



LAW & INEQUALITY

UNIVERSITY OF MINNESOTA LAW SCHOOL

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Navin Ramalingam

ARTICLES

Refunding the Community: What Defunding MPD Means and Why It Is Urgent and Realistic
JLI Vol. 39 Editorial Board

George Floyd's Legacy: Reforming, Relating, and Rethinking Through Chauvin's Conviction and Appeal Under a Felony-Murder Doctrine Long-Weaponized Against People of Color
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The \$2 Billion-Plus Price of Injustice: A Methodological Map for Police Reform in the George Floyd Era
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Prologue

After the murder of George Floyd by former Minneapolis Police Department Officer Derek Chauvin and three other MPD officers, the *Minnesota Journal of Law & Inequality (JLI)*, like various institutions across this nation, was forced to reckon with the stark racial inequality that had been present among us long before this nation was created. *JLI* released a statement¹ on the murder, acknowledging its own role in perpetuating racial inequality by not having Black voices in positions of power within the Journal.

In addition, as a response to both George Floyd's murder and the subsequent racial justice protests, law journals across the three law schools in Minnesota planned to publish a special issue with articles covering various racial justice issues plaguing this nation. Unfortunately, those plans did not materialize. But, *JLI* persisted with its plan and published several articles stemming from this initiative on *Inequality Inquiry*, *JLI's* blog, that would have been a part of the original special issue.

In the first article, *JLI's* editors analyzed what it means to "Defund the Police." The article (1) traced the history of policing in the United States since its colonial days; (2) outlined the decades of failure to achieve meaningful progress in Minneapolis; and (3) advocated for the redirection of MPD funding to violence prevention and alternative responses, along with the decriminalization of certain low-level non-violent offenses. *JLI* also published an article by Ramsey County Public Defender Greg Egan. The article—a work of empirical research that looked at second-degree felony murder convictions sentenced from 2012 through 2018 in Hennepin and Ramsey counties—detailed the racial inequities in Minnesota's felony-murder doctrine. This article would not have been possible without the tireless research and keen analytical insights of Volume 39 Staff Members Anne Bolgert, Abbie Maier, and Andrew Selva. The final article by Professor David Schultz is a methodological exploration of what it would take to reform the institution of policing in the United States, which also includes the civil settlements select cities have paid as a result of police misconduct in the past decade. This article materialized thanks to the selfless

1. *JLI's Statement of Solidarity*, MINN. J. OF LAW & INEQUALITY (June 2, 2020), <https://lawandinequality.org/2020/06/02/jlis-statement-of-solidarity/> [perma.cc/7SBF-GGVA].

work and research of Caroline Headrick and Chase Lindemann, both Volume 39 Staff Members.

JLI has decided to publish these articles as its own special issue, Issue 3 of Volume 39. This Special Issue came to fruition thanks to the exceptional dedication of Abigail Rauls, Executive Editor, and the hard work of the Volume 39 Online Editorial Team—Sam Brower (Lead Editor), Adam Johnson and Chris Lund. Thanks are also due to the authors, editors, and staff members of Volume 39. *JLI* is proud to continue its mission to demonstrate how the law perpetuates systemic oppression, exploitation, and discrimination in this country and beyond.

With Gratitude & In Solidarity,

Navin Ramalingam

Editor-in-Chief

Minnesota Journal of Law & Inequality (Vol. 39)

Refunding the Community: What Defunding MPD Means and Why It Is Urgent and Realistic

JLI Vol. 39 Editorial Board¹

“(The police) are a very real menace to every black cat alive in this country. And no matter how many people say, ‘You’re being paranoid when you talk about police brutality’—I know what I’m talking about. I survived those streets and those precinct basements and I know. And I’ll tell you this—I know what it was like when I was really helpless, how many beatings I got. And I know what happens now because I’m not really helpless. But I know, too, that if he (police) don’t know that this is Jimmy Baldwin and not just some other nigger^[2] he’s gonna blow my head off just like he blows off everybody else’s head. It could happen to my mother in the morning, to my sister, to my brother . . . [.] For me this has always been a violent country—it has never been a democracy.” — James Baldwin³

“Fuck Tha Police,”⁴ rapped the revered American hip-hop group N.W.A from Compton, California in their seminal debut

1. The *Minnesota Journal of Law & Inequality’s* (*JLI*) editorial board includes both the editors and the staff members. The article was drafted by Anna Berglund, Articles Editor; Sam Brower, Lead Online Editor; Abigail Hanson, Lead Managing Editor; Navin Ramalingam, Editor-in-Chief; and one more Editor. Thanks to Jen Davison, Lead Articles Editor, for her feedback; Abby Rauls, Executive Editor, and Hillary Richard, Staff Member, for their inputs. Thanks are also due to Adam Johnson and Chris Lund, Online Editors, for their help editing this article. Thanks, most of all, to *JLI* for providing a space for all us to come together, learn, and advocate for much-needed legal reform in this country.

2. *JLI’s* Vol. 39 does not have a single Black Editor. *JLI* acknowledges its own role in perpetuating racial inequality by not having Black voices in positions of power within the Journal. *JLI* strives to diversify its membership, authorship, and readership, and has measurable goals to achieve these objectives in the next few years. We chose to publish the n-word unredacted because it was part of a Baldwin quote. We do not possess the intellectual chutzpah to edit or censor a quote by James R. Baldwin. Not redacting the word while providing this context is our best solution to make peace with these competing tensions.

3. See Liz Kaufman, *6 James Baldwin Quotes About Race*, PBS: AM. MASTERS (Aug. 4, 2020), <https://www.pbs.org/wnet/americanmasters/6-james-baldwin-quotes-race/15142/> [perma.cc/73KR-SE49] (quote from Baldwin’s 1969 interview on the Dick Cavett Show).

4. N.W.A., *Fuck tha Police*, on STRAIGHT OUTTA COMPTON (Universal Music Grp., Ruthless Records, Priority Records 1988).

studio album, “Straight Outta Compton.”⁵ In six short minutes, Emcees Ice Cube, Ren, and Eazy-E, serve as effective prosecutors—with Dr. Dre presiding as a judge in the case of *N.W.A v. The Police Department*⁶—against the Los Angeles Police Department (LAPD) for possessing the “authority to kill a minority.”⁷ The LAPD, like police departments in other American cities,⁸ had a notorious reputation for corruption,⁹ using excessive force, racial profiling, and harassing minority communities in the Greater Los Angeles

5. *Id.*; see also Preezy Brown, *Tale of the Tape: N.W.A.’s “Fuck Tha Police”*, REVOLT (Feb. 21, 2019), <https://www.revolt.tv/2019/2/21/20824193/tale-of-the-tape-n-w-a-s-fuck-tha-police> [perma.cc/T3ZS-B8XY].

6. N.W.A., *supra* note 4, at 0:08.

7. *Id.* at 0:38. See also “*Fuck Tha Police*”, N.W.A., CLARKU: HIP-HOP & POLITICS, <https://wordpress.clarku.edu/musc210-hhp/hip-hop-culture-politics-exploring-the-narrative-and-power-of-rap-lyrics/fuck-tha-police-n-w-a/> [perma.cc/AHL7-LFHD]; Kory Grow, *How N.W.A.’s ‘Fuck tha Police’ Became the ‘Perfect Protest Song’*, ROLLING STONE (June 9, 2020), <https://www.rollingstone.com/music/music-features/nwa-fuck-tha-police-protest-song-1010355/> [perma.cc/44RE-SLW3].

8. See, e.g., CLARENCE TAYLOR, *FIGHT THE POWER: AFRICAN AMERICANS AND THE LONG HISTORY OF POLICE BRUTALITY IN NEW YORK CITY* (2018); Hollie A Teague, *Black and Blue in North Texas: The Long-Neglected History of Anti-Black Police Violence in North Texas, 1880-1930*, 49 J. BLACK STUD. 756 (2018); Safia Samee Ali, *George Floyd’s Death a Painful Reminder of Chicago’s History of Police Brutality*, NBC NEWS (June 3, 2020), <https://www.nbcnews.com/news/us-news/george-floyd-s-death-painful-reminder-chicago-s-history-police-n1224076> [perma.cc/NV43-TMMN]; Arun Rath, *Looking Back on Police Brutality and Racism in Boston*, GBH NEWS (June 14, 2020), <https://www.wgbh.org/news/local-news/2020/06/14/looking-back-on-police-brutality-and-racism-in-boston> [perma.cc/H5AX-2C7S]; Rebecca Gordon, *San Francisco’s Police Problem*, THE NATION (Feb. 23, 2016), <https://www.thenation.com/article/archive/san-franciscos-police-problem/> [perma.cc/ZY4H-YQZZ]; Levi Pulkkinen, *Feds: Seattle Police Show ‘Pattern of Excessive Force’*, SEATTLEPI (Dec. 16, 2011), <https://www.seattlepi.com/local/article/Feds-findings-in-Seattle-Police-abuse-2407378.php> [perma.cc/3FXM-KXHJ]; Radley Balko, *Albuquerque’s Long History of Police Abuse, Cover-Up, and Scandal*, WASH. POST (Apr. 14, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/04/14/albuquerque-long-history-of-police-abuse-cover-up-and-scandal/> [perma.cc/DX46-75WX].

9. See *Rampart Scandal Timeline*, PBS: FRONTLINE (May 2001), <https://www.pbs.org/wgbh/pages/frontline/shows/lapd/scandal/cron.html> [perma.cc/368W-BJ2D].

area.¹⁰ While some citizens¹¹ and the police¹² gave it their all to curb the popularity of the track, the song, the album, and the hip-hop group themselves would go on to achieve blockbuster status. In the summer of 2020, after the brutal killing of George Floyd¹³—an unarmed Black man—by a police officer¹⁴ with the Minneapolis Police Department (MPD), the popularity of the thirty-two-year old anti-police-brutality anthem skyrocketed.¹⁵ The very existence of an audio track called “Fuck Tha Police” and its enduring and unwavering appeal among large swaths of Americans over multiple decades perfectly encapsulates the story of modern American policing, especially its relationship to racial and ethnic minority groups in the United States.

10. See Karen Grigsby Bates, *‘It’s Not Your Grandfather’s LAPD’—and That’s a Good Thing*, NPR: CODE SWITCH (Apr. 26, 2017), <https://www.npr.org/sections/codeswitch/2017/04/26/492848045/it-s-not-your-father-s-lapd-and-that-s-a-good-thing> [perma.cc/F9PS-T8H5]; Peter J. Boyer, *Bad Cops*, NEW YORKER (May 13, 2001), <https://www.newyorker.com/magazine/2001/05/21/bad-cops> [perma.cc/685P-4MQS]; Sara Kate, *The 12 Biggest LAPD Screw-Ups of All Time*, RANKER (Sept. 18, 2020), <https://www.ranker.com/list/the-13-biggest-lapd-screw-ups-of-all-time/sarakate> [perma.cc/87DP-EG44].

11. See Rich Goldstein, *A Brief History of the Phrase ‘F*ck the Police’*, DAILY BEAST (Apr. 24, 2017), <https://www.thedailybeast.com/a-brief-history-of-the-phrase-fck-the-police> [perma.cc/52MD-852U] (describing how the album *Straight Outta Compton* was among the first to receive a Parental Advisory sticker after advocacy from the group Parents Music Resource Center).

12. See Steve Knopper, *The True Story of N.W.A. Playing “Fuck Tha Police” Live in Detroit*, GQ (July 21, 2020), <https://www.gq.com/story/nwa-fuck-the-police-live-detroit> [perma.cc/7C3S-CYBB]; *Fuck Tha Police*, N.W.A., CLARKU, *supra* note 7 (citing a letter from the Assistant Dir. of the FBI Off. of Pub. Affairs to Priority Records); Kory Grow, *N.W.A.’s ‘Straight Outta Compton’: 12 Things You Didn’t Know*, ROLLING STONE (Aug. 8, 2018), <https://www.rollingstone.com/feature/n-w-as-straight-outta-compton-12-things-you-didnt-know-707207/> [perma.cc/S6JF-L46Z] (“Law enforcement flat out refused to protect N.W.A. on tour,” and “[t]heir contract forbade them from performing ‘Fuck tha Police’ and ‘Straight Outta Compton’ . . . but they chose to do so anyway . . .”).

13. See Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [perma.cc/2M5M-VUXL].

14. See Doha Madani, *Derek Chauvin, Ex-officer Charged with Murder in George Floyd Case, Released on \$1M Bond*, NBC NEWS (Oct. 7, 2020), <https://www.nbcnews.com/news/us-news/derek-chauvin-ex-officer-charged-murder-george-floyd-case-released-n1242433> [perma.cc/NFL7-UCK4].

15. See Jonathan Bernstein, *Streams of N.W.A.’s ‘F—k tha Police’ Nearly Quadruple Amid Nationwide Protests*, ROLLING STONE (June 3, 2020), <https://www.rollingstone.com/music/music-news/fuck-tha-police-streams-protest-songs-george-floyd-1009277/> [perma.cc/UD5Y-6ET8]; Charlotte Krol, *Streams of N.W.A.’s “Fuck Tha Police” Grow by 272 per Cent amid George Floyd Protests*, NME (June 3, 2020), <https://www.nme.com/news/music/streams-of-n-w-as-fuck-tha-police-grow-by-272-per-cent-amid-george-floyd-protests-2681270> [perma.cc/R2SP-GZPM].

In four sections, this Article (1) looks at the history of policing in the United States and the city of Minneapolis; (2) surveys the ineffective internal reforms the MPD and the City have undertaken over the past few decades; (3) proposes urgent and effective responses to prevent the deaths of Black Americans, like Floyd, and other racial and ethnic minorities at the hands of the MPD; and (4) concludes why refunding the community, by defunding the MPD, is a pragmatic and timely response to the MPD killing Black and Brown Minnesotans.

I. The True History of Policing in the United States and Minneapolis

This past summer, Americans and people around the world watched in horror as pictures and videos of police officers in heavily militarized gear and war-time weapons subjected peaceful protestors across the United States to extraordinary violence.¹⁶ The scale and intensity of violence the police inflicted upon Americans exercising their constitutionally-protected first amendment rights begged the question—exactly *who* are these police officers sworn to “protect and serve?”¹⁷ Any meaningful survey tracing the roots of modern American policing begins with its relationship to that purported North Star of American prosperity¹⁸—private property.¹⁹

16. See Shawn Hubler & Julie Bosman, *A Crisis that Began with an Image of Police Violence Keeps Providing More*, N.Y. TIMES (Mar. 11, 2021), <https://www.nytimes.com/2020/06/05/us/police-violence-george-floyd.html> [perma.cc/8T9W-A5SF]; Daniel Politi, *Activists Create Public Online Spreadsheet of Police Violence Videos*, SLATE (June 6, 2020), <https://slate.com/news-and-politics/2020/06/george-floyd-public-spreadsheet-police-violence-videos.html> [perma.cc/63PG-MHSW]; Taylor Lorenz, *People Can't Stop Watching Videos of Police and Protesters. That's the Idea.*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/2020/06/02/style/police-protests-video.html> [perma.cc/Q8SZ-9A5J]; Jay Corbett, *2020 George Floyd Protests – Police Brutality Compilation – The 29th of May to the 2nd of June*, YOUTUBE (June 5, 2020), <https://www.youtube.com/watch?v=Dn6pAOIjgQg>.

17. See Jeremiah P. Johnson, *A Hippocratic Oath for Policing*, NAT'L POLICE FOUND., <https://www.policefoundation.org/a-hippocratic-oath-for-policing/> [perma.cc/Q66F-VPRB] (discussing Professor David Kennedy's proposal for a Hippocratic Oath in policing).

18. See Roger Pilon, *16. Property Rights and the Constitution*, in CATO HANDBOOK FOR POLICY MAKERS (8th ed. 2017), <https://www.cato.org/cato-handbook-policy-makers/cato-handbook-policy-makers-8th-edition-2017/property-rights-constitution> [perma.cc/8AN6-8TQJ] (referring to property as “the foundation of all rights” in American law).

19. See Jack Hurbanis, *History of Policing in America: Starts and Ends with Protecting Private Property*, WUWM 89.7 (June 2, 2020), <https://www.wuwm.com/podcast/spotlight/2020-06-02/history-of-policing-in-america-starts-and-ends-with-protecting-private-property#stream/0> [perma.cc/YRV3-B2JV].

The first documented death of Black men by law enforcement in what would become the United States happened in 1619 when a Dutch slave ship landed in Virginia.²⁰ Enslaved Africans aboard the ship were killed “because of overcrowding, unsanitary conditions, and inadequate provisions on the ships.”²¹ Their situation did not improve after they landed.²² The highly impactful Barbadian Slave Codes,²³ used by the British “to justify the practice of slavery and legalize the planters’ inhumane treatment of their enslaved Africans,” inspired American colonies to draft their own slave codes.²⁴ The first of these codes, drafted by Maryland and Virginia, defined enslaved people as “piece[s] of property” possessing no human rights, unlike their White owners.²⁵ The enslaved essentially had the same “status of farm animals or chattel.”²⁶ While Americans enslaved the Africans starting in the early seventeenth century, the history of modern policing itself goes back to thirteenth-century England.

William Blackstone, the eighteenth-century English lawyer, jurist, author of “Commentaries on the Laws of England,” and Tory politician the American common law judges love to love,²⁷ called the modern police’s predecessors King’s men.²⁸ These men kept the “king’s peace” since as early as the thirteenth century.²⁹ Even after Americans overthrew the king—with Thomas Paine famously

20. Michael A. Robinson, *Black Bodies on the Ground: Policing Disparities in the African American Community—An Analysis of Newsprint from January 1, 2015, Through December 31, 2015*, 48 J. BLACK STUD. 551, 552 (2017).

21. *Id.*

22. Mary Elliott & Jazmine Hughes, Four Hundred Years After Enslaved Africans Were First Brought to Virginia, Most Americans Still Don’t Know the Full Story of Slavery, N.Y. TIMES (Aug. 19, 2019), <https://www.nytimes.com/interactive/2019/08/19/magazine/history-slavery-smithsonian.html?mtrref=undefined&assetType=REGIWALL&mtrref=www.nytimes.com&gwh=2AB56260100AE928A4AE9A12CB77E790&gwt=regi&assetType=REGIWALL> [perma.cc/KX95-MDTU].

23. See Sir Hilary Beckles, *On Barbados, the First Black Slave Society*, BLACK PERSPECTIVES (Apr. 8, 2017), <https://www.aaihs.org/on-barbados-the-first-black-slave-society/> [perma.cc/92BJ-683K].

24. Robinson, *supra* note 20, at 552–53.

25. *Id.* at 552.

26. *Id.*

27. See Greg Bailey, *Sir William Blackstone in America*, VARSITYTUTORS, <https://www.varsitytutors.com/earlyamerica/early-america-review/volume-2/sir-william-blackstone-in-america> [perma.cc/LYL5-SGZ7]; cf. Neal Devins & David Klein, *The Vanishing Common Law Judge?*, 165 U. PENN. L. REV. 595 (2017).

28. Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police> [perma.cc/CZP2-T6EY].

29. *Id.*

proclaiming “the law is king”³⁰—Americans retained the King’s men. Since the thirteenth century, the constable, an officer of the King’s court, was aided by a group called the “watch.”³¹ The watch was composed of able-bodied adult male volunteers from the community who alerted authorities when there was trouble and operated mostly at night.³² In the early American colonies, these watches streamlined. Boston, New York, and Philadelphia formed their official night watches in the seventeenth century and their day watches in the early nineteenth century.³³ The goal of these watches was to “warn of impending danger” including activity that would break the law.³⁴ In the early colonies, and up until the mid-nineteenth century, slavery was legal in large parts of the United States.³⁵ This meant that any action that subverted slavery, like escaping it, was *breaking the law*.

A. *Modern American Policing is a Loyal Descendant of the Original Slave Patrols*

“It was part of my business to arrest all slaves and free persons of color who were collected in crowds at night, and lock them up. It was also part of my business to take them before the Mayor. I did this without any warrant, and at my own discretion. Next day they were examined and punished. The punishment is flogging. I am one of the men who flog them. They get not exceeding thirty-nine lashes. I am paid 50 cents for every negro I flog. The price used to be sixty-two and a half cents. I am paid fifty cents for every negro I arrest, and fifty cents more if I flog him. I have flogged hundreds. I am often employed by private persons to pursue fugitive slaves. I have been thus employed since 1838. I never refuse a good job of that kind.” - John Capeheart, Norfolk, Virginia’s Constable³⁶

30. *Paine on the Idea that the Law Is King (1776)*, LIBERTY FUND: ONLINE LIBR. OF LIBERTY, <https://oll.libertyfund.org/quote/paine-on-the-idea-that-the-law-is-king-1776> [perma.cc/VU6F-J3QK].

31. Gary Potter, *The History of Policing in the United States, Part 1*, E. KY. UNIV.: POLICE STUD. ONLINE (June 25, 2013), <https://plsonline.eku.edu/insidelook/history-policing-united-states-part-1> [perma.cc/9J9H-W34N].

32. Lepore, *supra* note 28; Potter, *supra* note 31.

33. GARY POTTER, *THE HISTORY OF POLICING IN THE UNITED STATES 2* (2013), <https://plsonline.eku.edu/sites/plsonline.eku.edu/files/the-history-of-policing-in-us.pdf> [perma.cc/7EB6-RUEU].

