminal prosecution in the rare event a prosecutor is willing to bring a charge against them.

However, these three decisions also defined a remedy for police use of force: monetary damages. The assumption within these cases was that the threat of a lawsuit would be a sufficient remedy and deterrent to address unjustified use of force. It is unclear they have served that purpose, as payoffs for police misconduct continue. There is no database that collects data on police use of force, even though the Violent Crime Control and Law Enforcement Act of 1994 had a voluntary provision to collect such information.<sup>150</sup> By 2014 the Bureau of Justice Statistics stopped gathering information altogether, leaving a large blind spot in assessing the problem.<sup>151</sup>

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<sup>148</sup> *Tenn. v. Garner* 471 U.S. 1 (1985).

<sup>149</sup> *Graham v. Connor*, 490 U.S. 386 (1989).

<sup>150</sup> Violent Crime Control and Law Enforcement Act of 1994, § 210402; see also Richard A. Oppel Jr. & Lazaro Gamio, *Minneapolis Police Use Force Against Black People at 7 Times the Rate of Whites*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/interactive/2020/06/03/us/minneapolis-police-use-of-force.html> (discussing the lack of a national database).

<sup>151</sup> Tom McCarthy, *The Uncounted: Why the US Can't Keep Track of People Killed By Police*, THE GUARDIAN (Mar. 18, 2015),

## Conclusion: George Floyd and Minneapolis

The narrative above brings us to Minneapolis, the killing of George Floyd, and back to Kerner Commission Report.

Despite its liberal reputation, Minneapolis has long been a city with significant residential segregation.<sup>152</sup> It continues to have large racial disparities in terms of educational outcomes,<sup>153</sup> income,<sup>154</sup> health and health care,<sup>155</sup> and police use of force, among other measures.<sup>156</sup> To paraphrase the Kerner Commission Report from more than 50 years ago, which is still relevant today, Minneapolis is a city with two separate and unequal communities. There were warning signs that there would be major uproar over another police shooting, especially in light of the deaths of other civilians such as Jamar Clark,<sup>157</sup> Justine Damond in Minneapolis,<sup>158</sup> and Philando Castile in nearby Falcon Heights.<sup>159</sup> In all three cases, the cities made payouts to compensate victims,<sup>160</sup> but there is little evidence that imposing financial liability has deterred police use of force against people of color.<sup>161</sup> The graphic nature of Floyd's death as depicted in the video with him pleading for his life under the knee of a police officer while three others stood by was more than many of the residents in Minneapolis were willing to bear.

George Floyd's killing is a tragedy and a part of the broader problem involving racist policing. It is also a lament for the road not taken. Back when the Kerner Commission reviewed the causes of urban riots in the 1960s, it recommended a path to confront and unravel systemic racism. That path was not taken. As a society we opted to address social and economic issues with criminal punishment rather than remedy the ills at the root of urban struggle—segregation, poverty, and poor educational opportunities.

The mistreatment of Rodney King and the killing of Michael Brown, Jamar Clark, and Philando Castile provided policy windows for government actors to enact change. The question now becomes whether the death of killing George Floyd has opened that window again, or whether

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<https://www.theguardian.com/us-news/2015/mar/18/police-killings-government-data-count>. *But see* David Schultz, *\$2 Billion-Plus Price of Injustice: A Methodological Map for Police Reform in the George Floyd Era*, INEQ. INQUIRY (Mar. 22, 2021), <https://lawandinequality.org/2021/03/22/the-2-billion-plus-price-of-injustice-a-methodological-map-for-police-reform-in-the-george-floyd-era/> (estimating that 15 major U.S. cities have paid over \$2.2 billion in police misconduct settlements in recent years).

<sup>152</sup> UNIVERSITY OF MINNESOTA INSTITUTE ON RACE AND POVERTY, EXAMINING THE RELATIONSHIP BETWEEN HOUSING, EDUCATION, AND PERSISTENT SEGREGATION (1998) (copy of the report on file with the author).

<sup>153</sup> SCHOTT FOUNDATION, BLACK LIVES MATTER: THE SCHOTT 50 STATE REPORT ON PUBLIC EDUCATION AND BLACK MALES (Feb. 2015), <http://schottfoundation.org/resources/black-lives-matter-schott-50-state-report-public-education-and-black-males>.

<sup>154</sup> Bernadette D. Proctor, Jessica L. Semega & Melissa A. Kollar, *Income and Poverty in the United States: 2015*, U.S. CENSUS BUREAU (Sept. 13, 2016), <https://www.census.gov/library/publications/2016/demo/p60-256.html>.

<sup>155</sup> MN COMMUNITY MEASUREMENT, MINNESOTA HEALTH CARE DISPARITIES BY RACE, HISPANIC ETHNICITY, LANGUAGE AND COUNTRY OF ORIGIN (June 19, 2020) (describing health care disparities in Minneapolis and Minnesota by race and ethnicity).

<sup>156</sup> Oppel Jr. & Gamio, *supra* note 150.

<sup>157</sup> Nicky Wolff, *Jamar Clark Shooting: No Criminal Charges for Minneapolis Police Officers*, THE GUARDIAN (Mar. 30, 2016), <https://www.theguardian.com/us-news/2016/mar/30/jamar-clark-shooting-no-criminal-charges-for-minneapolis-police-officers>.

<sup>158</sup> Chao Xiong, *Mohamed Noor Guilty of Third-Degree Murder, Manslaughter in Killing of Justine Ruzszyk Damond*, STAR TRIB. (May 1, 2019), <https://www.startribune.com/mohamed-noor-guilty-murder-manslaughter-fatal-shooting-justine-ruzszyk-damond-minneapolis-police/509224642/>.

<sup>159</sup> Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html>.

<sup>160</sup> Libor Jany, *Minneapolis City Council Approves \$200,000 Settlement in Jamar Clark*, STAR TRIB. (Aug. 23, 2019), <https://www.startribune.com/minneapolis-city-council-approves-200-000-settlement-in-jamar-clark-case/558007042/>. It must be noted that Minneapolis paid \$200,000 to the family of Jamar Clark, a Black teenager killed by White officers, while on the same date the Minneapolis City Council also approved a \$20,000,000 settlement to the family of Justine Damond, a White woman killed by a Black man.

<sup>161</sup> On March 12, 2021, the City of Minneapolis agreed to pay George Floyd's family \$27 million, which has been reported as "the largest pretrial settlement in a civil rights wrongful death lawsuit in U.S. history." Liz Navratil & Maya Rao, *Minneapolis to Pay Record \$27 Million to Settle Lawsuit with George Floyd's Family*, Star Trib. (Mar. 12, 2021), <https://www.startribune.com/minneapolis-to-pay-record-27-million-to-settle-lawsuit-with-george-floyd-s-family/600033541/>.

Donald Trump’s appeal to law and order—despite his loss in the 2020 elections—means that the opportunity for change has closed again. George Floyd’s killing has come at the most recent crossroads in the long road of racist policing in the United States. Let us carefully consider which path we take from here. Breonna Taylor’s shooting death by police in Louisville, Kentucky makes one wonder what we have learned from George Floyd.<sup>162</sup> George Floyd’s story come far down on a historic and long road regarding race and racism in the United States. His death tells us how as a society we got where we are today, and to wonder where we will go tomorrow

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<sup>162</sup> Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor’s Death*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/article/breonna-taylor-police.htm>.