34. *Id.*

35. See *American Slavery: Separating Fact from Myth*, THE CONVERSATION (June 19, 2017), <https://theconversation.com/american-slavery-separating-fact-from-myth-79620> [perma.cc/X9MU-VNQ8].

36. SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 83 (First Harvard University Press paperback ed. 2003) (2001).

“ . . . the paddy rollers would come an’ horse whip every las’ one of ‘em, jes cause poor souls were praying to God to free ‘em from dat awful bondage.” - Minnie Fulkes, formerly enslaved, Work Projects Administration interview, March 5, 1937³⁷

Historian Jill Lepore argues slavery is “not a rule of law . . . [but] a rule of police.”³⁸ Policing in the early United States followed two distinct but ultimately complementary approaches in the North and the South.³⁹ In the South, following the adoption of the aforementioned slave codes, slave patrols were formed in the early eighteenth century, the first one in the Carolinas in 1704.⁴⁰ The enslaved Africans called the slave patrols “patrollers,” “patty rollers,” or “paddy rollers” who used what would eventually become known as “paddy wagons,” an older version of the modern-day police van, to scour the counties for the runaway enslaved.⁴¹ These slave patrols were formed under state laws, organized by counties, and bankrolled by taxes.⁴² The same slave patrols would go on to inspire the Ku Klux Klan’s “night riders” after the end of the Civil War in 1865.⁴³

Following the Carolinas, the other southern colonies, Virginia, Tennessee, Georgia, and, after independence, states such as Kentucky, all formed slave patrols in the eighteenth century to protect the properties of White slave owners.⁴⁴ These laws were further strengthened following the slave revolts led by Abolitionists like Nat Turner, Gabriel Prosser, and Denmark Vesey in the early nineteenth century.⁴⁵ The goals of these slave patrols were multifold: (1) apprehend the runaway enslaved; (2) provide organized terror to deter revolt by the enslaved; and (3) maintain

37. Lincolnquakers, *Loudon County and the Paddy Rollers*, NEST OF ABOLITIONISTS (Sept. 9, 2020), <https://lincolnquakers.com/2020/09/09/loudoun-county-and-the-paddy-rollers/> [perma.cc/VRA2-NYTT].

38. Lepore, *supra* note 28.

39. See *The Racist Roots of American Policing: From Slave Patrols to Traffic Stops*, THE CONVERSATION (June 4, 2019), <https://theconversation.com/the-racist-roots-of-american-policing-from-slave-patrols-to-traffic-stops-112816> [perma.cc/8HDR-PZ5H].

40. POTTER, *supra* note 33, at 3.

41. Shem El, *From Slave Patrols to Paddy Wagons*, MOORISH AM. NEWS (May 2, 2015), <http://moorishamericannews.com/from-slave-patrols-to-paddy-wagons> [perma.cc/LGR2-YBKH].

42. *Loudon County and the Paddy Rollers*, *supra* note 37.

43. *Id.*

44. Robinson, *supra* note 20, at 553.

45. *Id.*

extra-judicial discipline for enslaved workers.⁴⁶ These slave patrols shed light on not only the origins of American law enforcement but also its primary motive—"the need to police enslaved Africans and control the behavior of Black people."⁴⁷

Though slave patrols originated in the Southern states, Northern states are not off the hook for their own contributions. Northern states like New York and Connecticut passed laws controlling the enslaved who escaped from the South to the Northern states.⁴⁸ The Northern States also helped Congress pass Fugitive Slave Laws in 1793—which were strengthened again in 1850—that "allowed for runaway enslaved Africans to be returned to their owners."⁴⁹

In the early nineteenth century, American cities experienced huge population growth through immigration and industrialization.⁵⁰ Industrialization also increased urbanization.⁵¹ Although public disorder—public drunkenness and prostitution—seemed to have increased with swift urbanization, "evidence of an actual crime wave [was] lacking."⁵² But this did not stop the "emerging commercial elite"⁵³ nativists⁵⁴ from using the fear of purported "outsiders"—mostly immigrants and Blacks—to whip up fear and establish "a mechanism to insure a stable and orderly work force, a stable and orderly environment for the conduct of business, and the maintenance of what they referred to as the 'collective good.'"⁵⁵ Around the same time, starting in the early 1830s, almost every major American city—Boston, New York City, Albany, Chicago, New Orleans, Cincinnati, Philadelphia, Newark, and Baltimore—had established centralized, bureaucratic police forces.⁵⁶ Professor Michael A. Robinson of the University of Georgia argues that the goal of early police departments was "to protect the

46. POTTER, *supra* note 33, at 3.

47. Robinson, *supra* note 20, at 533.

48. *Id.*

49. *Id.* at 533–34.

50. Lepore, *supra* note 28.

51. See Stuart M. Blumin, *Driven to the City: Urbanization and Industrialization in the 19th Century*, COLLEGE BD.: AP CENTRAL, <https://apcentral.collegeboard.org/series/america-on-the-world-stage/urbanization-industrialization-nineteenth-century> [perma.cc/7LY4-XD56].

52. POTTER, *supra* note 33, at 3.

53. *Id.* at 4.

54. Lepore, *supra* note 28.

55. POTTER, *supra* note 33, at 4.

56. *Id.* at 2–3.

financial interest of the wealthy, much like the slave patrols protected financial interests of enslaved African owners.”⁵⁷

While early policing in America targeted and terrorized enslaved Black people, early policing efforts also took aim at other non-White populations. Indigenous communities were forcibly moved and held indefinitely in military detention, including at Minnesota’s Fort Snelling Concentration Camp, which held over 1,600 Dakota people during the winter of 1862–63.⁵⁸ It is estimated that up to 300 Dakota detainees died in the camp.⁵⁹ The Texas Rangers reorganized shortly after in the 1870s to address the pressing “native question.”⁶⁰ More recently, in 2016–2017, law enforcement officers in North Dakota inflicted extraordinary violence against Native water protectors at Standing Rock.⁶¹ Over 300 police-inflicted injuries were reported among those protesting the Dakota Access Pipeline.⁶²

Although slave patrols were formally dissolved after the Civil War, the formerly enslaved promptly came under the Black Codes.⁶³ These Codes restricted where Black Americans could travel and live, and were brutally enforced by the newly formed police departments in both the North and the South.⁶⁴ The Black Codes were followed by (1) the Jim Crow laws (a “new kind of slave code”);⁶⁵ (2) the emergence of state police forces and union busting⁶⁶—a proud American tradition⁶⁷—during the Progressive Era; (3) the bipartisan “War on Crime” led by Presidents Lyndon

57. Robinson, *supra* note 20, at 555.

58. *The US-Dakota War of 1862*, HISTORIC FORT SNELLING, <https://www.mnhs.org/fortsnelling/learn/us-dakota-war> [perma.cc/986Y-UUV6].

59. *Id.*

60. Andrew R. Graybill, Rangers, Mounties, and the Subjugation of Indigenous Peoples, 1870-1885, *GREAT PLAINS QUARTERLY*, Spring 2004, at 82, 83.

61. See Julia Carrie Wong & Sam Levin, *Standing Rock Protesters Hold Out Against Extraordinary Police Violence*, *THE GUARDIAN* (Nov. 29, 2016), <https://www.theguardian.com/us-news/2016/nov/29/standing-rock-protest-north-dakota-shutdown-evacuation> [perma.cc/9VVD-FHX2].

62. *Id.*

63. *Racist Roots of American Policing*, *supra* note 39; *Jim Crow Laws*, HISTORY.COM (Mar. 26, 2021), <https://www.history.com/topics/early-20th-century-us/jim-crow-laws> [perma.cc/FE4A-9RUG].

64. *Racist Roots of American Policing*, *supra* note 39.

65. Lepore, *supra* note 28.

66. See Frank Olito, *Photos Show How Policing Has Evolved in the US Since Its Beginnings in the 1600s*, INSIDER (Apr. 26, 2021), <https://www.insider.com/history-of-police-in-the-us-photos-2020-6> [perma.cc/8KMU-LTAY].

67. See G. William Domhoff, *The Rise and Fall of Labor Unions in the U.S.*, WHO RULES AMERICA? (Feb. 2013), https://whorulesamerica.ucsc.edu/power/history_of_labor_unions.html [perma.cc/J43H-KFZ9].

Johnson and Richard Nixon;⁶⁸ and (4) the 1990s' so-called Tough-on-Crime bills.⁶⁹ Lepore succinctly articulates the vicious cycle of the self-fulfilling prophecy that is the policing of Black Americans in the United States:

Police patrolled Black neighborhoods and arrested Black people disproportionately; prosecutors indicted Black people disproportionately; juries found Black people guilty disproportionately; judges gave Black people disproportionately long sentences; and, then, after all this, social scientists, observing the number of Black people in jail, decided that, as a matter of biology, Black people were disproportionately inclined to criminality.⁷⁰

Today, there are approximately eighteen thousand law-enforcement agencies or police departments in the United States.⁷¹ Between them, they have nearly seven hundred thousand police officers. These agencies have received more than “seven billion dollars’ worth of surplus military equipment” from the Pentagon in the past two decades.⁷² In its treatment of its Black population, especially through its police force, Minneapolis is no different from any other major American city.

*B. Minneapolis—A Unique American Subculture Yet All
Too Common American Policing Problems*

“Would [the killing of Philando Castile by an officer in a suburb of St. Paul] have happened if those passengers, the driver and the passengers, were white? I don’t think it would have. So, I’m forced to confront, and I think all of us in Minnesota are forced to confront, that this kind of racism exists and that it’s incumbent upon all of us to vow that we’re going to do whatever we can to see that it doesn’t happen, doesn’t continue to happen.” - Governor Mark Dayton of Minnesota, July 7, 2016⁷³

68. See Elizabeth Hinton, *Why We Should Reconsider the War on Crime*, TIME (Mar. 20, 2015), <https://time.com/3746059/war-on-crime-history/> [perma.cc/LMF6-JWTT].

69. See Ed Chung, Betsy Pearl & Lea Hunter, *The 1994 Crime Bill Continues to Undercut Justice Reform—Here’s How to Stop It*, CTR. FOR AM. PROGRESS (Mar. 26, 2019), <https://www.americanprogress.org/issues/criminal-justice/reports/2019/03/26/467486/1994-crime-bill-continues-undercut-justice-reform-heres-stop/> [perma.cc/6CLR-33TF].

70. Lepore, *supra* note 28.

71. Robinson, *supra* note 20, at 552.

72. Lepore, *supra* note 28.

73. PBS Newshour, *Minn. Governor: Castile Shooting Outcome Would Have Been Different If He Was White*, YOUTUBE (Jul. 7, 2016), <https://www.youtube.com/>

Minneapolis has long been described as a paradox.⁷⁴ It is part of one of the wealthiest metropolitan areas in the country, but this has been primarily true only for its White residents.⁷⁵ Minneapolis is a bastion of progressive politics,⁷⁶ but is also a racially segregated city despite a history of welcoming refugees and immigrants from all around the world.⁷⁷ The current chief of the MPD, as a young lieutenant, once joined a lawsuit filed against his own department for tolerating racism.⁷⁸ Only 7 percent of MPD officers live in the city.⁷⁹ Some commute from predominantly White suburbs like Anoka or even exurbs like Hudson, Wisconsin.⁸⁰ This disparity has worsened in the past two decades after Governor Jesse Ventura signed a law revoking the requirement that Minneapolis and St. Paul police officers live in the cities in which they worked.⁸¹

Excessive force complaints against the eight-hundred-plus-officer strong MPD are commonplace.⁸² Black Americans account for twenty percent of the city's population, but "accounted for more than 60 percent of the victims in Minneapolis police shootings from late 2009 through May 2019."⁸³ Black Minneapolitans are also more likely "to be pulled over, arrested and have force used against them than white residents,"⁸⁴ which MPD's own data demonstrates.⁸⁵

watch?v=E6Qf7zJYNHc.

74. Ricardo Lopez, *Minnesota's Decades-Long Failure to Prevent Police Abuse*, NEW YORKER (June 10, 2020), <https://www.newyorker.com/news/news-desk/minnesotas-decades-long-failure-to-confront-police-abuse> [perma.cc/8HMU-EMFA].

75. *Id.*

76. See Matt Furber, John Eligon & Audra D. S. Burch, *Minneapolis Police, Long Accused of Racism, Face Wrath of Wounded City*, N.Y. TIMES (Apr. 5, 2021), <https://www.nytimes.com/2020/05/27/us/minneapolis-police.html> [perma.cc/Q5LC-FUT8].

77. See generally MYRON ORFIELD, Draft, INTEGRATION AND NEO-SEGREGATION IN MINNESOTA (Dec. 2018), https://www.law.umn.edu/sites/law.umn.edu/files/metro-files/orfield_neosegregation_draft.pdf [perma.cc/7PDV-BWP3].

78. See Furber et al., *supra* note 76.

79. Jessie Van Berkel & Liz Navratil, *Minnesota Human Rights Department Launches Probe into Minneapolis Police*, STAR TRIB. (June 30, 2020), <https://www.startribune.com/minn-officials-push-for-systems-change-at-minneapolis-police-dept/570958652/> [perma.cc/MPY2-H5E6].

80. Lopez, *supra* note 74.

81. News Release, Representative Rich Stanek, Stanek Residency Freedom Bill Becomes Law (Mar. 15, 1999), <https://www.house.leg.state.mn.us/GOP/goppress/Stanek/0309rsresidency.htm> [perma.cc/XW7A-NN3P].

82. See Furber et al., *supra* note 76.

83. *Id.*

84. *Id.*

85. Joseph Schneider & Alfred Ndungu, *Does the Minneapolis Police Department Traffic Stop Data Reveal Racial Bias?*, INEQUALITY INQUIRY (Nov. 24, 2020), <https://lawandinequality.org/2020/11/24/does-the-minneapolis-police-department->

Today in Minneapolis, Native individuals experience more stops and searches relative to their population frequency.⁸⁶ In the U.S., Native Americans are more likely to be killed by the police than any other racial or ethnic group.⁸⁷ For those who survive police encounters and end up incarcerated in Minnesota, Native inmates are 1.8 times more likely than their White counterparts to be placed in solitary confinement.⁸⁸ Native organizers have rallied against police brutality for many years: The American Indian Movement (AIM) was formed in 1968, in part due to police brutality against Native people in Minneapolis.⁸⁹ Minnesota's Native communities continue to protest the state-sanctioned violence against non-White bodies and affirm that Native Lives Matter.⁹⁰

In 2015, an MPD officer killed Jamar Clark, a Black man, claiming that Clark tried to take another officer's weapon.⁹¹ The Hennepin County Attorney, Mike Freeman, declined to press charges, claiming the shooting was justified. In 2016, a suburban police officer fired seven shots and killed Philando Castile, a Black man, in front of Castile's four-year-old daughter, and girlfriend, even after Castile informed the officer he had a licensed gun on his person.⁹² In 2018, Thurman Blevins, a Black man, begged two White police officers closing in on him to not shoot him and leave him alone. Blevins was still shot in a fatal encounter captured on camera.⁹³ Only one percent of complaints against MPD officers "that have been adjudicated since 2012 have resulted in disciplinary action."⁹⁴ The only MPD officer to be convicted of an on-duty, fatal

traffic-stop-data-reveal-racial-bias/ [perma.cc/65SS-KCMG].

86. Matthew Harvey, *Fatal Encounters Between Native Americans and the Police*, FED'L RESERVE BANK OF MINNEAPOLIS (Mar. 25, 2020), <https://www.minneapolisfed.org/article/2020/fatal-encounters-between-native-americans-and-the-police> [perma.cc/99DN-UCL7].

87. *Id.*

88. Andy Mannix & Jeff Hargarten, *Minnesota Sending Black, Native American Prisoners to Solitary Confinement at Higher Rates than Whites*, STAR TRIB. (Jan. 17, 2020), <https://www.startribune.com/minnesota-sending-black-native-american-prisoners-to-solitary-confinement-at-higher-rates-than-whites/567087582/> [perma.cc/6US3-WQXL].

89. See Katrina Phillips, *Longtime Police Brutality Drove American Indians to Join the George Floyd Protests*, WASH. POST (June 6, 2020), <https://www.washingtonpost.com/outlook/2020/06/06/longtime-police-brutality-drove-american-indians-join-george-floyd-protests/> [perma.cc/CBT7-A3W3].

90. *Id.*

91. See Lopez, *supra* note 74.

92. See *id.*

93. Barbara Marcolini, *Minneapolis Police Video Shows Moments Before Thurman Blevins Was Shot*, N.Y. TIMES (July 30, 2018), <https://www.nytimes.com/video/us/100000006031561/minneapolis-police-video-thurman-blevins-shot.html>.

94. See Furber et al., *supra* note 76.

shooting was “a Black MPD officer who shot and killed Justine Ruszczyk, a white woman, in 2017.”⁹⁵ Ruszczyk’s family received a \$20 million settlement from the city of Minneapolis. Minneapolis Police Union’s then-president has called Black Lives Matter a “terrorist organization”⁹⁶ and “openly wore a white power patch on his motorcycle jacket.”⁹⁷ MPD, like many other police departments, has tried unsuccessfully to reform itself many times over the past few decades.

II. Current Efforts at Reform

A. *Trial and Error—A Decades-Long Story of the City and the MPD’s Inability to Create Meaningful Change*

“We’re tired of weak reforms like body cameras, tweaks to civilian oversight, and new signs in police cars . . . 150 years after MPD was founded and 3 years after they murdered Jamar Clark, the problems they cause in our communities haven’t changed. We want a better return on the investment of our tax dollars.” - Hani Ali, Black Visions Collective, Nov. 1, 2018.⁹⁸

95. Kandace Montgomery & Miski Noor, *Decades of Tensions Between Minneapolis Police and Black Communities Have Led to This Moment*, VOX (June 1, 2020), <https://www.vox.com/first-person/2020/6/1/21276309/george-floyd-police-protests-minneapolis-black-lives-matter> [perma.cc/X6AD-43TF].

96. *Id.*

97. Haven Orecchio-Egresitz, *A 2007 Lawsuit Said the President of the Minneapolis Police Union Wore a ‘White Power’ Patch on His Motorcycle Jacket and Discriminated Against Officers of Color*, INSIDER (May 29, 2020), <https://www.insider.com/president-minneapolis-police-union-wore-white-power-patch-lawsuit-2020-5> [perma.cc/5V2H-W3US].

98. Press Release, Black Visions Collective, FACEBOOK (Nov. 1, 2018), <https://www.facebook.com/LitBLVC/posts/for-immediate-release-november-1-2018reclaim-the-block-coalition-demands-5-dives/316155155638538/>.

George Floyd.⁹⁹ Jamar Clark.¹⁰⁰ David Smith.¹⁰¹ Tommie Baker.¹⁰² Quincy Smith.¹⁰³ Dominic Felder.¹⁰⁴ Christopher Burns.¹⁰⁵ Mark Henderson.¹⁰⁶ Philando Castile. Thurman Blevins. How much longer will we engage in a process of trial and error that results in Black and Brown people shot and killed?¹⁰⁷ Racially discriminatory policing in Minneapolis is not a recent phenomenon,¹⁰⁸ and any suggestion¹⁰⁹ that the issue can be solved through incremental policy changes faces a difficult task in explaining why this time will be different. George Floyd's tragic murder was preceded by decades of unrestrained police misconduct and decades of ineffective reform

99. See Hill et al., *supra* note 13.

100. See *Jamar Clark Shooting, One Year Later*, MPR NEWS, https://live.mprnews.org/Event/Black_Lives_Matter_protests_in_Minneapolis_Fourth_Precinct?Page=24#.

101. See Randy Furst, *May 25: Minneapolis Pays \$3 Million in Police Misconduct Case*, STAR TRIB. (June 1, 2013), <https://www.startribune.com/may-25-minneapolis-pays-3-million-in-police-misconduct-case/208912661/> [perma.cc/BS57-6CBV].

102. See COMMUNITIES UNITED AGAINST POLICE BRUTALITY, *STOLEN LIVES IN MINNESOTA: PEOPLE WHO HAVE LOST THEIR LIVES THROUGH ENCOUNTERS WITH LAW ENFORCEMENT AUTHORITIES* 3 (Oct. 18, 2018), https://d3n8a8spro7vhmx.cloudfront.net/cuapb/pages/17/attachments/original/1556948828/Minnesota_Stolen_Lives_Names_2018.pdf?1556948828 [perma.cc/N7FC-3P5B].

103. See *Minneapolis Agrees to Pay \$3 Million for Police Misconduct*, PINTAS & MULLINS (May 31, 2013), <https://www.pintas.com/blog/minneapolis-agrees-to-pay-3-million-for-police-misconduct/> [perma.cc/HR2F-H8LB].

104. See Brandt Williams, *Family of Man Shot by Mpls Police Wins \$1.8M Award*, MPR NEWS (Oct. 25, 2010), <https://www.mprnews.org/story/2010/10/25/excessive-force-verdict> [perma.cc/Y4UU-T93P].

105. Alejandra Matos & Matt McKinney, *13 Excessive Force Complaints Against Minneapolis Police Officer Involved in Terrence Franklin Shooting*, STAR TRIB. (July 1, 2013), <https://www.startribune.com/13-excessive-force-complaints-against-minneapolis-cop-involved-in-shooting/213718651/> [perma.cc/HWM9-K4S2].

106. Mara Klecker, *Woodbury Reaches \$1.5 Million Settlement with Mother of Man Killed by Police in 2012*, STAR TRIB. (Apr. 17, 2019), <https://www.startribune.com/woodbury-reaches-1-5-million-settlement-with-mother-of-man-killed-by-police-in-2012/508709872/> [perma.cc/SQ46-C2E9].

107. Jeff Hargarten, Jennifer Bjorhus, MaryJo Webster & Kelly Smith, *Every Police-Involved Death in Minnesota Since 2000*, STAR TRIB. (Apr. 27, 2021), <https://www.startribune.com/every-police-involved-death-in-minnesota-since-2000/502088871/> [perma.cc/CFQ5-UV63].

108. See Jamiles Lartey & Simone Weichselbaum, *Before George Floyd's Death, Minneapolis Police Failed to Adopt Reforms, Remove Bad Officers*, THE MARSHALL PROJECT (May 28, 2020), <https://www.themarshallproject.org/2020/05/28/before-george-floyd-s-death-minneapolis-police-failed-to-adopt-reforms-remove-bad-officers> [perma.cc/ZWC8-5HYJ].

109. *E.g.*, Jason C. Johnson & James A. Gagliano, Opinion, *Defunding the Police Isn't the Answer*, CNN (June 9, 2020), <https://www.cnn.com/2020/06/09/opinions/defunding-police-is-not-the-answer-johnson-gagliano/index.html> [perma.cc/G2HB-N9FL].

measures.¹¹⁰ The experience of Minneapolis, one of the most “progressive” cities in the United States,¹¹¹ demonstrates that good intentions and internal solutions are not enough to counteract the repressive and systemic racism that has been intrinsic to police forces from the outset.¹¹² When it comes to constraining excessive use of force and holding MPD accountable, we have fallen woefully short.

Complicating Minneapolis’ reputation for racist policing¹¹³ are the City’s progressive attitudes and prior attempts to constrain the use of force. In 2016, MPD issued a new policy creating a “duty to intervene” for officers in circumstances where they see a fellow officer use excessive force.¹¹⁴ That same year, MPD unveiled its “sanctity of life” policy,¹¹⁵ which set forth a requirement of de-escalation for officers in “dangerous situations.”¹¹⁶ In 2017, the Department implemented body cameras to be worn by its officers,¹¹⁷ a measure viewed by some as “key to police reform.”¹¹⁸ There was

110. MPD150, ENOUGH IS ENOUGH: A 150 YEAR PERFORMANCE REVIEW OF THE MINNEAPOLIS POLICE DEPARTMENT (Expanded ed. 2020), https://www.mpd150.com/wp-content/uploads/reports/report_2_compressed.pdf [perma.cc/65X8-9F5A]; see also Lopez, *supra* note 74.

111. See John Eligon & Julis Bosman, *How Minneapolis, One of America’s Most Liberal Cities, Struggles with Racism*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/06/01/us/minneapolis-racism-minnesota.html> [perma.cc/QFZ2-RGVU].

112. See Lepore, *supra* note 28; MPD150, ENOUGH IS ENOUGH, *supra* note 110.

113. See Furber et al., *supra* note 76.

114. MINNEAPOLIS POLICE DEPARTMENT POLICY AND PROCEDURE MANUAL 5-301 § III(C)(2) (“Regardless of tenure or rank, any sworn employee who observes another employee use any prohibited force, or inappropriate or unreasonable force (including applying force when it is no longer required), must attempt to safely intervene by verbal and physical means, and if they do not do so shall be subjected to discipline to the same severity as if they themselves engaged in the prohibited, inappropriate, or unreasonable use of force.”). See also Lopez, *supra* note 74; Bernard Condon & Todd Richmond, *Duty to Intervene: Floyd Cops Spoke Up but Didn’t Step In*, ASSOCIATED PRESS (June 7, 2020), <https://apnews.com/article/george-floyd-american-protests-us-news-ap-top-news-mn-state-wire-0d52f8acbbdab6a29b781d75e9aeb01> [perma.cc/4MW5-M3TM].

115. MINNEAPOLIS POLICE DEPARTMENT POLICY AND PROCEDURE MANUAL 5-301 § I.

116. Libor Jany, *Minneapolis Police Reveal Changes to Use-of-Force Policy*, STAR TRIB. (Aug. 9, 2016), <https://www.startribune.com/minneapolis-police-reveal-changes-to-use-of-force-policy/389509371/> [perma.cc/2LUS-DKNH].

117. See Tim Nelson, *Bodycam Use by Minneapolis Police Hits Record Highs This Year*, MPR NEWS (Aug. 14, 2019), <https://www.mprnews.org/story/2019/08/14/bodycam-use-by-minneapolis-police-hits-record-highs-this-year> [perma.cc/HJ8B-4UXF].

118. See Candice Norwood, *Body Cameras Are Seen as Key to Police Reform. But Do They Increase Accountability?*, PBS NEWSHOUR (June 25, 2020), <https://www.pbs.org/newshour/politics/body-cameras-are-seen-as-key-to-police-reform-but-do-they-increase-accountability> [perma.cc/7QYF-AN7E].

also cause for optimism when, in August 2017, Medaria Arradondo was appointed the City's first Black police chief.¹¹⁹ Arradondo had previously joined other Black police officers in Minneapolis in suing the MPD for racial discrimination; the case eventually settled for \$740,000.¹²⁰

In 2018, the City Council shifted \$1.1 million of the MPD budget to fund community-led public safety initiatives.¹²¹ However, the City Council added \$8.2 million to the department budget in December of 2019.¹²² In April of 2019, Minneapolis Mayor Jacob Frey announced that the City would ban "warrior-style" training that police officers were allowed to use when they were off-duty, one of the first bans of its kind in the nation.¹²³ These policies and reform measures failed to prevent George Floyd's killing, when former-Officer Derek Chauvin knelt on Floyd's neck for—at least—8 minutes and 46 seconds.¹²⁴ Nor do these policies, even with the added weight of public scrutiny after Floyd's murder, give any assurance that they will be sufficient to prevent another instance of police brutality.

An inability to prevent MPD officers from using excessive force against Black and Brown people has led to reliance on other avenues, beyond internal reform, to seek accountability for the officers involved.¹²⁵ MPD 150—a collective of local organizers, researchers, artists, and activists—have compiled resources that analyze the history of the Minneapolis Police Department.¹²⁶ In the late 1960s, the City Council created a "Civil Rights Commission" designed to provide an outlet for investigating civilian complaints about police officers.¹²⁷ Shortly thereafter, Mayor Charles Stenvig, who had previously served as head of the police union, revoked the Civil Rights Commission's authority to conduct investigations,

119. *Minneapolis Police Name First Black Chief in Wake of Shooting*, NBC NEWS (Aug. 21, 2017), <https://www.nbcnews.com/news/nbcblk/minneapolis-police-name-first-black-chief-wake-shooting-n793956> [perma.cc/X84L-2PPV].

120. See Orecchio-Egresitz, *supra* note 97.

121. See Montgomery & Noor, *supra* note 95.

122. *Id.*

123. Cinnamon Janzer, *Minneapolis Bans "Warrior-Style" Training for Police Officers*, NEXT CITY (Apr. 30, 2019), <https://nextcity.org/daily/entry/minneapolis-bans-warrior-style-training-for-police-officers> [perma.cc/MJ27-8QTT].

124. See Hill et al., *supra* note 13.

125. See Lartey & Weichselbaum, *supra* note 108 (quoting Valerie Castile, mother of Philando Castile) ("We still have that big question: Why? Why does this keep happening and why no one is being held accountable?").

126. *MPD 150: A People's Project Evaluating Policing*, <https://www.mpd150.com/>. See MPD150, ENOUGH IS ENOUGH, *supra* note 110.

127. MPD150, ENOUGH IS ENOUGH, *supra* note 110, at 12.

leaving the Minneapolis Police Department as the only entity capable of investigating police misconduct.¹²⁸ The issues that led to the creation of the Civil Rights Commission persisted in its absence, and the City created the “Civilian Review Authority” in 1990.¹²⁹ Unfortunately, the Civilian Review Authority was stripped of power by the Minnesota Legislature in 2012—at the request of the Minneapolis Police Federation—and replaced by the City with the Office of Police Conduct Review.¹³⁰

The current process of filing complaints against Minneapolis police officers is complicated, based on theories of self-accountability, and is, ultimately, ineffective.¹³¹ In its current form, the Office of Police Conduct Review works to investigate charges of police misconduct and provides “recommendations regarding the merits of such complaints to the chief of police.”¹³² Any such recommendations are interceded by another layer of review, whereby a review panel composed of two MPD officers and two civilians provides an opportunity for MPD to prevent issues from reaching the Chief’s desk.¹³³ Despite the fact that hundreds of police misconduct complaints against the MPD are brought each year, only three percent of complaints result in discipline, and the vast majority of complaints result in no action, while a moderate corrective action of “coaching” serves as an alternative.¹³⁴

Even if a complaint does reach a recommendation of officer discipline, another obstacle looms: arbitration. Internal disciplinary decisions are finalized after binding arbitration, which regularly reverses firings and other punishments.¹³⁵ Between 2013 and 2018,

128. *Id.*

129. *Id.* at 13.

130. *Id.* at 15; Randy Furst, *New Law Throws Minneapolis Police Oversight in Turmoil*, STAR TRIB. (Apr. 6, 2012), <https://www.startribune.com/new-law-throws-minneapolis-police-oversight-in-turmoil/146497655/> [perma.cc/Z38F-FZRG]; *Office of Police Conduct Review*, MINNEAPOLIS: CITY OF LAKES <https://www2.minneapolismn.gov/government/departments/civil-rights/opcr/> [perma.cc/UN74-KJ77].

131. See Jennifer Bjorhus, Liz Sawyer & Star Tribune Staff Writers, *Minneapolis Police Officers Disciplined in Fraction of Cases*, STAR TRIB. (June 9, 2020), <https://www.startribune.com/minneapolis-police-officers-disciplined-in-fraction-of-cases/571120852/> [perma.cc/F6EJ-QSEX].

132. MINNEAPOLIS, MINN. CODE OF ORDINANCES § 172.10, available at https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=CO_OR_TIT9FIPOPR_CH172POCOOV.

133. *Id.* at § 172.40.

134. Bjorhus et al., *supra* note 131, tbl.

135. Solomon Gustavo, *What We Know (and Don’t Know) So Far About the Effort to Dismantle the Minneapolis Police Department*, MINNPOST (July 9, 2020), <https://www.minnpost.com/metro/2020/07/what-we-know-and-dont-know-so-far-about-the-effort-to-dismantle-the-minneapolis-police-department/> [perma.cc/5M7T-

MPD fired five officers and demoted one officer from its 800-person force.¹³⁶ When asked to comment or respond to these jarring numbers, MPD did not respond,¹³⁷ apparently running from scrutiny rather than facing it. In more recent years, some have observed the Minneapolis Police Department engaging in a pattern of “stonewalling, evading and deflecting the slightest suggestion of police brutality” in response to racially discriminatory policing.¹³⁸ Although there are a host of reasons why racially discriminatory policing continues in Minneapolis, lack of accountability is a common thread.

The inability or unwillingness to hold MPD accountable or prevent its officers from using excessive force has damaging consequences for Black Minneapolitans and other minorities. According to a 2015 report from the American Civil Liberties Union, Black people in Minneapolis were 8.7 times more likely than White people to be arrested for low-level offenses and 25 times more likely to be arrested for “loitering with intent to commit a narcotics offense.”¹³⁹ Despite constituting only 6 percent of the population of Minneapolis, “Black people accounted for more than 60 percent of the victims in Minneapolis police shootings from late 2000 through 2018.”¹⁴⁰ Carrying on with the status quo is an act of complicity to the cruelty Black people in Minneapolis experience on a daily basis.¹⁴¹

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136. Bjorhus et al., *supra* note 131 (“Of the 1,600 police misconduct complaints filed in Minneapolis from 2013 through 2018 . . . only 45 resulted in an officer being disciplined. . . . Five officers were successfully fired during that six-year period, and one was demoted.”); Furber et al., *supra* note 76 (referring to Minneapolis’ “800-plus officer force”).

137. Bjorhus et al., *supra* note 131.

138. Todd Baer, Opinion, *The Minneapolis Police Department Has a Long History of Brutality*, AL JAZEERA (June 11, 2020), <https://www.aljazeera.com/opinions/2020/6/11/the-minneapolis-police-department-has-a-long-history-of-brutality/> [perma.cc/42YU-BUTE].

139. *Picking Up the Pieces: A Minneapolis Case Study*, ACLU (Apr. 15, 2015), <https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/picking-pieces?redirect=feature/picking-pieces> [perma.cc/ZP5M-YSTZ].

140. Montgomery & Noor, *supra* note 95 (citing Jeff Hargarten, *Minneapolis Police Shootings Since 2000: A Deeper Look at Who and Where*, STAR TRIB. (July 15, 2018), <https://www.startribune.com/minneapolis-police-shootings-since-2000-a-deeper-look-at-who-and-where/435882213/> [perma.cc/QDZ5-45RV]).

141. See Audrey McNamara, *Minneapolis Declares Racism a Public Health Emergency*, CBS NEWS (July 17, 2020), <https://www.cbsnews.com/news/minneapolis-racism-public-health-emergency/> [perma.cc/3MDW-8U64] (“The resolution notes that ‘the killings of unarmed Black men are associated with an increase in depression and emotional issues for Black people.’ Dr. Jess Clemons . . . told ‘CBS This Morning’ . . . ‘We’re expected to not only present with symptoms, but also have nowhere to go, because lack of access, the stigma, and barriers associated with it.’”); RESOLUTION

*B. Recent Attempts at Reform Demonstrate the Difficulty of
Achieving Substantive and Meaningful Change*

The killing of George Floyd, an unarmed Black man, by a White Minneapolis police officer on May 25, 2020, fueled renewed outrage towards the racist policing of the MPD. Floyd was murdered with a knee to his neck as onlookers pleaded for his release and captured a video that would spur protests in at least 140 cities across the United States.¹⁴² In Minneapolis, the reaction to the death was swift: thousands gathered in protest the next day, the four officers involved were fired, the protests grew rapidly, Governor Walz declared a peacetime emergency, and for over a week crowds swelled, shutting down the city and demanding change.¹⁴³ The officer who had forced his knee on Floyd's neck was charged with third degree murder just four days after Floyd's death.¹⁴⁴ This powerful reaction suggested that substantive change of the MPD might finally be in reach.

The cause advanced by the protesters was distilled by their rallying cries to abolish the police and defund MPD,¹⁴⁵ a cause that community groups such as Black Visions¹⁴⁶ and Reclaim the Block¹⁴⁷ have been championing for several years. As pressure mounted to take action, the Minneapolis City Councilors responded. On June 7, 2020, a majority of City Councilors pledged to dismantle

BY JENKINS AND CUNNINGHAM, DECLARING RACISM A PUBLIC HEALTH EMERGENCY IN THE CITY OF MINNEAPOLIS, <https://lms.minneapolismn.gov/Download/RCA/14012/Declaring%20Racism%20a%20Public%20Health%20Emergency%20Resolution.pdf> [perma.cc/DB3E-QJ7D].

142. See Derrick Bryson Taylor, *Floyd Protests: A Timeline*, N.Y. TIMES (Mar. 28, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [perma.cc/DK92-2WH3].

143. See Greta Kaul, *Seven Days in Minneapolis: A Timeline of What We Know About the Death of George Floyd and Its Aftermath*, MINNPOST (June 1, 2020), <https://www.minnpost.com/metro/2020/05/what-we-know-about-the-events-surrounding-george-floyds-death-and-its-aftermath-a-timeline/> [perma.cc/3XG2-E7DK].

144. See Jeannie Suk Gersen, *How the Charges Against Derek Chauvin Fit into a Vision of Criminal-Justice Reform*, NEW YORKER (June 17, 2020), <https://www.newyorker.com/news/our-columnists/how-the-charges-against-derek-chauvin-fit-into-a-vision-of-criminal-justice-reform> [perma.cc/WWW4-AG9S] ("After criminal charges against Chauvin were announced, on May 29th, protesters decried their insufficient severity.").

145. See Miguel Otárola, *Movement to Defund Police Sees Minneapolis as Proving Ground*, STAR TRIB. (June 9, 2020), <https://www.startribune.com/movement-to-defund-police-sees-minneapolis-as-proving-ground/571116932/?refresh=true> [perma.cc/M8HJ-C7ED].

146. See *Values*, BLACK VISIONS, <https://www.blackvisionsmn.org/values> [perma.cc/8PX6-ZGGL].

147. See RECLAIM THE BLOCK, <https://www.reclaimtheblock.org/> [perma.cc/U2YE-F9WC].

the MPD in its current form¹⁴⁸ and on June 26, the Council unanimously passed an ordinance seeking an amendment to the City Charter.¹⁴⁹ The City Charter currently contains a provision, § 7.3(c), requiring that a police department be funded by the Council in an amount proportional to the City's population.¹⁵⁰ The amendment, which would need approval by the Charter Commission, Mayor, and voters of Minneapolis, would mark a major transition from how the MPD is currently funded and change the shape of policing in the city.

The charter amendment process hit immediate hurdles, showing the difficulty of sustaining momentum for change. The Charter Commission, an unelected body whose members skew White, stymied any hope of having the amendment appear on the November 3, 2020 ballot.¹⁵¹ They voted to take the full 150 days to review the City Council's proposed amendment, meaning that the multi-stage process was stalled while the energy from the summer protests dissipated.¹⁵² The Commission rejected the Council's proposal in November.¹⁵³ In December 2020, the City Council voted to divert \$8 million from the MPD to the Office of Violence Prevention and other city services.¹⁵⁴ This amount reflects just 4.5% of MPD's budget.¹⁵⁵ The City Council narrowly voted to not diminish the size of the police force, keeping it above the threshold size

148. Dionne Searcey & John Eligon, *Minneapolis Will Dismantle Its Police Force, Council Members Pledge*, N.Y. TIMES (June 7, 2020), <https://www.nytimes.com/2020/06/07/us/minneapolis-police-abolish.html> [perma.cc/FTN7-GJAD].

149. David Schuman, *Mpls. City Council Votes Unanimously to Dismantle MPD*, CBS MINN. (June 26, 2020), <https://minnesota.cbslocal.com/2020/06/26/minneapolis-city-council-takes-another-step-toward-dismantling-police-department/> [perma.cc/4JJE-4JAN].

150. MINNEAPOLIS, MINN. CODE OF ORDINANCES, CHARTER § 7.3(c), available at https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=CH_ARTVIIAD.

151. See Andrew Hazzard, *Minneapolis Charter Commission's Slow-Rolling of Public Safety Amendment Follows Pattern*, SW. J. (Aug. 19, 2020), <https://www.southwestjournal.com/news/2020/08/minneapolis-charter-commissions-slow-rolling-of-public-safety-amendment-follows-pattern/> [perma.cc/4TDY-WLSJ].

152. *Id.*

153. Brandt Williams, *Charter Commission Rejects Minneapolis Council's Public Safety Amendment*, MPR NEWS (Nov. 5, 2020), <https://www.mprnews.org/story/2020/11/04/charter-commission-rejects-councils-public-safety-amendment> [perma.cc/9RLL-R9WN].

154. Jenny Gross & John Eligon, *Minneapolis City Council Votes to Remove \$8 Million from Police Budget*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/us/minneapolis-police-funding.html> [perma.cc/LH65-AR7Q].

155. *Id.*

required by the City Charter.¹⁵⁶ These acts are a far cry from the expansive vision of reform demanded after Floyd's killing.

Monumental change to the MPD was never going to be easy. Though protests suggested mass support for the idea of defunding the police, a local poll found that 44% of residents oppose a reduction in the size of the force, while 40% support it.¹⁵⁷ There are legitimate concerns regarding changing the current mechanisms of public safety, and those concerns are not only expressed by White suburbanites. The same poll found that residents who identify as Black were more likely to oppose the reduction than their White counterparts.¹⁵⁸ Black residents of Minneapolis' North Side report mixed feelings about the proposal; some acknowledge the need to have an authority to call when a crime is committed while also having encountered racist policing themselves.¹⁵⁹ When something goes wrong, people still want someone to count on to protect their families.¹⁶⁰

One of the major sticking points for residents about the City Council proposal is that it does not map out a vision for what type of services would replace a police department presence.¹⁶¹ Everyone from Mayor Jacob Frey to the Charter Commission to community activists have expressed frustration and reluctance towards the City Council's lack of a plan.¹⁶² Members of the Council, however, insist that the lack of detail is part of the design and will allow them

156. See MINNEAPOLIS, MINN. CODE OF ORDINANCES, CHARTER § 7.3(c); Liz Navratil, *With 2021 City Budget, Minneapolis Council Leaves Its Mark on Police and Public Safety*, STAR TRIB. (Dec. 10, 2020), <https://www.startribune.com/with-2021-city-budget-minneapolis-council-leaves-its-mark-on-police-and-public-safety/573361181/> [perma.cc/R2SP-RMC8].

157. Star Trib., MPR News & Kare 11 Minn., *Poll: Mayor Frey, the City Council and Defunding Minneapolis Police*, STAR TRIB. (Aug. 16, 2020), <https://www.startribune.com/minnesota-poll-full-results-minneapolis-defund-police-department-city-council-mayor-jacob-frey-dismantle-reform-george-floyd-mpd/572109911/?refresh=true> [perma.cc/U7ZK-WQ5T].

158. *Id.*

159. John Eligon, *Distrust of the Minneapolis Police, and Also the Effort to Defund Them*, N.Y. TIMES (Apr. 5, 2021), <https://www.nytimes.com/2020/08/04/us/minneapolis-defund-police.html?auth=linked-google> [perma.cc/63BH-EJD3].

160. *Id.* (quoting Raeisha Williams, community activist) ("When my house is broken into, I want to be able to call the police. When my security alarm goes off, I want to know they're going to arrive and protect my family.").

161. *Id.*

162. Emily Haavik, *Public Can Now Weight In on City Council Plan to Replace the Minneapolis Police Department*, KARE 11 (June 29, 2020), <https://www.kare11.com/article/news/local/minneapolis-city-council-plan-to-replace-minneapolis-police-department-open-for-public-comment/89-8b87a698-29f5-4f56-95ce-895c1127c60e> [perma.cc/5FYQ-43XU].

to spend time with stakeholders devising a workable replacement.¹⁶³

The national backlash over George Floyd's killing was swift and powerful; the City Council's reaction was equally fast, but progress stalled when anti-democratic barriers emerged. Now residents are left wondering whether change will ever happen and, if so, what it will look like.

III. Solutions

The recent barriers faced by the Minneapolis City Council reveal the difficulties in challenging the MPD's entrenched power. Throughout the history of the MPD, systemic hurdles have prevented progress, societal racism has hindered change, and community concerns about alternative safety strategies have cast doubt on new proposals. Yet, since 2000, the officers tasked with protecting and serving Minneapolis residents have killed 34 individuals, 22 of whom were Black.¹⁶⁴

Compounding the statistics about loss of life is real concern about the effectiveness of the MPD. Statistics cited after the killing of George Floyd show the MPD has cleared only 56% of homicide cases in 2019, along with just 22% of rapes in 2016.¹⁶⁵ These clearance rates trend lower than those nationally, where, in corresponding years, 61% of murder offenses¹⁶⁶ and 41% of rape offenses¹⁶⁷ were cleared. Additionally, we should be able to "resolve confusion over a \$20 grocery transaction without drawing a weapon or pulling out handcuffs."¹⁶⁸ Clearly, the current system is not working.

163. *Id.*

164. Hargarten et al., *supra* note 107.

165. Susan Du, Emily Cassel & Hannah Jones, *Defund & Dismantle: Minneapolis Looks Toward a Police-Free Future*, CITY PAGES (July 1, 2020), [https://web.archive.org/web/20200824074336/http://www.citypages.com/news/defund-dismantle-minneapolis-looks-toward-a-police-free-future/571575191].

166. U.S. DEPT OF JUST., FED'L BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2019 – OFFENSES CLEARED (2020), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/clearances.pdf [perma.cc/FDB8-Y3CZ].

167. *Clearances*, FBI: UCR: 2016 CRIME IN THE UNITED STATES, https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/clearances#:~:text=Overview,by%20arrest%20or%20exceptional%20means [perma.cc/4KB5-MNNC].

168. Steve Fletcher, *I'm a Minneapolis City Council Member. We Must Disband the Police—Here's What Could Come Next*, TIME (June 5, 2020), https://time.com/5848705/disband-and-replace-minneapolis-police/ [perma.cc/X8RC-GAJE].

We argue for a two-prong response: defund the MPD and decriminalize or legalize certain non-violent offenses. These approaches are feasible and focus on local change. Altering police funding mechanisms and decriminalizing low-level crimes potentially provide the quickest and most direct impact for Minneapolis residents.

A. *Defund MPD, Refund the Community*

Our first proposed change is defunding the MPD. As used in this article, defunding encompasses both reducing the budget of the police *and* reducing police responsibilities. Common critiques from outside,¹⁶⁹ as well as inside,¹⁷⁰ the police force describe the many roles a police officer is expected to play: social worker, mental health practitioner, traffic liaison, investigator, and more. “Unbundling” those roles from a police officer’s duties would divert funds from the police department to other city departments or community resources that address housing, mental health, and preventative violence.¹⁷¹

Shifting funds to service providers outside of the police department would reduce potential violent interactions between community members and police. It would address societal issues closer to their roots, as opposed to the temporary solutions that the police can provide. While the goal of defunding is to shrink the police department, it would still retain a police force to address serious threats to public safety which would calm the fears of many described above.

1. Redirect MPD Funding

Many cities across the nation have started *defunding* their police departments by *funding* alternative safety programs. Although Minneapolis may not be able to reduce the size of the police force and thereby dramatically cut funding without a charter

169. See Opinion, *Are We Asking Police to Do Too Much? 7 Experts Debate the Role Cops Should Play in Today's Society*, PHILA. INQUIRER (Feb. 28, 2019), <https://www.inquirer.com/opinion/commentary/role-of-police-law-enforcement-expert-opinion-20190228.html> [perma.cc/VM5A-K5FH].

170. See, e.g., German Lopez, *One of the Biggest Problems with American Policing: We Rely on Cops Way Too Much*, VOX (Jan. 24, 2016), <https://www.vox.com/2016/1/24/10816536/police-reliance-melvin-russell> [perma.cc/SV8J-5BJ6] (citing Baltimore Police Lt. Colonel Melvin Russell); CBSDFW, *Dallas Police Chief 'We're Asking Cops to Do Too Much in This Country'*, YOUTUBE (July 11, 2016), <https://www.youtube.com/watch?v=3RtnQ2GqBeg>.

171. Derek Thompson, *Unbundle the Police*, THE ATLANTIC (June 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/unbundle-police/612913/> [perma.cc/UL6P-N3PW].

amendment, the city had initial success with community safety programs and should build on those successes by shifting more funds from the police department budget. In 2018, the Office of Violence Prevention (OVP) was established within the Minneapolis Health Department (MHD).¹⁷² Since its inception, the OVP has implemented programs which are designed to treat community violence as a public health concern.¹⁷³ Three program highlights include:

- i. Project LIFE, a group violence intervention initiative, focuses its efforts on group-involved gun violence.¹⁷⁴ The program serves individuals with prior exposure to violence and provides them with wrap-around support services that address health, housing, and other basic needs. Since the start of the program in 2016, non-fatal gang affiliated shootings in Minneapolis have dropped from 93 to 27.¹⁷⁵
- ii. Next Step, a program in partnership with Hennepin Healthcare, seeks to interrupt community violence by connecting young people who have suffered a violent injury to resources such as job training, educational support, or housing.¹⁷⁶ Since 2016, the program has helped 400 individuals connect with community support, and less than 7% have returned to a partner hospital with the same or similar injuries.¹⁷⁷

172. *History of the Office of Violence Prevention*, MINNEAPOLIS: CITY OF LAKES (May 17, 2021), <https://www2.minneapolismn.gov/government/departments/health/office-violence-prevention/violence-prevention-history/> [perma.cc/HKT7-4ZFJ].

173. See Phillipe Cunningham, *Reimagination of Public Safety Should Start with This Principle*, STAR TRIB. (July 18, 2020), <https://www.startribune.com/reimagination-of-public-safety-should-start-with-this-principle/571809282/> [perma.cc/2AAK-6XS9].

174. See *Project Life – Lifestyle Intervention for Empowerment*, NORTHPOINT HEALTH & WELLNESS CENTER, <https://northpointhealth.org/project-life> [perma.cc/725W-24TB]; Jessica Lee, *After Positive Results, Minneapolis Looks to Expand Anti-Violence Program*, MINNPOST (Nov. 18, 2019), <https://www.minnpost.com/metro/2019/11/after-positive-results-minneapolis-looks-to-expand-anti-violence-program/> [perma.cc/D9FR-QUZZ].

175. Minneapolis City Council Meeting, *Policy & Government Oversight: Community Safety Workgroup Presentation* (Aug. 6, 2020) (presentation of Sasha Cotton, Dir. of Minneapolis Off. of Violence Prevention), recording available at <https://mpls.dev.implex.net/?p=9460> (2:33:20).

176. *Next Step Program*, HENNEPIN HEALTHCARE, <https://www.hennepinhealthcare.org/support-services/next-step-program/> [perma.cc/DSG7-PV7B].

177. Minneapolis City Council Meeting, *Policy & Government Oversight: Community Safety Workgroup Presentation* (Aug. 6, 2020) (presentation of Sasha

- iii. Most recently, the OVP rolled out MinneapUs.¹⁷⁸ Modeled after Cure Violence,¹⁷⁹ a successful nationwide community safety program, MinneapUs staff members act as violence interrupters. The program will provide informal mediation and de-escalation, while offering connections for community support.

Additionally, the OVP has helped to fund¹⁸⁰ successful community programs such as MAD DADS,¹⁸¹ St. Stephen's Homeless Outreach,¹⁸² and the Domestic Abuse Project.¹⁸³ Yet the OVP received roughly \$3.7 million in funding from the city in 2020 compared to the MPD's \$192 million. Though OVP resources are slated to substantially increase in 2021,¹⁸⁴ Minneapolis should more aggressively fund and expand OVP programming. While "there are not deep literatures on [community safety programs] individually, there is evidence that combinations of these programs are under appreciated causes of reduced crime over the past several decades."¹⁸⁵ The recent movement of \$8 million from the MPD's 2021 budget to violence prevention still leaves a police force with a suspect community safety culture largely intact.¹⁸⁶

Cotton, Dir. of Minneapolis Off. of Violence Prevention), *recording available at* <https://mpls.dev.implex.net/?p=9460> (2:28:50).

178. See Liz Navratil, *Outreach Workers in Minneapolis Walk a Beat to Turn People Away from Violence*, STAR TRIB. (Oct. 13, 2020), <https://www.startribune.com/new-minneapolis-outreach-workers-walk-a-beat-to-turn-people-away-from-violence/572733161/> [perma.cc/E9XV-PKVP].

179. CURE VIOLENCE GLOBAL, <https://cvg.org/> [perma.cc/V7WA-YEPY].

180. See *Violence Prevention Initiatives*, MINNEAPOLIS: CITY OF LAKES (May 17, 2021), <https://www2.minneapolismn.gov/government/departments/health/office-violence-prevention/violence-prevention-initiatives/> [perma.cc/GL56-DSVD].

181. MAD DADS OF MINNEAPOLIS, <http://minneapolismaddads.org/> [perma.cc/GB5Z-HZC9].

182. *What We Do*, ST. STEPHENS, <https://ststephensmpls.org/our-programs> [perma.cc/46F4-FSCB].

183. DOMESTIC ABUSE PROJECT, <https://www.mndap.org/> [perma.cc/PZ6U-7PTC].

184. CITY OF MINNEAPOLIS, 2021 MAYOR'S RECOMMENDED BUDGET 365–71 (2020) [<https://web.archive.org/web/20201103075652/https://www2.minneapolismn.gov/www/groups/public/@finance/documents/webcontent/wcmsp-226229.pdf>].

185. *Center for Policing Equity Releases Critical Steps for Exploring How Public Safety Resources Are Allocated*, CTR. FOR POLICING EQUITY (July 27, 2020), <https://policingequity.org/newsroom/press-releases/critical-steps-exploring-public-safety-resources-allocation> [perma.cc/3LYB-TRSA].

186. See Solomon Gustavo, *What Minneapolis' Budget Debate Actually Means—for the City, the MPD, and Future of Policing in the City*, MINNPOST (Dec. 14, 2020), <https://www.minnpost.com/metro/2020/12/what-minneapolis-budget-debate-actually-means-for-the-city-the-mpd-and-future-of-policing-in-the-city/#:~:text=In%20response%2C%20Frey%20proposed%20a,cuts%20for%20almost>

In addition to violence prevention initiatives, increased funding should be directed to programs which bolster the ability of mental health practitioners to respond to those in crisis. A robust mental health response beyond current police capabilities is imperative, as “the risk of being killed during a police incident is 16 times greater for individuals with untreated mental illness than for other civilians approached or stopped by officers.”¹⁸⁷ Since 2006, Hennepin County, in which Minneapolis is located, has offered direct support for adults with mental health crises through Community Outreach for Psychiatric Emergencies.¹⁸⁸ Increased funding through Hennepin County and structural changes to the 911 response framework could help Minneapolis mirror the results seen in Oregon’s much lauded CAHOOTS program, which responded to roughly 17 percent of Eugene’s emergency calls in 2019.¹⁸⁹

Programs without city connections are also important to the promotion of a changed relationship with community safety. Black Visions, a leader in the Minneapolis abolition movement, has coordinated “Peace Walks”¹⁹⁰ throughout Minneapolis neighborhoods and hosted teach-ins about community safety.¹⁹¹ The American Indian Movement (AIM) has long engaged in informal community security initiatives, one being AIM Patrol.¹⁹² Bolstering the funding of these non-city associated organizations through fundraising or grants will not only serve as a continued check on

%20every%20department. [perma.cc/6EML-ABKC]; Shannon Gibney, *A Black Mother Contemplates What It Means to Defund the Police*, TWIN CITIES PBS: ORIGINALS, <https://www.tptoriginals.org/a-black-mother-contemplates-what-it-means-to-defund-the-police/> [perma.cc/9NAK-JYDT].

187. TREATMENT ADVOCACY CTR., OFF. OF RSCH. & PUB. AFFS., *OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS* 1 (Dec. 2015), <https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf> [perma.cc/U4BB-6KD8].

188. *Hope from COPE*, HEALTHY HENNEPIN (Aug. 2015), <https://www.healthyhennepin.org/stories/cope> [perma.cc/X8EZ-2G3V].

189. WHITE BIRD CLINIC, *CRISIS ASSISTANCE HELPING OUT ON THE STREETS (CAHOOTS)*, MEDIA GUIDE 2020, at 1 (2020), <https://whitebirdclinic.org/wp-content/uploads/2020/07/CAHOOTS-Media.pdf> [perma.cc/5UCD-CXVA].

190. See, e.g., @BlackVisionsMN, TWITTER (Sept. 3, 2020, 1:00 PM), <https://twitter.com/BlackVisionsMN/status/1301580785674223621> [perma.cc/3PK2-F8A6].

191. See, e.g., Black Visions, Online Event, *National Night Out Teach In*, FACEBOOK (Sept. 15, 2020), <https://www.facebook.com/events/320339325858939/> [perma.cc/C4CW-NMNL].

192. See Delilah Friedler, *What Will Replace the Minneapolis Police? The City’s Native American Community Has Some Ideas*, MOTHER JONES (June 13, 2020), <https://www.motherjones.com/politics/2020/06/american-indian-movement-patrol-defund-police-minneapolis/> [perma.cc/8JUF-6QHM].

systemic safety powers, but also support a more community-based understanding of what safety *is*.

2. Disaggregate MPD Functions

In addition to redirecting funds away from the MPD, certain responsibilities should be redirected as well. Specifically, MPD officers should not be conducting traffic stops. While this article was prompted by the killing of George Floyd, the role of police in traffic stops was questioned after another tragic and unnecessary killing in Minnesota: that of Philando Castile.¹⁹³ In 2016, Philando Castile, a nutrition services supervisor at a local elementary school, was pulled over for a broken taillight. After notifying the officer of his legally possessed firearm, Castile was shot and killed. Castile's girlfriend and her daughter were also in the car.¹⁹⁴ In the years leading up to his shooting, Castile had been pulled over fifty-two times for traffic violations.¹⁹⁵ Removing armed police officers from these types of routine interactions could prevent the deadly escalation of commonplace encounters.¹⁹⁶

Other cities within the nation have proposed moving towards police-less traffic stops, including Berkley¹⁹⁷ and Cambridge.¹⁹⁸ Minneapolis should follow their lead and implement a non-police

193. See Pam Louwagie, *Falcon Heights Police Shooting Reverberates Across the Nation*, STAR TRIB. (July 8, 2016), <https://www.startribune.com/falcon-heights-police-shooting-reverberates-across-the-nation/385861101/> [perma.cc/LZ9C-C5NM]; Jessica Lussenhop, *Philando Castile Death: 'I Lost My Best Friend in a Police Shooting'*, BBC NEWS (June 3, 2020), <https://www.bbc.com/news/world-us-canada-52896872> [perma.cc/B69Q-T3GM]. This Article was drafted before police in Brooklyn Center, an inner-ring suburb of Minneapolis, shot and killed Daunte Wright in the course of a traffic stop in April 2021. See Denise Lavoie, *Daunte Wright: Doting Dad, Ballplayer, Slain by Police*, ASSOCIATED PRESS (Apr. 14, 2021), <https://apnews.com/article/daunte-wright-shooting-minnesota-f70fb7fc4c205740507b7ec53d7315f0> [perma.cc/DL4P-EGCY].

194. Louwagie, *supra* note 193.

195. *Philando Castile Had Been Stopped 52 Times by Police*, CBS MINN. (July 9, 2016), <https://minnesota.cbslocal.com/2016/07/09/philando-stops/> [perma.cc/7DN4-8QFD].

196. See Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635 (2019); Julianne Cuba, *Vision Zero Cities: Removing Police from Traffic Enforcement Is Crucial*, STREETS BLOG NYC (Oct. 21, 2020), <https://nyc.streetsblog.org/2020/10/21/vision-zero-cities-removing-police-from-traffic-enforcement-and-self-enforced-streets/> [perma.cc/ZTR8-GRUR].

197. *California City Moves Toward Removing Police from Traffic Stops*, NBC NEWS (July 15, 2020), <https://www.nbcnews.com/news/us-news/berkeley-california-police-reform-rcna48> [perma.cc/2YPB-HFQF].

198. *Cambridge Proposal: Let Unarmed City Employees Make Traffic Stops Instead of Police*, CBS BOSTON (July 29, 2020), <https://boston.cbslocal.com/2020/07/29/cambridge-police-officers-traffic-stops-proposal-city-employees/> [perma.cc/UQN9-4LNR].

traffic enforcement system. This system could be staffed with civilian employees and housed within the Minneapolis Regulatory Services Department,¹⁹⁹ a division which already manages Minneapolis Traffic Control.²⁰⁰

Demographic data shows the need for traffic stop reform. In 2019, Minneapolis was over 60 percent White,²⁰¹ yet 70 percent of traffic stops were of non-Whites.²⁰² If a traffic stop progressed to a search of the vehicle, 78 percent of those searches were of Black individuals' vehicles.²⁰³ These extreme disparities mandate a system overhaul.

Reinforcing this need for a drastic shift in the traffic safety system is the fact that Minneapolis has attempted elements of traffic stop reform. This reform has not worked. "Lights On!," a program which allowed police officers to hand out vouchers to fix minor equipment violations, was adopted after Castile's death.²⁰⁴ Yet Minneapolis police "issued White drivers the vouchers at a rate three times higher than Black and East African ones in equipment stops."²⁰⁵ The outcome of the voucher disbursement is especially discouraging, given that Black drivers are pulled over at a much higher rate than White drivers.²⁰⁶

The removal of traffic safety responsibilities from the MPD offers an opportunity to restructure safety regulations. At a minimum, removal of armed officers correspondingly removes the

199. *Regulatory Services*, MINNEAPOLIS: CITY OF LAKES (May 3, 2021), <https://www2.minneapolismn.gov/government/departments/reg-services/> [perma.cc/8R2E-53K4].

200. *Traffic Control Services*, MINNEAPOLIS: CITY OF LAKES (May 3, 2021), <https://www2.minneapolismn.gov/government/departments/reg-services/divisions/traffic-control/> [perma.cc/55Y5-CMHF].

201. *QuickFacts: Minneapolis city, Minnesota*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/minneapoliscityminnesota> [perma.cc/F6AX-XN2K].

202. Andy Mannix, *Black Drivers Make Up Majority of Minneapolis Police Searches During Routine Traffic Stops*, STAR TRIB. (Aug. 7, 2020), <https://www.startribune.com/black-drivers-make-up-majority-of-minneapolis-police-searches-during-routine-traffic-stops/572029792/> [perma.cc/8WPE-52DH] (select "Stopped" from drop-down menu on the table in the article).

203. *Id.*

204. LIGHTS ON!: A PROGRAM OF MICROGRANTS, <https://www.lightsonus.org/> [perma.cc/S6VP-Y8FL].

205. Mannix, *supra* note 202.

206. See Sarah Holder, Rachael Dottle & Marie Patino, *The Precipitous Drop of Police Traffic Stops in Minneapolis*, BLOOMBERG: CITYLAB (Sept. 14, 2020), <https://www.bloomberg.com/graphics/2020-minneapolis-police-stops/> [perma.cc/RE5Y-LDGL] (noting the disparities in the voucher program and traffic stops generally, but also an 80 percent decrease in traffic stops following George Floyd's death).

potential for officer-associated violence stemming from traffic stops. At a higher level, reassigning traffic enforcement duties to a separate department would allow Minneapolis to define policies of enforcement that actively counteract operational biases produced by racism.

B. Rethink What We See as a Threat in Society

In order to change the way police interact with citizens, it is necessary to re-evaluate which situations warrant armed police intervention. Disaggregating current police functions, as discussed above, is part of the solution. But disaggregation must be accompanied by the decriminalization and legalization of activities that our society no longer views as a threat to community safety and which produce racial disparities in our criminal justice system. By both disaggregating police functions and decriminalizing certain low-level, non-violent offenses—such as legalizing recreational marijuana use for adults—high-risk interactions between police and community will decrease, and police officers and prosecutors will be able to focus on more substantial threats to community safety.

Although broad decriminalization and legalization requires legislative action, prosecutorial discretion allows for change at the local level. Prosecutors in both Hennepin and Ramsey counties have implemented policies aimed at reducing the prosecution of certain low-level crimes such as drug possession. In 2019, the Hennepin County Attorney's Office announced that it would no longer be prosecuting those in possession of small amounts of marijuana.²⁰⁷ According to Hennepin County Attorney Mike Freeman, the policy change was motivated by a flawed Minnesota law with “grossly inappropriate” penalties that result in racial disparities in the criminal justice system.²⁰⁸ However, the policy contains exceptions that allow for charges in situations where a person also possesses trace amounts of another illegal substance (like THC oil or wax) or a firearm.²⁰⁹ Previous drug possession convictions, or allegations of gang activity, can also lead to charges.²¹⁰

207. David Chanen, *Hennepin County Prosecutor Won't Charge People Caught with Small Amounts of Marijuana*, STAR TRIB. (Mar. 15, 2019), <https://www.startribune.com/hennepin-county-attorney-won-t-prosecute-people-caught-with-small-amounts-of-marijuana/507174002/> [perma.cc/JU8C-66PM].

208. *Id.*

209. *Id.*

210. *Id.*

Ramsey County Attorney John Choi also implemented a similar policy regarding marijuana possession in 2019.²¹¹ More recently, prosecutors in Ramsey County have opted not to pursue charges for all fifth-degree drug possession cases throughout the COVID-19 pandemic in order to ease the burden on an already backlogged court system and to ensure the right to a speedy trial in more serious cases.²¹² Ramsey County Sheriff Bob Fletcher expressed his support for the policy, noting that his department had already moved away from pursuing small possession cases because “[w]e need to be thinking about where we can do the most good to keep the community safe.”²¹³ Despite some flaws, policies that give prosecutors and police the discretion to eliminate charges for low-level drug possession crimes are a step in the right direction in the face of legislative inaction. These policies should be expanded to cover more low-level non-violent crimes and implemented with accompanying tools to track the impact on reducing racial disparities in the criminal justice system.

Prosecutorial discretion and decriminalization must be accompanied by legalization of marijuana use for adults. In every state, Black people are arrested for marijuana possession at higher rates than White people, despite the fact that Blacks and Whites use marijuana at essentially the same rate.²¹⁴ Although possession of a small amount of marijuana in Minnesota is not technically a criminal offense, Minnesota has the eighth largest racial disparity in the United States in arrests for marijuana possession: Black people are over five times more likely than White people to be arrested.²¹⁵ Despite broad public support²¹⁶ and recent federal

211. Memorandum from John J. Choi, Ramsey Cnty. Att’y, to All Assistant Ramsey Cnty. Att’ys in the Crim. Div. & Juv. Div. (Feb. 28, 2019), <https://www.ramseycounty.us/sites/default/files/County%20Attorney/Charging%20Policy%20Regarding%20the%20Sale%20of%20a%20Small%20Amount%20of%20Marijuana%203.1.19.pdf> [perma.cc/DCT2-G7PN].

212. Sarah Horner, *Ramsey County Attorney’s Office Stops Charging 5th-Degree Drug Possession Cases During Coronavirus Pandemic*, TWINCITIES.COM: PIONEER PRESS (June 28, 2020), <https://www.twincities.com/2020/06/28/coronavirus-ramsey-county-mn-attorney-drops-5th-degree-drug-possession-cases/> [perma.cc/BG3E-HN52].

213. *Id.*

214. ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 5 (2020), https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf [perma.cc/6EXK-HPKX].

215. *Id.* at 70 (state profile).

216. Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RSCH. CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/> [perma.cc/X4TU-5ASK].

action towards decriminalization,²¹⁷ legislative pushes for legalization of recreational marijuana in Minnesota have failed.²¹⁸ Legalizing recreational marijuana use for adults in Minnesota would result in fewer arrests,²¹⁹ which in turn would reduce the number of potentially high risk interactions between armed police and community members. It would assist in addressing the racial disparities within the criminal justice system and promote community safety by allowing police and prosecutors to focus on more significant threats.

Conclusion

Over the past year, “Defund the Police” became a rallying cry for racial justice activists in the United States. However, liberal establishment figures such as President Barack H. Obama²²⁰ and Representative James E. Clyburn,²²¹ the highest-ranking Black member of Congress and a veteran of the civil rights movement, have acknowledged the political costs of calling for what many see as a radical response. But the severity of the problem necessitates an extreme solution. The politicization of the language of defunding obscures the end goal of this process, which is as much about *funding* community safety programs as *defunding* militarized police departments. Although the popularity of the rallying cry has garnered national attention, the important debate is not whether to use the language of defunding, but how to prevent the continuing subjugation of Black people by the police.

As a legal journal that focuses its scholarship on how the existing legal system oppresses, exploits, and discriminates against

217. Catie Edmondson, *House Passes Landmark Bill Decriminalizing Marijuana*, N.Y. TIMES (Dec. 6, 2020), <https://www.nytimes.com/2020/12/04/us/politics/house-marijuana.html> [perma.cc/9LFY-YXGY].

218. J. Patrick Coolican, *Minnesota Senate Rejects Legalizing Recreational Marijuana*, STAR TRIB. (Mar. 12, 2019), <https://www.startribune.com/republican-committee-to-hear-marijuana-legalization-bill-monday-in-minnesota-senate/506978532/> [perma.cc/82B5-7T7C].

219. See, e.g., Christopher Ingraham, *After Legalization, Colorado Pot Arrests Plunge*, WASH. POST. (Mar. 26, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/03/26/after-legalization-colorado-pot-arrests-plunge/> [perma.cc/V4S7-VUT4].

220. Chandelis Duster, *Obama Cautions Activists Against Using ‘Defund the Police’ Slogan*, CNN (Dec. 2, 2020), <https://www.cnn.com/2020/12/02/politics/barack-obama-defund-the-police/index.html> [perma.cc/U9LR-G5RQ].

221. Matthew Brown, *Democratic Whip James Clyburn: ‘Defund the Police’ Cost Democrats Seats, Hurt Black Lives Matter Movement*, USA TODAY (Nov. 8, 2020), <https://www.usatoday.com/story/news/politics/2020/11/08/james-clyburn-defund-police-cost-democrats-seats-hurt-black-lives-matter/6216371002/> [perma.cc/B8DQ-8C5A].

marginalized communities, we believe that the response should be multifaceted. In Section I, we traced the history of policing in the United States since its colonial days. From its racist roots in slave patrols and Black codes to today's hyper-militarized police departments, it is clear that American policing does what it was intended to do: control Black lives through state violence. In Section II, we outlined the decades of failure to achieve meaningful progress in Minneapolis, despite the existence of "liberal" policies and procedures meant to address the unauthorized use of force against Black people. For a few months in the summer of 2020, it appeared that this was poised to change as mass protests kicked off a period of intense scrutiny of policing. However, recent efforts have fallen short of providing the substantive change they promised. In Section III, we advocated for the redirection of MPD funding to violence prevention and alternative responses, along with the decriminalization of certain low-level non-violent offenses. We recognize that neither of these approaches represent a complete solution. However, both represent viable changes to the structural problems inherent within the MPD.

As the energy from the past summer's protests fades, the cause of police reform does not become any less urgent. The sweeping promises and blanket optimism must be followed up by an ongoing commitment to the details of enacting change. Those of us who benefit from the privilege of not thinking about race every single day must remind ourselves that every day we wait for change is another day a Black man might be murdered by the state for a simple grocery store dispute.

George Floyd's Legacy: Reforming, Relating, and Rethinking Through Chauvin's Conviction and Appeal Under a Felony-Murder Doctrine Long- Weaponized Against People of Color

Greg Egan[†]

I. Inequity and Evolution: How Police Use of Force and the Felony-Murder Doctrine Are Poised to Change on the One-Year Anniversary of George Floyd's Death

Minnesota's second-degree felony-murder statute represents a unique and creative charging mechanism that affords wide discretion to prosecutors. This makes it ripe for inequitable application. It is the most serious charge brought against George Floyd's killer, Derek Chauvin.¹ Prosecutors can find novel ways to charge felony-murder for almost any unintended death, and they often use it in cases where they also allege homicidal intent. At the same time, it is a charge prosecutors can find plausible justification not to bring in most cases. This wide discretion provides leverage to prosecutors in plea negotiations. Plea negotiations can work to the benefit of defendants who are initially charged with second-degree intentional murder by affording them the opportunity to plead down to felony-murder, which carries less than half the guideline sentence.² This wide charging discretion also has the potential to unfairly elevate crimes that should have been charged as manslaughter, third-degree murder, or other lesser offenses. The discretion can entail a twenty-fold inflation in sentencing over the

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1. Complaint at 1, *State v. Chauvin*, No. 27-CR-20-12646 (Hennepin Cnty. Dist. Ct. 2020).

2. Sentencing guidelines provide for 306 months for intentional second-degree murder and 150 months for second-degree felony-murder for an offender with no criminal history. MINNESOTA SENTENCING GUIDELINES GRID § 4.A (MINNESOTA SENTENCING GUIDELINES COMMISSION 2020). There are recent Minnesota cases where even defendants indicted for first-degree premeditated murder were allowed to plead all the way down to second-degree felony-murder. *See infra* Section II.B.

charges on which it is commonly predicated.³ For these reasons, the charging and disposition of felony-murder cases reveal much about racial disparities in the larger criminal justice system.

The felony-murder doctrine is frequently weaponized against people of color, while prosecutors and judges allow White defendants to exploit the doctrine to their benefit. Killings by peace officers magnify the disparity; officers who should be charged with felony-murder instead face reduced charges, or more frequently, no charges at all.⁴ The victim's and the killer's race matter, both in police killings and in the broader application of the felony-murder doctrine. This context allows for an informed assessment of the evolution Minnesota and the world have undergone in the year since George Floyd's killing. It also provides a framework for an analysis of the inevitable appeal of Chauvin's convictions and the implications this may have on reform or abolition of the felony-murder doctrine. It situates this prosecution within the affected community as it moves forward through reform, growth, and unity.

Section II of this Article analyzes sentencings, plea negotiations, convictions, and charging under Minnesota's felony-murder doctrine across race, buttressing statistics with examples and exposing racial inequities in the way the felony-murder doctrine is deployed. Section III provides a legal analysis of the case against Philando Castile's killer, Jeronimo Yanez. While the world applauded the second-degree manslaughter charge against Yanez, the case was actually ripe for felony-murder charging. This section juxtaposes the Yanez case with a more obscure shooting by a defendant of color who was not a peace officer, illustrating that a killing by a peace officer can be more egregious, yet not result in charges of the level faced by a lay person of color. Section IV exposes how Minnesota peace officers who kill have, until now, rarely been prosecuted at any level. It provides a brief overview of the only other four prosecuted Minnesota police killings in recent memory, reconciling these cases with larger trends and accounting for race.

3. Compare MINN. STAT. § 609.66(1)(a) (2020) (providing for a two-year statutory maximum penalty for reckless or unlawful intentional discharge of a firearm), with MINN. STAT. § 609.19(2) (2020) (providing for a forty-year statutory maximum for second-degree felony-murder). Relative to statutory maximum comparisons, the disparities are generally less pronounced when it comes to guideline sentences for common predicate felonies. But they are still marked. An offender with a criminal history score of zero faces a guideline sentence of twenty-one months for second-degree assault and 150 months for second-degree felony-murder. MINNESOTA SENTENCING GUIDELINES GRID § 4.A (MINNESOTA SENTENCING GUIDELINES COMMISSION 2020). A guideline sentence for an offender with no criminal history who is convicted of unlawful discharge of a firearm is probation. *Id.*

4. See *infra* Section IV.

The section weighs the implications of Chauvin's appeal of his convictions against the broader historical abuses of the felony-murder doctrine. It analyzes the impact these legal proceedings have on public policy and recognizes their symbolic and social power, which reframes the hurt, the hope, and the heart of the Twin Cities community.⁵

II. The Color of Injustice: Racial Disparities in Charging and Disposition of Second-Degree Felony-Murder Cases

Defendants of color have different outcomes under the felony-murder doctrine than White defendants. When defendants of color are charged with more serious murder counts, they are less likely to be afforded the opportunity to plead down to second-degree felony-murder.⁶ Defendants of color are more often convicted of the most serious charge when the top count is second-degree felony-murder.⁷ They are statistically more likely to be convicted in general and are often sentenced more harshly upon conviction.⁸ Individual cases across demographics fortify these statistical trends, making it clear that the felony-murder doctrine has long been weaponized against people of color, while representing a relatively lenient alternative for White defendants.

The statistics relied upon in this Article were drawn from a set of all second-degree felony-murder convictions sentenced from 2012 through 2018 in Ramsey and Hennepin counties, where St. Paul and Minneapolis are respectively located.⁹ The data set includes offenders who initially faced lesser or greater charges, so long as the conviction was ultimately for second-degree felony-murder. The statistical set includes cases that were resolved through guilty pleas as well as trial convictions. The data include the length of sentences, alongside the guideline sentences. Offender age, gender, and race are also included. This data set reveals much about the deployment, effect, and backdrop of Minnesota's felony-murder rule in perpetuating racial inequities.

5. The Twin Cities is a colloquialism referring to the greater Minneapolis and Saint Paul metropolitan region, generally. For the purposes of this Article, Twin Cities refers to Ramsey and Hennepin counties where the data was gathered from.

6. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, § 609.19, SUBD. 2(1): SENTENCED 2012–2018 (2020) (on file with author).

7. *Id.*

8. *Id.*

9. *Id.*

A. Racially Disparate Sentencings

Sentencing statistics across race expose disparities in the application of the felony-murder doctrine. White defendants sentenced to second-degree felony-murder in Ramsey and Hennepin counties from 2012 to 2018 were two-and-a-half times more likely to receive a shorter-than-guideline sentence relative to a longer-than-guideline sentence.¹⁰ Meanwhile, defendants of color received mitigated and aggravated sentencing departures at roughly the same rate.¹¹ Judges gave reduced sentences to White defendants 25 percent of the time, compared to 16 percent for defendants of color.¹² One White defendant was sentenced to a mere five years for his involvement in a drug deal where the victim was shot to death.¹³ While the defendant did not fire the fatal shots, he was also armed.¹⁴

This disparity is also manifested by cases involving White defendants committing egregious crimes but receiving guideline sentences, instead of the aggravated sentences that similarly-situated defendants of color frequently receive. Even after hearing all the gruesome evidence during a jury trial of a White defendant who tortured his girlfriend to death, a sentencing judge ordered a guideline range sentence.¹⁵ The defendant had beaten the victim over her entire body.¹⁶ There were scrapes and scratches on her arms and knees, likely from her attempt to crawl away.¹⁷ The defendant fractured her neck before ultimately choking her to death.¹⁸ He admitted to choking her the night before as well.¹⁹ If ever a case warranted an aggravated sentencing departure, this one

10. *Id.*

11. *Id.*

12. *Id.*

13. Felony Criminal Complaint at 2–4, *State v. Sjostrand*, No. 62-CR-18-219 (Ramsey Cnty. Dist. Ct. 2012).

14. *Id.* at 2–3.

15. Felony Criminal Complaint at 2, *State v. Manney*, No. 27-CR-11-16860 (Ramsey Cnty. Dist. Ct. 2012).

16. *Id.*

17. *Id.*

18. *Id.*

19. Like the trial judge, who exercised relative leniency at sentencing, prosecutors were lenient to this White defendant by declining to seek an indictment under the domestic abuse provision of the first-degree murder statute. MINN. STAT. § 609.185(a)(6) (2010) (providing for culpability when an actor “causes the death of a human being while committing domestic abuse, when the perpetrator has engaged in a past pattern of domestic abuse . . . and the death occurs under circumstances manifesting an extreme indifference to human life”).

did. However, the White defendant was given a guideline-range sentence.²⁰

Even when an aggravated sentence is arguably warranted for a defendant of color,²¹ it can still be disproportionately harsh and glaringly out of sync with what similarly-situated White defendants receive. An Asian defendant received a sentence double the presumptive sentence for killing a child in his care.²² Sentencing guideline ranges suggest that he had a criminal history score of zero.²³ Meanwhile, a White woman who suffocated her infant to death before almost killing a second child the same way received a sentence of barely half of what the sentencing guidelines prescribed.²⁴ There should be parity in sentencing across race under the felony-murder statute, but there is not.

B. Plea Negotiations and Convictions Across Race

On their surface, the racial demographics of second-degree felony-murder convictions in the Twin Cities support the claim of widespread racial disparity. Minnesota's population is approximately 83.8 percent White.²⁵ A higher concentration of people of color reside in the St. Paul/Minneapolis metro area,²⁶ which is 77.1 percent White.²⁷ Second-degree felony-murder conviction statistics do not mirror this demographic data. Between 2012 and 2018, defendants of color accounted for 80.2 percent of felony-murder convictions, while White defendants accounted for just 19.8 percent.²⁸ Normalized for demographics, people of color in

20. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, *supra* note 6.

21. *See e.g.*, Felony Criminal Complaint at 2–3, State v. Meak, No. 62-CR-15-1070 (Ramsey Cnty. Dist. Ct. 2012). The defendant was alleged to have “rough housed” a child; semen was found on the child. *Id.*

22. *Id.*; MINNESOTA SENTENCING GUIDELINES GRID § 4 (MINNESOTA SENTENCING GUIDELINES COMMISSION 2011).

23. *See* MINNESOTA SENTENCING GUIDELINES GRID § 4 (MINNESOTA SENTENCING GUIDELINES COMMISSION 2011).

24. Complaint at 2, State v. Casey, No. 27-CR-13-22282 (Ramsey Cnty. Dist. Ct. 2013); MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, *supra* note 6.

25. *Quick Facts Minnesota*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/MN> [perma.cc/9FXV-D3H2].

26. MINNESOTA STATE DEMOGRAPHIC CENTER, DEPARTMENT OF ADMINISTRATION, AGE, RACE, & ETHNICITY (2018), <https://mn.gov/admin/demography/data-by-topic/age-race-ethnicity/> [perma.cc/6H2L-GUYN].

27. *Race and Ethnicity in the Minneapolis Area (Metro Area)*, CEDAR LAKE VENTURES, INC. (Sept. 14, 2018) (citing U.S. Census data), <https://statisticalatlas.com/metro-area/Minnesota/Minneapolis/Race-and-Ethnicity> [perma.cc/7Z53-9F8N].

28. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER,

the Twin Cities are statistically twelve times more likely to be convicted of second-degree felony-murder.²⁹

More troubling than the racial distribution of second-degree felony-murder convictions is the disparity in what the convictions reflect in the shadow of the original charges. The overwhelming majority of convictions are the result of plea negotiations.³⁰ Indeed, negotiated plea deals have become the vehicle by which most criminal cases are resolved around the country.³¹ 66.7 percent of the White defendants convicted of second-degree felony-murder in Minnesota were initially charged or indicted with more serious levels of homicide.³² For White defendants, a guilty plea to second-degree felony-murder most often represents generous resolution relative to the exposure under the original complaint or indictment. White defendants in the Twin Cities routinely benefit by pleading down to second-degree felony-murder.

Conviction statistics under the second-degree felony-murder doctrine present the opposite trend for defendants of color. Defendants of color sentenced to second-degree felony-murder had their charges reduced in only 38.5 percent of cases.³³ For the rest of the defendants of color, their second-degree felony-murder conviction represented the most serious count.³⁴ The plea bargaining statistics reveal a striking racial disparity: White defendants plead to reduced felony-murder charges at nearly double the rate of defendants of color.

Inequities run deeper than statistically tilted plea negotiations. The facts of individual cases, as alleged in the criminal complaints, best illustrate two parallel yet unenviable trends. White defendants are frequently punished leniently, while defendants of color receive harsher treatment even when the facts support opposite outcomes.

supra note 6.

29. *Id.*

30. *See id.*

31. INNOCENCE PROJECT, REPORT: GUILTY PLEAS ON THE RISE, CRIMINAL TRIALS ON THE DECLINE (Aug. 7, 2018), <https://innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/> [perma.cc/9TSN-B7QH]; NAT'L ASS'N OF CRIM. DEF. LAWYERS, THE TRIAL PENALTY REPORT 14 (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> [perma.cc/7P42-YC7F].

32. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, *supra* note 6.

33. *Id.*

34. *Id.*

A robbery involving six codefendants that left a young man dead illustrates this disturbing trend. Two of the codefendants were Black, and four were White.³⁵ While all six were initially indicted for first-degree murder,³⁶ the four White codefendants were permitted to plead guilty to a reduced charge under the inherently pliable second-degree felony-murder rule.³⁷ The Black defendant who fired the gun pled to second-degree intentional murder.³⁸ While the Black codefendant who did not fire the gun pled guilty to second-degree felony-murder, he received a harsher-than-guideline sentence.³⁹ The White codefendants all received sentences within guideline sentence range for second-degree felony-murder.⁴⁰ None of the four White codefendants received consecutive sentences; both of the Black codefendants did.⁴¹

According to the complaint and newspaper coverage of the incident, five of the codefendants hatched a detailed plan to break into their drug dealer's apartment to steal drugs and take back a gaming system.⁴² Newspaper coverage reported that at least part of the group was intent on "beating the [expletive] out of [the drug dealer] then taking everything."⁴³ The same source recounted an agreement to split what they burglarized, "since it's a group deal."⁴⁴ The sixth codefendant was reportedly recruited to bring a gun; he "made sure it was loaded."⁴⁵ As a car waited outside, four of the codefendants burst into the apartment, according to the criminal complaint.⁴⁶ Some reportedly ransacked it searching for drugs,

35. *Id.*

36. Brandon Stahl, *Suburban Women Plead Guilty to Murder for Their Role in Drug Robbery-Turned Slaying*, STAR TRIB. (Jan. 22, 2018), <https://www.startribune.com/suburban-women-plead-guilty-to-murder-for-their-role-in-drug-robbery-turned-slaying/470561553/> [perma.cc/3E24-VC8B].

37. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, *supra* note 6.

38. *Id.*

39. *Id.* While he pled down to second-degree unintentional felony-murder like the White codefendants, his sentence was 24 percent higher than prescribed in the Minnesota Sentencing Guidelines. *Id.*; MINNESOTA SENTENCING GUIDELINES GRID § 4.A (MINNESOTA SENTENCING GUIDELINES COMMISSION 2017).

40. *Id.*; MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, *supra* note 6.

41. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, *supra* note 6.

42. Complaint at 3, State v. Peterson, No. 27-CR-17-10674 (Hennepin Cnty. Dist. Ct. 2018).

43. Stahl, *supra* note 36.

44. *Id.*

45. *Id.*; Complaint at 3, State v. Peterson, No. 27-CR-17-10674 (Hennepin Cnty. Dist. Ct. 2018).

46. Complaint at 3, State v. Peterson, No. 27-CR-17-10674 (Hennepin Cnty. Dist.

yelling and swearing at the victim, while others attacked the decedent and “pistol whipped” him.⁴⁷ The complaint further recounts that they forced the decedent’s girlfriend onto a bed, pointed the gun at her head, and told her they would kill her if she left the bedroom.⁴⁸ She described holding the decedent as “he took his last breath.”⁴⁹ The decedent was shot in the neck; the bullet grazed his jugular vein, shattered his spine, and fractured his skull.⁵⁰ Prosecutors also noted blunt force trauma to his head and face.⁵¹ The codefendants reportedly left him there and fled with the drugs.⁵²

Although it may be argued that lesser charges are warranted because the White codefendants did not actually pull the trigger,⁵³ it is a well-established tenet of Minnesota criminal law that accomplices are liable for the conduct of the principal at the same level.⁵⁴ Even so, the disparity in sentencing under the same statutory subsection remains: the Black codefendant who did not pull the trigger received a significantly harsher sentence than the

Ct. 2018).

47. Complaint at 3, State v. Peterson, No. 27-CR-17-10674 (Hennepin Cnty. Dist. Ct. 2018).

48. Stahl, *supra* note 36.

49. Complaint at 3, State v. Peterson, No. 27-CR-17-10674 (Hennepin Cnty. Dist. Ct. 2018); David Chanen, *Mother of Slain Teen Laments A Wasted Life Over Drugs, Mistakes*, STAR TRIB. (Apr. 7, 2018), <https://www.startribune.com/mother-of-slain-teen-laments-a-wasted-life-over-drugs-mistakes/479024163/> [perma.cc/4XD3-6ZTX].

50. Complaint at 3, State v. Peterson, No. 27-CR-17-10674 (Hennepin Cnty. Dist. Ct. 2018).

51. *Id.*

52. *Id.*

53. Admittedly, some legal scholars have taken issue with this tenet, arguing that an accomplice should not bear full liability for the actions of the principal actor. See Michael Heyman, *Losing All Sense of Just Proportion: The Peculiar Law of Accomplice Liability*, 87 ST. JOHN’S L. REV. 129 (2013); Sherif Girgis, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 266 (2013); Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91 (1985).

54. State v. Ezeka, 946 N.W.2d 393, 407 (Minn. 2020) (citing MINN. STAT. § 609.05(1) (2018)); State v. Whitman, 114 N.W. 363, 364 (Minn. 1908). It is notable that in at least one U.S. jurisdiction, “[f]or all intents and purposes the ‘second-degree felony-murder’ rule for accomplices has been abolished.” CAL. STATE SENATE, FACT SHEET FOR SENATE BILL 1437 (2018); see also People v. Cruz, 46 Cal. Rptr. 3d 166, 169 (Cal. Ct. App. 2020) (citing CAL. STAT. ch. 1015, § 1 (2018) (explaining that “to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life”). If Minnesota had a similar limitation, the five codefendants who did not fire the fatal shot may not have been convicted of second-degree felony-murder. Other states align with Minnesota in holding accomplices fully liable under the felony-murder doctrine. See, e.g., State v. Chambers, 515 N.W.2d 531, 533 (Wisc. Ct. App. 1994); State v. Blair, 228 P.3d 564, 568 (Ore. 2010); State v. Rios, 172 P.3d 844, 846 (Ariz. 2007).

four similarly-situated White codefendants. The felony-murder rule should not be contorted to reach inequitable outcomes.

While advocates for the White codefendants may argue that they were actually treated too harshly, in reality, they reaped the benefit of the second-degree felony murder rule, considering that the facts could have yielded a conviction under a far more serious variant of the doctrine. Under Minnesota law, both the first and second-degree murder statutes have a provision for felony-murder.⁵⁵ Burglary is among the predicate felonies specifically enumerated in the first-degree felony-murder statute.⁵⁶ Ample facts alleged in the complaints would support this predicate offense.⁵⁷ Yet prosecutors were content with a conviction under the lesser second-degree felony-murder provision. Their decision transformed potential first-degree felony-murder life sentences into second-degree felony-murder sentences as short as twelve and a half years.⁵⁸

While the author does not contend that life sentences would be just in this case, an analytical juxtaposition of the second-degree and first-degree felony-murder rules illustrates the wide-ranging homicidal liability that exists on strikingly similar facts. Such discretion perpetuates further inequity in plea negotiations, trials, and sentencings, leaving a system ripe for abuse and incapable of delivering racial equity. This example exposes the reasons that both first-degree and second-degree felony-murder should be excised from Minnesota's statutory and common law schemes. Doing so will leave a set of thoughtfully-tiered laws, accounting for all levels of homicidal and less-than-homicidal liability,⁵⁹ and it will create a construct under which these six codefendants, Black and White, could have been equitably charged or indicted, negotiated with, tried, and sentenced.

55. See MINN. STAT. § 609.185(a)(3) (2016); MINN. STAT. § 609.19(2)(1) (2016).

56. See MINN. STAT. § 609.185(a)(3) (2016). The Supreme Court of Minnesota recognizes first-degree felony-murder prosecutions predicated on burglary. See, e.g., *State v. Mosley*, 853 N.W.2d 789, 794 (Minn. 2014).

57. See Complaint at 3, *State v. Peterson*, No. 27-CR-17-10674 (Hennepin Cnty. Dist. Ct. 2018) (alleging on its face burglary while possessing a firearm as the predicate felony).

58. MINN. STAT. § 609.19(1)(1) (2016); MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, *supra* note 6.

59. Absent the felony-murder doctrine, the Minnesota Legislature has erected a thoughtful, effective, and wide-ranging statutory scheme that aptly addresses all unjustified killings, ranging from second-degree manslaughter, MINN. STAT. § 609.205(1) (2020) to third degree murder, MINN. STAT. § 609.195(a) (2020), to second-degree intentional murder, MINN. STAT. § 609.19(1)(1) (2020), to first-degree murder, MINN. STAT. § 609.185(a)(1) (2020).

While it is easy to criticize prosecutors who apply the felony-murder doctrine in racially inequitable ways, one should not overlook that it is the theoretical underpinnings of Minnesota's felony-murder doctrines that enable them to do so. Minnesota's statutory schemes provide the architecture for convictions under statutory provisions with guideline sentences ranging from just over ten years to life in prison for essentially the same conduct. Both the theory and application of Minnesota's felony-murder doctrines must be repaired or repealed if the disparities cannot be reconciled. As the law stands now, felony-murder makes for faux plea negotiations, and as exemplified below, unjust charging. These are the byproducts of the unconscionably wide prosecutorial discretion inherent in the doctrine.

C. Charging Discretion Ripe for Abuse

White defendants frequently benefit from the felony-murder doctrine, while defendants of color have a markedly different experience. Just as this disparity is painfully apparent in plea negotiations and conviction trends, it also manifests in charging decisions. Even when prosecutors ultimately amend their charges, initial charging decisions reveal further racial inequity. These decisions inarguably impact the course of individual prosecutions, even when cases gravitate away from the initial charges. It is the stunningly wide discretion inherent in Minnesota's felony-murder doctrine, in the abstract, that sustains racially inequitable charging practices.

Defendants of color may face aggressive felony-murder charges for facts that should not warrant murder prosecutions at all. According to a criminal complaint and newspaper reports, a Black Minneapolis man had a dispute with his brother.⁶⁰ Isolated in the basement, the victim shot the defendant.⁶¹ Witnesses say they heard three shots, and the defendant shouted out, "my brother just shot me."⁶² It was only then that the defendant returned fire.⁶³ His defensive gunshots killed his brother only after the defendant himself received multiple gunshot wounds.⁶⁴

In their criminal complaint, prosecutors strained to justify their second-degree felony-murder charge by noting that the

60. Complaint at 3, State v. Clark, No. 27-CR-18-4772 (Hennepin Cnty. Dist. Ct. 2018).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

victim's firearm was only "a small gun,"⁶⁵ as if to imply that the bullets fired from it did not have lethal potential. It is also noteworthy that prosecutors acknowledged that it was the victim who pursued the defendant into the basement, where, cornered, they exchanged gunfire.⁶⁶ Self-defense would have negated the second-degree assault on which the felony-murder charge was predicated.⁶⁷ Legal scholars have advanced compelling arguments as to why most assaults should not be viable predicate felonies; most states have adapted their laws accordingly.⁶⁸ Charging prosecutors were almost certainly aware of this fracture in the legal and academic communities. But that did not prevent them from bringing murder charges against this Black defendant.

The felony-murder charge was not, however, enough for prosecutors: they went a step further by also bringing the grossly inflated charge of second-degree intentional murder.⁶⁹ The result was a leveraging of plea negotiations to extract a plea to what appears a lesser count of second-degree felony-murder. This prosecutorial tool creates an artificial middle count used to extort guilty pleas from people of color who are actually liable of lesser crimes, or no crime at all.

Stretching the second-degree felony-murder doctrine to charge and convict this Black defendant is not an isolated occurrence. Another Black man left to care for his girlfriend's infant children was convicted of second-degree felony-murder, primarily for failing to seek medical care for an infant's burned wrist and instead giving him too much over-the-counter medicine, which doctors opined may have had an unintended sedative effect.⁷⁰ In attending to the child, the defendant had wrapped the child's wrist,⁷¹ which likely would have made it difficult to assess the severity of the burn. This should

65. *Id.*

66. *Id.*

67. MINN. STAT. § 609.065 (2006) (characterizing "justifiable taking of life" as occurring "when necessary in resisting or preventing an offense which the actor reasonably believes exposes the actor or another to great bodily harm or death").

68. Greg Egan, *Collateral and Independent Felonious Design: A Call to Adopt a Tempered Merger Limitation for Predicate Felonies of Assault Under a Minnesota Felony-Murder Doctrine Currently 'Too Productive of Injustice'*, 44 MITCHELL HAMLINE L. REV., no. 5, 2018, at 98 (advocating adoption of a merger limitation to Minnesota's felony-murder doctrine, which would make most assaults inviable as predicate felonies).

69. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, *supra* note 6.

70. Complaint at 2–3, State v. Todd, No. 27-CR-12-17771 (Hennepin Cnty. Dist. Ct. 2012).

71. *Id.* at 2.

have been significant to charging attorneys, because the specific cause of death was a blood infection from the burn.⁷²

There were injuries consistent with child abuse, which prosecutors implicitly speculated the defendant had caused.⁷³ But they also acknowledged that more than a dozen other people resided in a home containing rotting food, dead animals, and overall filthy conditions.⁷⁴ The complaint further acknowledged a potential accidental fall down the stairs,⁷⁵ but prosecutors refused to concede that this could have accounted for some of the injuries noted in the autopsy. Regardless of the source or intentionality of the injuries, the cause of death was listed as “complications from neglect.”⁷⁶

In assessing the fairness of attributing fatal neglect to the defendant, prosecutors should have considered several factors. The defendant, who was twenty years old, was the only one in the house who took any responsibility for caring for the children under intensely challenging circumstances.⁷⁷ He described having to feed the children nonperishable food and being relegated to a small room in the basement.⁷⁸ The defendant’s mother was upset at him for having the children in the house, but that did not stop her from leaving additional young children in his care when she too left the home for an unspecified amount of time.⁷⁹ The defendant had made scores of phone calls to the children’s mother; she ignored them all, so he did not know if or when she would return.⁸⁰ Furthermore, when she finally returned, she was with the children during the hours immediately before it became known that the infant was dead; the infant did not die while in the defendant’s care.⁸¹

Rather than focusing on those facts, the charging prosecutor focused on the allegation that the defendant left the children sleeping in a crib for an hour before their mother finally returned so he could go to the store—likely to buy food for the children.⁸² Prosecutors make no mention of which, or how many, adults were in the house for the hour during which he did not, allegedly,

72. *Id.* at 3.

73. *Id.* at 3–4.

74. *Id.* at 2.

75. *Id.*

76. *Id.* at 3.

77. *Id.* 1–2.

78. *Id.* at 2.

79. *Id.*

80. *Id.*

81. *Id.* at 3.

82. *Id.*

“arrange for supervision.”⁸³ A second-degree felony-murder conviction for this young Black defendant represents a miscarriage of justice, and it stands in stark contrast to the manner in which the doctrine is generally employed in cases charged against White defendants.

Even when later amended, initial charging decisions often reflect deference to White defendants ultimately convicted of second-degree felony-murder. Two men were shot to death at a St. Paul motel because one of them allegedly owed a codefendant \$1,000.⁸⁴ The White defendant drove the killer to the hotel, knocked on the door, then helped force entry.⁸⁵ He watched as several shots were fired, then the victims bled to death in the parking lot and on a nearby roadway.⁸⁶ After the defendant fled in his car, he later picked up the shooter and other codefendant and drove them further away from the scene while they plotted their stories to avoid incriminating one another.⁸⁷ Police found the two lifeless bodies and quickly apprehended the defendant.⁸⁸ Yet prosecutors effectively ignored both deaths when making their initial charging decision: they charged the White defendant only with aiding and abetting attempted first-degree aggravated robbery and aiding and abetting attempted simple robbery.⁸⁹ These offenses carry statutory maximum sentences of just ten and five years, respectively.⁹⁰

Prosecutors failed to charge second-degree felony-murder initially.⁹¹ The Black codefendant who was not the gunman in this case was sentenced to the statutory maximum: forty years in prison.⁹² The White codefendant was sentenced to just over twelve

83. *Id.* at 1–4.

84. Felony Criminal Complaint at 3, *State v. Benner*, No. 62-CR-16-2156 (Ramsey Cnty. Dist. Ct. 2016).

85. *Id.*

86. *Id.*

87. *Id.* at 4.

88. *Id.*

89. *Id.* at 1–2.

90. MINN. STAT. § 609.245(1) (2014); MINN. STAT. § 609.24 (2014).

91. Felony Criminal Complaint at 3, *State v. Benner*, No. 62-CR-16-2156 (Ramsey Cnty. Dist. Ct. 2016).

Defendants of color are routinely charged with felony-murder from the onset of prosecution for similar or even less serious robberies resulting in unintended deaths. *See, e.g.*, Complaint at 3, *State v. Smith*, No. 27-CR-14-1327 (Hennepin Cnty. Dist. Ct. 2014); Criminal Felony Complaint at 2–3, *State v. Calloway*, No. 62-CR-16-6907 (Ramsey Cnty. Dist. Ct. 2016); Criminal Felony Complaint at 3, *State v. Smith*, No. 62-CR-16-6906 (Ramsey Cnty. Dist. Ct. 2016); Complaint at 2–3, *State v. Foresta*, No. 27-CR-13-25524 (Hennepin Cnty. Dist. Ct. 2014); Complaint at 3, *State v. Turner*, No. 27-CR-13-25523 (Hennepin Cnty. Dist. Ct. 2013).

92. MINN. STAT. § 609.19(1) (2014). Sarah Horner, *He Didn't Pull the Trigger*,

years.⁹³ The initial decisions impact trial preparation, investigations, plea negotiations, and sentencings—further propelling racial inequities.

The Twin Cities has an unadmirable history in the disposition of second-degree felony-murder cases. The record is ripe with disheartening examples of White defendants benefiting from the felony-murder doctrine, while defendants of color receive draconian treatment. The racial inequities manifest in charging, plea negotiations, conviction levels, and sentencings. Nearly a decade of statistics support these findings. In the abstract, the felony-murder doctrine is strained, artificial, and unfair. The archaic doctrine's application magnifies its flaws. The felony-murder doctrine exacerbates racial inequities and should be overhauled or altogether abolished.

III. Culpable Negligence or Reckless Intent: A Case Study in the Charging of a Peace Officer and an Indigent Man of Color

A police shooting and a shooting by an indigent person of color occurred in recent years in Ramsey County; though similar in factual consequence, they quickly took on very different legal complexions. In 2016, after months of deliberation, Ramsey County prosecutors made a charging decision in a high-profile police shooting.⁹⁴ The victim was a Black school cafeteria worker, Philando Castile.⁹⁵ The defendant was a veteran of the St. Anthony Police Department, Jeronimo Yanez.⁹⁶ Castile had been driving

But He Gets 40 Years, ST. PAUL PIONEER PRESS (Feb. 8, 2017), <https://www.twin-cities.com/2017/02/08/st-paul-man-gets-40-years-for-midway-area-double-murder/> [perma.cc/8UQC-8CF3].

93. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2ND DEGREE MURDER, *supra* note 6.

94. *See generally* John Choi, Ramsey Cnty. Att'y, *Remarks Regarding the Hiring of a Special Prosecutor to Assist in the Philando Castile Matter* (July 29, 2016), <https://www.ramseycounty.us/sites/default/files/County%20Attorney/County%20Attorney%20transcribed%20remarks%207%2029%2016.pdf> [perma.cc/3H2V-BHSX] (stressing the importance of being “thoughtful and deliberate” in order to “provide the legitimacy this case requires and deserves”). The charging decision was announced more than four months after the incident. *See* Press Release, Office of the Ramsey County Attorney, *Ramsey County Attorney Announces Criminal Charges Against Police Officer in Death of Philando Castile*, RAMSEY CNTY. ATT’Y’S OFF. (Nov. 16, 2016), https://www.ramseycounty.us/sites/default/files/County%20Attorney/11.16.16%20County%20Attorney%20Remarks%20as%20Prepared%20for%20Delivery%20in%20Yanez%20Case_0.pdf [perma.cc/UQ8S-MDVK]; Felony Criminal Complaint at 7, *State v. Yanez*, No. 0620373879 (Ramsey Cnty. Dist. Ct. 2017).

95. Mitch Smith, *Officer Cleared in 2016 Killing of Black Driver*, N.Y. TIMES at A1 (June 16, 2017).

96. *Id.*

with his girlfriend and her young daughter when Yanez pulled the car over for a broken brake light.⁹⁷ Castile “calmly” told the officer that he had a firearm; he also had a valid permit to carry.⁹⁸ Yanez suddenly fired seven times into the car, killing Castile and nearly striking his girlfriend and the child.⁹⁹ Prosecutors charged Yanez with second-degree manslaughter and intentional discharge of a firearm that endangers safety.¹⁰⁰

The same office charged a more obscure case nearly a decade earlier against a nineteen-year-old Mexican immigrant, Alfredo “Freddy” Gutierrez-Gonzales, who was mishandling a rifle on the front porch of a house.¹⁰¹ When Gutierrez-Gonzales heard someone approaching, he put the rifle down.¹⁰² His friend called out, “Don’t trip, it’s just me.”¹⁰³ As Gutierrez-Gonzales picked the rifle back up, it suddenly went off.¹⁰⁴ The bullet struck his friend, who was White, in the head; he died at the scene.¹⁰⁵ Prosecutors did not dispute that the rifle going off was anything other than a tragic accident.¹⁰⁶ Within days, prosecutors charged Gutierrez-Gonzales with second-degree felony-murder.¹⁰⁷ The peace officer and the young man of color faced markedly different consequences.

The felony-murder charge in the Gutierrez-Gonzales case rested on a legally unstable foundation. The criminal complaint clearly enumerated the predicate felony: reckless discharge of a firearm within a municipality.¹⁰⁸ Unlike most other viable predicate felonies, which require intentional or knowing levels of *mens rea* to trigger felony-murder prosecutions,¹⁰⁹ the predicate felony in the

97. *Id.*

98. *Id.*

99. *Id.*

100. Felony Criminal Complaint at 7, State v. Yanez, No. 0620373879 (Ramsey Cnty. Dist. Ct. 2017).

101. Felony Criminal Complaint at 1–3, State v. Gutierrez-Gonzales, No. 62-CR-08-16753 (Ramsey Cnty. Dist. Ct. 2008).

102. *Id.* at 3.

103. State’s Memorandum of Law, State v. Gutierrez-Gonzales, No. 62-CR-08-16753 (Ramsey Cnty. Dist. Ct. 2008).

104. Felony Criminal Complaint at 3, State v. Gutierrez-Gonzales, No. 62-CR-08-16753 (Ramsey County District Court 2008).

105. *Id.*; Mara Gottfried, *Girlfriend of Suspected Shooter: ‘Turn Yourself In . . .’*, ST. PAUL PIONEER PRESS (Nov. 16, 2008), <https://www.twincities.com/2008/11/16/girlfriend-of-suspected-shooter-turn-yourself-in/> [perma.cc/5SLC-NHDX].

106. Felony Criminal Complaint at 3, State v. Gutierrez-Gonzales, No. 62-CR-08-16753 (Ramsey Cnty. Dist. Ct. 2008).

107. *Id.* at 5.

108. *Id.* at 1.

109. See, e.g., Butala v. State, 887 N.W.2d 826, 831 (Minn. 2016) (establishing that arson is a viable predicate felony); MINN. STAT. § 609.561(1) (2020) (specifying

case against Gutierrez-Gonzales required only reckless *mens rea*.¹¹⁰ Although under Minnesota common law, offenses with reckless *mens rea*—or even strict liability—are technically viable predicate felonies,¹¹¹ this charging vehicle stretches the theoretical framework of the felony-murder doctrine, which is premised on imputed intent, and has come under harsh criticism.¹¹²

In *State v. Engle*, decided just months before Gutierrez-Gonzales was charged, the Supreme Court of Minnesota assessed the *mens rea* requirement for reckless discharge of a firearm within a municipality as a standalone offense.¹¹³ The *Engle* Court noted ambiguity in whether the reckless *mens rea* required the voluntary act of pulling the trigger, or merely any voluntary act that “increases the likelihood that the gun will discharge accidentally.”¹¹⁴ The *Engle* Court concluded that any “conscious or intentional act in connection with the discharge of a firearm” satisfies the *mens rea* element.¹¹⁵

a *mens rea* requirement of “intentionally” for the predicate felony of arson); *State v. Dorn*, 887 N.W.2d 826, 831 (Minn. 2016) (requiring that the actor knowingly or intentionally commit the predicate assault to trigger the felony-murder doctrine) (cited in Egan, *Collateral and Independent Felonious Design*, *supra* note 68 (analyzing the general intent crime of first-degree assault as a Minnesota predicate felony, contrasting it to the elevated *mens rea* threshold of specific intent assault required to trigger felony-murder under Ohio law)).

110. MINN. STAT. § 609.66(1)(a)(3) (2006); see *generally* *State v. Engle*, 743 N.W.2d 595 (Minn. 2008) (developing *mens rea* required for reckless discharge of a firearm in a municipality).

111. See *State v. Smoot*, 737 N.W.2d 849, 853–855 (Minn. Ct. App. 2007) (holding that felony Driving While Impaired, a strict liability offense, may serve as a viable predicate felony in felony-murder prosecutions).

112. Interview with Professor George M. Platt, University of Oregon School of Law (Nov. 14, 1969) (cited in *State v. Blair*, 214 P.3d 47, 57 (Oregon Ct. App. 2009) (stressing “we have approached the outer limits of the *mens rea* requirement with respect to murder in the felony-murder doctrine. In effect what we have is strict liability when one who sets out to commit a lesser felony with no *mens rea*—with no mental element of intending to kill anyone—winds up as a murderer [T]here will be a door through which the very unusual defendant will be able to exit from the charge of murder”)).

113. *State v. Engle*, 743 N.W.2d 592 (Minn. 2008).

114. *Id.* at 595–96 (Minn. 2008) (cited in *State v. Coleman*, 944 N.W.2d 469, 478 (Minn. Ct. App. 2020) (defining reckless *mens rea* but applying it to third-degree murder)).

115. *State v. Engle*, 743 N.W.2d at 596. It should not be lost on the reader that the defendant in *Engle*, a private security guard, was acting in a quasi-law enforcement capacity. *Id.* at 593. While the race of the victim is unclear from the published appellate court opinion, it is clear that Mr. Engle shooting and paralyzing the victim was not justified. *Id.* Notwithstanding the horrific consequences of the shooting, Mr. Engle was not charged with attempted murder or even assault, and the sentencing judge imposed a mere two years of probation after which the conviction was to be reduced to a misdemeanor. *Id.* Rare are the cases where a lay person of color receives the benefit of such generous charging or sentencing.

Arguably, the law just months before Gutierrez-Gonzales was charged required a deliberate, volitional trigger pull.¹¹⁶ The complaint did not allege one.¹¹⁷ Still, prosecutors rushed to charge Gutierrez-Gonzales with felony-murder. More unnerving, prosecutors made no attempt to satisfy even the lower post-*Engle mens rea* threshold. They failed to plead any voluntary acts by Gutierrez-Gonzales that would have “increase[d] the likelihood that the gun will discharge accidentally.”¹¹⁸ The only facts alleged in the complaint relating to Gutierrez-Gonzales’ handling the rifle are “trying to put a clip in” and “pick[ing] the gun back up” after “put[ting] the gun down.”¹¹⁹ This is routine conduct that peace officers across the nation engage in every day without criticism; yet it is the sole alleged misconduct on which Gutierrez-Gonzales’ felony-murder charge hinged.

The same office declined to utilize a similar predicate felony against Yanez. Prosecutors had to have realized that such a charging option was available; the potential predicate felony was evident as counts two and three on the very face of the complaint: intentional discharge of a firearm that endangers safety.¹²⁰ The *mens rea* for the would-be predicate felony was intentional.¹²¹ If reckless discharge of a firearm could predicate felony-murder charges in the case against Gutierrez-Gonzales, certainly intentional discharge of a firearm could serve as a predicate felony in the case against Yanez. Intentional discharge of a firearm is a more legally sound predicate felony because of its heightened *mens rea* requirement. Charging second-degree felony-murder would have recalibrated plea negotiations, trial strategy, and the way jurors viewed the evidence. It may have even led to a guilty plea or a different verdict at trial.

The facts only bolster the case for a felony-murder charge against Yanez. He deliberately aimed his firearm in the direction of Castile and the other two occupants of the vehicle, and with full volitional control, pulled the trigger no less than seven times.¹²²

116. See generally *id.*

117. Felony Criminal Complaint at 3, State v. Gutierrez-Gonzales, No. 62-CR-08-16753 (Ramsey Cnty. Dist. Ct. 2008) (alleging the “gun suddenly went off . . . the shooting was an accident”).

118. See *Engle*, 743 N.W.2d at 596.

119. Felony Criminal Complaint at 3, State v. Gutierrez-Gonzales, No. 62-CR-08-16753 (Ramsey Cnty. Dist. Ct. 2008).

120. Felony Criminal Complaint at 1–2, State v. Yanez, No. 0620373879 (Ramsey Cnty. Dist. Ct. 2017).

121. MINN. STAT. § 609.66(1)(a)(2) (2006).

122. Smith, *supra* note 95.

Obviously, prosecutors thought they had a strong case for unlawful intentional discharge of a firearm, otherwise they would not have charged Yanez with those two counts. But they failed to take the next step and bring the felony-murder charge, even though the only additional element of proof they would have needed was not in dispute: Philando Castile's lifeless body.

The Yanez prosecutors may argue that it was a legitimate exercise of discretion not to charge felony-murder. That discretion is precisely the problem: it so rarely gets used to the detriment of peace officers and is so often weaponized against people of color.¹²³ Regardless of whether it was Yanez's status as a peace officer or the race of the victims that differentiated the charging in the two cases, this disparity exemplifies unconscionable systemic bias in the prosecution of police killings and killings by civilian people of color. If prosecutors cannot harmonize their charging decisions across these demographics, the felony-murder doctrine should be abolished.

IV. George Floyd's Legacy: Lasting Reform and a Shifting Social Prism in Anticipation of Appellate Review of Minnesota's Felony-Murder Doctrine

The distorted approach to police killings, coupled with larger systemic racial bias, has plagued the Twin Cities' handling of felony-murder cases, other homicides, and crime more generally. In the four years between the Castile and Floyd killings, Minnesota prosecutors brought charges against peace officers on just two other occasions.¹²⁴ In that time there were forty-seven on-duty police killings in the state.¹²⁵ The problem goes back much further: from 2000–2016, the Office of the Hennepin County Attorney did not bring charges in a single police shooting.¹²⁶ The racial inequity of

123. See *supra* Section II; see also Greg Egan, Opinion, *Minnesota Needs to Change Its 'Felony-Murder' Doctrine. Racial Inequities Are One Reason*, ST. PAUL PIONEER PRESS at 19A (June 28, 2020).

124. Pat Borzi, *Why Are Cops in Minnesota So Rarely Charged in Officer-Involved Deaths?*, MINNPOST (June 1, 2020), <https://www.minnpost.com/metro/2020/06/why-are-cops-in-minnesota-so-rarely-charged-in-officer-involved-deaths/> [perma.cc/2STM-WX7G].

125. Jeff Hargarten, Jennifer Bjorhus, MaryJo Webster, & Kelly Smith, *Every Police-Involved Death in Minnesota Since 2000*, STAR TRIB. (Oct. 2, 2020), <https://www.startribune.com/fatal-police-encounters-since-2000/502088871/> [perma.cc/C7PV-EPNG].

126. Tom Jackman & Devlin Barrett, *Charging Officers with Crimes is Still Difficult for Prosecutors*, WASH. POST (May 29, 2020), <https://www.washingtonpost.com/crime-law/2020/05/29/charging-cops-with-crimes-is-still-difficult-prosecutors/> [perma.cc/WM2V-Z7ZD].

that approach and the tacit acceptance of the devastation, dehumanization, and terror it encompasses have deeply scarred the community. The *Chauvin* conviction and appellate posture may cultivate justice in two conflicting ways: either upholding a measure of accountability against Floyd's killer in a way that catalyzes community healing, or, alternatively, prompting a legal change in a way that would, unfortunately, lessen this killer's punishment but facilitate new law benefiting the long-abused community he has so deeply scarred.

The prosecution of George Floyd's killer stands apart from even the other exceedingly rare cases charged against peace officers. It is a sign of progress, but it also evidences just how far things had deteriorated. The other recent Minnesota police killings, while driven in part by their unique factual circumstances, still mirror the racial inequities evident in second-degree felony-murder prosecutions more generally. They also reflect a basic deference to peace officers. A Washington County Sheriff's deputy, Brian Krook, was recently indicted for second-degree manslaughter for shooting a young man in the midst of a mental health crisis.¹²⁷ The victim was a White, off-duty Emergency Medical Technician.¹²⁸ The victim's race and occupation likely motivated prosecutors to seek the indictment. In addition, there tends to be greater sympathy for victims suffering from a mental health crisis.¹²⁹ Under these circumstances, even though Krook was also White, prosecutors went to the grand jury. They did not, however, go so far as to recommend a felony-murder charge. One can speculate as to whether prosecutors would have pursued felony-murder had the shooting involved an officer of color. Conversely, had the victim been a person of color, an indictment may not have been sought at all. What appear to be surface inroads towards justice in the Krook prosecution are nuanced and may actually be yet another manifestation of racial inequity. This is an inequity challenged—but not eviscerated—by the conviction of Floyd's killer.

The Krook case stands in stark contrast to the most recent prosecuted police shooting in Minnesota leading up to George Floyd's killing, but that does not mean that it harmonizes with the

127. Summons at 1, *State v. Krook*, No. 82-CR-19-2887 (Washington Cnty. Dist. Ct. 2019); Matt Sepic, *Washington Co. Deputy Says he Felt 'Horrible' After Shooting, Killing a Man Threatening Suicide*, MINN. PUB. RADIO NEWS (Mar. 18, 2020), <https://www.mprnews.org/story/2020/03/17/washington-co-deputy-says-he-felt-horrible-after-shooting-a-suicidal-man-to-death> [perma.cc/3AS4-9RR2].

128. *Id.*

129. Hargarten et al., *supra* note 125.

Chauvin case when it comes to racial justice and policing. Mohamed Noor was a Black, Somali-American Minneapolis police officer who, in the dark of night, shot and killed a White woman.¹³⁰ While initially Noor was charged with third-degree murder and second-degree manslaughter,¹³¹ prosecutors later elevated charges, bypassing second-degree felony-murder to charge Noor with second-degree intentional murder.¹³² Although bringing criminal charges—perhaps even a felony-murder charge—was appropriate, intentional murder was a stretch.¹³³ There was no body camera footage and no incriminating statement by Noor.¹³⁴ His charges far exceeded those that Yanez and Krook faced. Noor's was the only one of the three cases where an officer of color killed a White victim, so the charging and outcome of that case should not be wholeheartedly celebrated.

Just a few miles from the courthouse where Chauvin's trial was still drawing to its conclusion, yet another young Black man was gunned down by a White peace officer, Kimberly Potter.¹³⁵ Daunte Wright had been pulled over for expired license plate tabs, allegedly tried to flee, and was shot because Potter somehow thought she was handling a taser instead of a firearm.¹³⁶ A County Attorney promptly charged the officer with Second-Degree Manslaughter, and Minnesota Attorney General Keith Ellison

130. Libor Jany, *Ex-Minneapolis Police Officer Noor to Plead Not Guilty in Diamond Shooting Death*, STAR TRIB. (April 26, 2008), <https://www.startribune.com/minneapolis-police-officer-mohamed-noor-will-plead-not-guilty-in-shooting-death-of-justine-damond/480845391/> [perma.cc/9SZJ-RWGS].

131. Complaint at 1, *State v. Noor*, No. 27-CR-18-6859 (Hennepin Cnty. Dist. Ct. 2018).

132. *Second-Degree Murder Charge Officially Added to Noor Complaint*, 5 EYEWITNESS NEWS KSTP (Mar. 26, 2019), [web.archive.org/web/20200614165049/https://kstp.com/news/second-degree-murder-charge-officially-added-mohamed-noor-complaint/5175413/].

133. In its statutory amendments in the wake of George Floyd's killing, the Minnesota Legislature recognized a more nuanced mental state required for prosecution of an officer in Noor's position, which in some ways validated his defense. Compare MINN. STAT. § 609.066(1)(1) (2016) (classifying a killing as "justified" only when actually "necessary to protect the peace officer or another from apparent death or great bodily harm"), with MINN. STAT. § 609.066(1)(1) (2020) (inserting "if an objectively reasonable officer would believe, based on the totality of the circumstances known to the officer at the time and without the benefit of hindsight, that such force is necessary").

134. Jany, *supra* note 130.

135. Nicholas Bogel-Burroughs & Azi Paybarah, *Protesters Clash with Police After Minnesota Officer Shoots Black Man*, N.Y. TIMES (Apr. 11, 2021), <https://www.nytimes.com/2021/04/11/us/brooklyn-center-minnesota-police-shooting.html> [perma.cc/8PPJ-SNRQ].

136. *Id.*

vowed to continue with the prosecution when his office took over.¹³⁷ Though it appears more a case of ineptitude than savagery, this case has many of the same racial, policing, and power elements of Chauvin's. And the likely result is another conviction. That would be the right outcome; it would reinforce the sea change finally evident in Chauvin's case. The hope is that these tragic cases will decrease in frequency, but when they do happen, the trend for greater accountability will continue.

Against this backdrop it appears we are at a fulcrum in our long history of racial inequity in the prosecution and sentencing of police killings, and in the use of the felony-murder doctrine more generally. Up until now, most frequently, officers who killed were never even charged.¹³⁸ On the rare occasions—two others in recent memory in Minnesota—that a White officer was charged or indicted, it was only to second-degree culpable manslaughter, not felony-murder.¹³⁹ A person of color is killed by police; the initial public outcry dissipates; only in rare cases are charges brought; then it happens all over again. Community leaders like former Minneapolis NAACP president Leslie Redmond have expressed their exasperation: “The 13th [Amendment to the U.S. Constitution] abolished slavery except if one was duly convicted of a crime. The legacy of slave patrols ha[s] continued through our current policing system and it is time for a change. The murder of George Floyd made people realize that silence equal[s] consent.”¹⁴⁰

Considering that long history of tribulation, the community rightly celebrated Chauvin's convictions. But there is a reasonable chance that the conviction to the top count, second-degree felony-murder, will not stand. The Supreme Court of Minnesota may answer the call of academics and practitioners to reevaluate the merger limitation to the felony-murder doctrine.¹⁴¹ The high Court may hold that at the very least assaults—and possibly other felony-level crimes of physical aggression towards a person—that lead to an unintended death cannot predicate felony-murder. Such a

137. Amy Forliti, *Minnesota AG's Office to Prosecute Case Involving Wright's Death*, STAR TRIB. (May 21, 2021), https://www.startribune.com/minnesota-ag-office-to-prosecute-case-in-wrights-death/600059862/?utm_source=newsletter&utm_medium=email&utm_campaign=talkers [perma.cc/TV9B-93ML].

138. Jackman & Barrett, *supra* note 126.

139. Indictment, State v. Krook, No. 82-CR-19-2887 (Washington Cnty. Dist. Ct. 2019); Criminal Complaint, State v. Potter, No. 27-CR-21-7460 (Hennepin Cnty. Dist. Ct. 2021).

140. Interview with Leslie E. Redmond, Esq., Former NAACP President, in St. Paul, Minnesota (Jan. 3, 2021) (on file with author).

141. Egan, *Collateral and Independent Felonious Design*, *supra* note 68.

holding would be grounded in the following reasoning: because the *mens rea*, or violent underlying criminal intent was common to the predicate assaultive crime and murder in the abstract, the two crimes merge.¹⁴²

As horrific as his actions were, Chauvin did not intend to kill Floyd. There was public outrage when he was not charged with intentional murder,¹⁴³ but Ellison and his team were correct to conclude that intentional murder simply did not fit. Chauvin set out to do something appalling: he likely wanted make Floyd fear the power imbalance, likely wanted to hurt Floyd; perhaps he even intended to make him beg for his life, or at the very least recognize that he had the absolute power to take it away. Chauvin likely further intended to whitewash all of this in a police report he would have turned over to prosecutors to entice them to charge Floyd, had he survived. He likely intended to make Floyd out as the bad actor, maybe even the aggressor, just as peace officers have done across the Twin Cities and across the rest of the country with impunity for far too long. Even more appalling, Chauvin used the power of his badge to try to do all of this. But none of this could be congruent with an affirmative intent to kill. The Author is among the harshest critics of what Chauvin did, but to assert that he intended to slowly kill George Floyd in broad daylight amidst a sea of onlookers is misguided.

As unsettling as this prospect is, and as much as Derek Chauvin deserves a harsh penalty for the heinous murder he without question committed, the progressive elements of the legal community have to recognize that in many ways, Chauvin's case provides a sound factual scenario to finally rewrite Minnesota's felony-murder doctrine by adopting a merger limitation. Chauvin was calculated and intentional in perpetrating an appalling and wholly unjustified assault, but he did not intend to kill. Take away the badge, take away the devastation Chauvin's actions have had on the community, take away his heartlessness, his violence, his callousness, and his horrifying belief that he was untouchable, and what is left is a text-book example of the type of prosecution that a merger limitation to the felony-murder doctrine would preclude. The law must be so clinical, so objective, and so dispassionate if it

142. *Id.* (providing thorough analysis of mechanics of felony-murder doctrine predicated on assaultive crimes).

143. Harry Litman, Opinion, *Does Third-Degree Murder Sound Too Mild for Chauvin? It's Exactly Right*, L.A. TIMES (June 2, 2020), www.latimes.com/opinion/story/2020-06-02/george-floyd-derek-chauvin-murder-charge [perma.cc/A797-5K3S].

is to dispense justice on a broad scale, even when it seems unpalatable in the short term.

Change in Minnesota's felony-murder doctrine is long overdue. But from a community, racial equity, and police reform perspective, it would seem both shameful and tragic if this were to be the case to finally deliver it. For more than forty years, the Supreme Court of Minnesota and the State Legislature have turned a deaf ear to calls for reform,¹⁴⁴ silencing those who have suffered from a racially and socioeconomically biased law weaponized against the disenfranchised.¹⁴⁵ Shameful, tragic, but not atypical: the world finally listens when a White person of power speaks.

Chauvin's legal team will invariably do just that by challenging the felony-murder conviction with a call for merger. Ironically, the unintended champion for a long-overdue change in law that would benefit communities of color may now be this White former officer who has wreaked such devastation on those very communities. It is not just ironic; it is insulting and demeaning. However distasteful it may be, Chauvin's appeal has the potential to finally cleanse Minnesota's felony-murder doctrine of some of the gross racial and socioeconomic inequity that has plagued it for generations.

Peace officers are not the only actors who have perpetuated the inequities of Minnesota's felony-murder doctrine; prosecutors and judges should not escape blame.¹⁴⁶ As sickening as overturning the most serious conviction against Chauvin would be, the accompanying evolution in the law would facilitate justice, even if prosecutors and judges were not ready. The outcry, tragedy, and reform of the past year should leave their mark on these ministers of justice, awakening them to the inequities of the felony-murder doctrine and the way it has long been employed to defile communities of color. But even if all that has happened in the past year does not have that effect, a change in the law would drag prosecutors and judges forward, whether they were ready or not, because it would finally deprive them of a tool that—unconsciously or intentionally—they have long weaponized against the disenfranchised.¹⁴⁷

So even if Chauvin's felony-murder conviction is overturned, George Floyd will still have had a lasting impact on the law and on

144. Egan, *Collateral and Independent Felonious Design*, *supra* note 68.

145. Egan, *Minnesota Needs to Change Its 'Felony-Murder' Doctrine*, *supra* note 123.

146. *See supra* Sections II & III.

147. *See supra* Sections II & III.

the broader community in which it is immersed. Slow as the waking of conscience may be, the tide is finally shifting. And that tidal pool is deeper, and hopefully longer lasting, than just Derek Chauvin's legal case. Although only one of the recent Minnesota police killings leading up to Chauvin has resulted in a conviction, all four cases were brought in the past five years.¹⁴⁸ On an unprecedented scale in the wake of George Floyd's killing, the streets have flooded with sustained protest—both in Minnesota and around the world.¹⁴⁹ Their calls are for racial equity and police reform.¹⁵⁰ And it has not been without effect: the public has successfully demanded laws aimed at fostering more effective relationships between the police and the community, preventing police killings, and imposing greater accountability when killings do occur.¹⁵¹ Moreover, leaders like Minneapolis Police Chief Medaria Arradondo are now at the helm. He immediately discharged all four officers involved in Floyd's death and promised, "The Floyd family will lead me forward."¹⁵² Finally, the aggressive charging of Chauvin,¹⁵³ like the general approach of Ellison and his team to this prosecution, are in and of themselves promising.¹⁵⁴ Things are starting to change.

148. Jon Collins & Riham Feshir, *Two Minnesota Police Shooting Trials, Two Very Different Verdicts*, MPR NEWS (May 1, 2019), <https://www.mprnews.org/story/2019/05/01/two-minnesota-police-shooting-trials-two-very-different-verdicts> [perma.cc/HQ2G-J5HE].

149. Olivia Le Poidevin, *George Floyd: Black Lives Matter Protests Go Global*, BBC NEWS (June 8, 2020), <https://www.bbc.com/news/av/world-52967551>.

150. *Id.*

151. *See, e.g.*, MINN. STAT. § 299C.80 (2020) (calling for the formation of an independent Use of Force Investigations Unit within the Bureau of Criminal Apprehension to conduct officer-involved death investigations); MINN. STAT. § 609.06(3) (2020) (limiting choke holds and other restraints by peace officers); MINN. STAT. § 609.066(2) (2020) (tightening restrictions on peace officers' use of deadly force); MINN. STAT. § 626.5534 (2020) (imposing a use of force reporting requirement upon chief law enforcement officers); MINN. STAT. § 626.8434(3) (2020) (prohibiting "warrior-style" training); MINN. STAT. § 626.8435 (2020) (establishing the Ensuring Police Excellence and Improving Community Relations Advisory Council, which legislators intended to protect civil and human rights, provide for citizen involvement, and advance reforms that "promote positive interactions between peace officers and the community"); MINN. STAT. § 626.8469 (2020) (providing for training in crisis response, conflict management, mental illness crises, and cultural diversity); MINN. STAT. § 626.8475 (2020) (imposing a duty for peace officers to intervene and report "regardless of tenure or rank").

152. Sara Sidner, *Minneapolis Police Chief Vows to Reform Police Department*, CNN VIDEO (June 13, 2020), <https://www.cnn.com/videos/us/2020/06/13/minneapolis-police-chief-reform-george-floyd-sidner-pkg-nr-vpx.cnn>.

153. Chauvin's conviction under the second-degree felony-murder doctrine is rare for peace officers, but squarely akin to what defendants of color have historically and routinely faced. *See supra* Section II.

154. Libor Jany, *Seeking to Show Pattern of Excessive Force by Chauvin, Prosecutors Cite Incident with 14-Year-Old Boy Who Couldn't Breathe*, STAR TRIB.

The Supreme Court of Minnesota may wrestle Chauvin's murder convictions away from the communities that rightly celebrated them, but it cannot take away the reform, the unity, and the dialogue that has grown over the course of this past year. Moreover, when it comes to the felony-murder doctrine, the Supreme Court of Minnesota cannot take away that conviction without also taking away a tool that has been weaponized in the legal system against communities of color for generations. The ideal outcome is for Chauvin's appeal to catalyze a dialogue about a merger limitation to the felony-murder doctrine, but for the Supreme Court of Minnesota to recognize that public policy demands that his conviction stand.

There is momentum behind this outcome. The appellate posture of the Noor case illustrates Minnesota appellate courts' prism shift when it comes to killings by police generally. Although not specifically enumerated in statute, a time-honored common law requirement for Murder in the Third-Degree is that the killer's "general malice" involve "ill will" directed at someone other than "the person slain."¹⁵⁵ The Minnesota Court of Appeals in *Noor* could not have been any more flagrant in disregarding the long line of binding precedent from the Supreme Court of Minnesota,¹⁵⁶ instead

(Nov. 18, 2020), <https://www.startribune.com/chauvin-prosecutors-cite-incident-with-14-year-old-boy-who-couldn-t-breathe/573105501/> [perma.cc/2CWM-X8HP] (detailing prosecution's intent to introduce evidence of Chauvin's prior use of unreasonable force against a fourteen-year-old boy while "ignoring his pleas that he could not breathe"); see also Stephan Montemayor & Chao Xiong, *Four Fired Minneapolis Police Officers Charged, Booked in Killing of George Floyd*, STAR TRIB. (June 4, 2020), <https://www.startribune.com/four-fired-minneapolis-officers-booked-charged-in-killing-of-george-floyd/570984872/> [perma.cc/DV8T-GWJK] (announcing Ellison's decision to upgrade the charges to include second-degree felony-murder within days of being assigned the case).

155. *State v. Weltz*, 193 N.W. 42, 43 (Minn. 1923) (enumerating "intentional driving of a carriage in among a crowd, or the discharging of a gun among a multitude of people" as "common illustrations") (cited in *State v. Coleman*, 957 N.W.2d 72, 78 (Minn. 2021)). *Coleman* was handed down by the Supreme Court of Minnesota as the Chauvin trial was in progress. *Coleman*, 957 N.W.2d at 72.

156. The Noor intermediate appellate court used tortured reasoning to reinterpret time-honored, binding case law and statutory authority. See, e.g., *State v. Zumberge*, 888 N.W.2d 688, 698 (Minn. 2017) ("Third-degree murder cannot occur when the defendant's actions were focused on a specific person.") (cited in *State v. Noor*, 955 N.W.2d 644, 654 (Minn. Ct. App. 2021)); *State v. Hanson*, 176 N.W.2d 607, 614–15 (Minn. 1970) (holding that Murder in the Third-Degree "occurs only where the death is caused without intent to effect the death of any person, a phrase which under our decisions excludes a situation where the animus of defendant is directed toward one person only") (cited in *Noor*, 955 N.W.2d at 654); *State v. Lowe*, 68 N.W. 1094, 1095 (Minn. 1896) ("It is, however, necessary that the act was committed without special design upon the particular person or persons with whose murder the accused is charged.") (cited in *Noor*, 955 N.W.2d at 653). See also MINN. STAT. § 645.08(2) (2018) ("[T]he singular includes the plural; and the plural, the singular[.]") (cited in *Noor*,

holding without ambiguity that “[t]he phrase does not preclude the possibility of a third-degree murder conviction if an unintentional death is caused by an act directed at a single person.”¹⁵⁷ A bold stance this was for the Minnesota Court of Appeals, an error-correcting court not authorized to forge new policy.¹⁵⁸ The *Noor* appellate court made this ruling knowing that it would pave the way for reinstating the Murder in the Third-Degree charge on the eve of the Chauvin trial, which was already pending *voir dire*.¹⁵⁹ The intermediate appellate court’s legal reasoning was strained at best. In sum, the Minnesota Court of Appeals acknowledged in *Noor* the overwhelming weight of binding authority, then promptly issued a ruling in direct contradiction to it. This is result-oriented reasoning at its finest, and it demonstrates just how much the cultural climate has changed.

It is significant that the Minnesota Court of Appeals was receptive to this change in cultural climate. *Noor* suggests that appellate courts will no longer be complacent in police abuse. As a matter of public policy, they will now instead side with those terrorized by it. On some level, this is a step in the right direction. However, it is legally nuanced. What is clear is that the holding in *Noor* seems to show the courts mirroring the growing public intolerance of police killings. Not even the Minnesota Court of Appeals is immune to the evolution George Floyd’s killing has propelled this past year.

The Supreme Court of Minnesota likely will not be immune to this evolution either. It will uphold both *Noor*, when it comes to Murder in the Third-Degree, and *Chauvin* when it comes to Felony-Murder in the Second-Degree and Murder in the Third-Degree. It will uphold these convictions against former peace officers even though it requires making new law as it pertains to Murder in the Third-Degree, and upholding bad law, at least temporarily, as it pertains to Second-Degree Felony-Murder. To the extent that these laws implicate excessive force by police, that is probably a good thing. But the social dialogue and legal reform should not stop with the analysis of the five prosecuted Minnesota police killings in recent memory.

955 N.W.2d at 645) (using a mere general cannon of construction to attempt to unwrite a well-established tenet of Murder in the Third Degree). The *Noor* court even quotes the 1896 murder statute, emphasizing the words “design to effect the death” to argue that somehow the plain language of the century-old statute invalidates the requirement that the defendant endanger another person. See 955 N.W.2d at 655.

157. *Noor*, 955 N.W.2d at 656.

158. *Jensen v. 1985 Ferrari*, 949 N.W.2d 729, 741 n.21 (Minn. Ct. App. 2020).

159. *Noor*, 955 N.W.2d at 644.

If the high Court does not forge new ground by adopting the merger limitation in the *Chauvin* appeal, it should be vigilant not to overlook a more appropriate case to reform the felony-murder doctrine. Instead of protecting the White former peace officer who violently betrayed the public trust, the case that ultimately propels legal reform of the felony-murder doctrine should look more like most of the convictions that have come through the system in the last forty years. These cases have borne the mark of a tragedy, but for opposite reasons: most convictions feature disenfranchised people of color as defendants. They commit assaults, do not intend to kill, and cannot hide behind a badge. These actors, though certainly not blameless, have for years received the draconian treatment that Chauvin will seek to sidestep on appeal.

The tragedy of George Floyd must not be compounded. Even if his case exposes some of the faults of the felony-murder doctrine, Chauvin does not deserve to be the agent of reform—not after what he has done to the community. The conversation must begin here, but the true reformer has yet to come forward. The time is ripe. We are reexamining police killings; now we must reexamine the weaponization of the felony-murder doctrine against disenfranchised people of color.

Prosecutors have analyzed the Chauvin case through a different lens than past police killings. Hopefully, appellate court jurists do too. Finally deploying a second-degree felony-murder charge against a peace officer with success demonstrates this shift. It took strong evidence. It also took a jury that had absorbed the social evolution that has taken place in the year since George Floyd's killing.

The convictions will not repair the long-standing racial inequities of the felony-murder doctrine—or of criminal prosecutions more generally—nor will they completely halt the onslaught of police killings in the Twin Cities and in the rest of the nation and world. But they have already had some effect in making peace officers reevaluate use of force. And regardless of what happens in the appellate courts, the appeal will force a long-overdue conversation about substantive felony-murder reform in Minnesota, across the country, and hopefully in the few nations abroad that still employ the archaic doctrine. This conversation will embrace evolving norms about racial justice and policing. The convictions and appeal will make prosecutors and judges more cognizant of racial disparities that leave gaping wounds. They will reinforce broader reform, rethinking, and unity. They will promote, solidify,

and stand for justice both in our laws and in our communities. That will be George Floyd's legacy.

The \$2 Billion-Plus Price of Injustice: A Methodological Map for Police Reform in the George Floyd Era

David Schultz†

Introduction

The death of George Floyd on May 25, 2020 under the knee of a Minneapolis police officer forced America again to confront the connection between racism and law enforcement. It also compelled the City of Minneapolis to act. Merely a few days later on June 7, 2020 a majority of Minneapolis City Council members called for a defunding of police,¹ setting off a similar set of movements nationally.² After efforts to place an initiative on the 2020 ballot to eliminate the police failed,³ and the City Charter Commission rejected the idea,⁴ on December 10, 2020 the Minneapolis City Council voted to divert \$8 million from the police budget to fund alternative programs.⁵ The Mayor subsequently approved the

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1. Estefan Saucedo, *Minneapolis City Council Announces Intent to Disband Police Department*, KARE11 (June 7, 2020), <https://www.kare11.com/article/news/local/george-floyd/minneapolis-city-council-announces-plan-to-dismantle-police-department/89-a2260d74-4e21-4069-9b06-735aafba95cd> [perma.cc/5NFX-D29H].

2. Jack Brewster, *The 'Defund The Police' Movement Is Sweeping The Country—Here's What It Really Means*, FORBES (June 10, 2020), <https://www.forbes.com/sites/jackbrewster/2020/06/09/the-defund-the-police-movement-is-sweeping-the-country-heres-what-it-really-means/?sh=571393d44d9b> [perma.cc/7JH6-XPZ7].

3. Zoe Jackson, *How Charter Commission Kept Minneapolis Police Reform Off November Ballot*, STAR TRIB. (Sept. 1, 2020), <https://www.startribune.com/how-charter-commission-kept-minneapolis-police-reform-off-november-ballot/572285651/> [perma.cc/MJ7M-AXY4].

4. Brandt Williams, *Charter Commission Rejects Minneapolis Council's Public Safety Amendment*, MPR NEWS (Nov. 5, 2020), <https://www.mprnews.org/story/2020/11/04/charter-commission-rejects-councils-public-safety-amendment> [perma.cc/QGM9-647W].

5. Jenny Gross & John Eligon, *Minneapolis City Council Votes to Remove \$8 Million from Police Budget*, N.Y. TIMES (Dec. 12, 2020), <https://www.nytimes.com/2020/12/10/us/minneapolis-police-funding.html#:~:text=Months%20after%20their%20pledge%20to,in%20a%20city%20where%20law> [perma.cc/2CEQ-6MWZ].

budget cuts.⁶ In taking this action, the City of Minneapolis took its first steps to defunding or reimagining policing.

The movement to defund police has attracted mixed if not negative reviews nationally.⁷ Donald Trump ran against the “defund the police” mantra,⁸ and there is evidence that his messaging was successful in blunting Democratic Party gains nationwide in the 2020 elections.⁹ This suggests that the defunding movement or messaging, whatever its merits, so far has not resonated politically with the American public and its future as a reform tactic or strategy is questionable.¹⁰ Most Americans want police accountability and reform, but not necessarily its abolition.¹¹ It is possible that the progressive activists who support the defund police movement are political outliers who do not represent where the consensus of American public opinion is located.¹² The

6. Liz Navratil, *Minneapolis Mayor Jacob Frey Signs New Budget with Police Changes*, STAR TRIB. (Dec. 11, 2020), <https://www.startribune.com/minneapolis-mayor-jacob-frey-signs-new-budget-with-police-changes/573371971/> [perma.cc/6EVN-ZFTZ].

7. Nolan D. McCaskill, *‘Defund the Police’ Faces Skepticism—Even in Deeply Liberal Cities*, POLITICO (June 19, 2020), <https://www.politico.com/news/2020/06/19/defund-the-police-movement-faces-skepticism-328084> [perma.cc/7E6F-CGL7].

8. John Fritze & David Jackson, *‘Law and Order’: Trump Returns to 2016 Theme as Violence Spreads after George Floyd Death*, USA TODAY (June 2, 2020), <https://www.usatoday.com/story/news/politics/2020/06/02/george-floyd-trump-returns-law-and-order-theme-rose-garden/5310231002/> [perma.cc/QV8Z-VZE4].

9. Kris Maher & John McCormick, *In Minnesota and Beyond, ‘Defund the Police’ Weighed on Democrats*, WALL ST. J. (Nov. 18, 2020), <https://www.wsj.com/articles/in-minnesota-and-beyond-defund-the-police-weighed-on-democrats-11605700803> [perma.cc/X8MH-4WJX]; Justine Coleman, *Clyburn: ‘Defund the Police’ Slogan Hurt Democratic Candidates*, THE HILL (Nov. 8, 2020), <https://thehill.com/homenews/sunday-talk-shows/525053-clyburn-defund-the-police-slogan-hurt-democratic-candidates> [perma.cc/VTU5-L2NM].

10. See e.g., John Gramlich, *20 Striking Findings from 2020*, PEW RES. CTR. (Dec. 11, 2020), https://www.pewresearch.org/fact-tank/2020/12/11/20-striking-findings-from-2020/?fbclid=IwAR1b19K_30SXwp255v7cDzXiRI60yBFGJ_cstx2TqzENWhnyWpKwJDoGrbw [perma.cc/99NA-9PVQ] (indicating that support for Black Lives Matter peaked at 67% but fell to 55% by September, while at the same time only 25% of those surveyed supported cuts to policing in their area); Kendall Karson, *64% of Americans Oppose ‘Defund the Police’ Movement, Key Goals: Poll*, ABC NEWS (June 12, 2020), <https://abcnews.go.com/Politics/64-americans-oppose-defund-police-movement-key-goals/story?id=71202300> [perma.cc/MP9X-XR3N].

11. Steve Crabtree, *Most Americans Say Policing Needs ‘Major Changes’*, GALLUP (July 22, 2020), <https://news.gallup.com/poll/315962/americans-say-policing-needs-major-changes.aspx> [perma.cc/6PWR-QGGF].

12. STEPHEN HAWKINS & TARAN RAGHURAM, *MORE IN COMMON, AMERICAN FABRIC: IDENTITY AND BELONGING* (2020), https://www.moreincommon.com/media/s5jhgp5/moreincommon_americanfabricreport.pdf [https://perma.cc/4M39-ZX9W] (generally indicating that progressive activists hold different views than Americans more broadly and that the U.S. is divided by generations, race, and age more so than other nations).

opportunity for police reform that the death of George Floyd created may already be closing,¹³ and we may therefore be in a Post-George Floyd policy location where the chance for serious change has already stalled.¹⁴

The reality is that police are not going to entirely disappear from America anytime soon. Nonetheless, the question remains, if one is still interested in the idea of reforming or changing police behavior, especially when it comes to addressing its racial impact, what should such reform look like? Offering a preliminary path for reform, or at least outlining the questions that need to be asked, is the subject of this Article.

This Article does not propose an answer to what a reformed institution of policing looks like in America. Instead, it is a methodological exploration of the types of questions that need to be asked and addressed if any type of reforms are to occur. The purpose of this Article then is to set a path of questions and issues that need to be addressed by reformers and activists if they wish to alter the way police operate as an institution in the United States.

I. What Is the Indictment of the Police?

A. *The Historical Functions of the Police*

The critique of police in America is multifaceted. First, in defense of police as an institution is the argument that they perform at least two fundamental functions: the classic law and order function, and a social service function.¹⁵ In terms of law and order, criminal law serves many purposes including as a tool to secure

13. It is possible that George Floyd's death was a triggering event that created a policy window that may have already closed. See 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 major and unexpected events can alter the policy landscape); JOHN KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2007) (proposing that changing the policy agenda requires a confluence of policy, problem, and politics streams and a policy entrepreneur willing to move an issue); Anthony Downs, *Up and Down with Ecology—The "Issue-Attention Cycle"*, 28 PUB. INT. 38 (1972) (noting a five-stage process discussing how the public gets excited by a policy issue and then interest fades).

14. Deena Zaru & Tonya Simpson, *Defund the Police' Movement 6 Months after Killing of George Floyd*, ABC NEWS (Nov. 25, 2020), <https://abcnews.go.com/US/defund-police-movement-months-killing-george-floyd/story?id=74296015> [perma.cc/ATD5-MEU7] (noting that while some police reforms have been adopted, others are stalled, and that President Joe Biden has come out against the defund the police movement).

15. See generally SAMUEL WALKER, *THE POLICE IN AMERICA: AN INTRODUCTION* (1996) (describing police functions in the United States broadly).

policy goals.¹⁶ Criminal law then can be viewed as a regulatory tool to ensure compliance of policy goals that the state seeks to secure.¹⁷

Criminal law is necessary for security.¹⁸ In Western thought, dating back at least to Thomas Hobbes¹⁹ and John Locke,²⁰ individuals were not seen as naturally good, and the state was needed to keep people from harming others. Left to our own devices, where individuals self-enforced their rights, life would be “solitary, poor, nasty, brutish, and short,”²¹ or inconvenient due to the inability of individuals to properly and appropriately punish people who transgressed upon those rights.²² Except for some utopian or anarchist thinkers, social order and security was considered impossible without law and state enforcement efforts to keep peace.²³

Criminal law also serves as an instrument of social control and order.²⁴ For some, this control is a necessary tool to keep the peace and assure orderly relations among people.²⁵ For others, the social control aspect of criminal law is an instrument of the ruling class to control certain people or behaviors.²⁶ In this view, law is not objective, but reflects specific perspectives on race, class, and gender.²⁷ Law defines “normalcy,”²⁸ and the threat of criminal

16. See, e.g., THOMAS A. BIRKLAND, AN INTRODUCTION TO THE POLICY PROCESS: THEORIES, CONCEPTS, AND MODELS OF PUBLIC POLICY MAKING 342–72 (2019) (generally discussing how criminal sanctions are one of several tools to enforce policy goals); DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING 274–76 (2002).

17. THOMAS J. GARDNER & TERRY M. ANDERSON, CRIMINAL LAW 6 (2018); Lena Maculan & Alicia Gil Gil, *The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts*, 40 OXFORD J. LEGAL STUD. 132 (2020).

18. GARDNER & ANDERSON, *supra* note 17, at 5–6.

19. See THOMAS HOBBS, LEVIATHAN (Collier Macmillan 1977) (1651).

20. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT (New American Library 1965) (1689).

21. HOBBS, *supra* note 19, at 100.

22. LOCKE, *supra* note 20, at 316.

23. See GEORGE WOODCOCK, ANARCHISM: A HISTORY OF LIBERTARIAN IDEAS AND MOVEMENTS (1962) (surveying anarchist thought and the belief that natural human sociality and cooperation rendered criminal law unnecessary).

24. IREDELL JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW 23 (1980); see also HERBERT JACOB, CRIME AND JUSTICE IN URBAN AMERICA (1980) (discussing criminal justice as an instrument of social control).

25. GARDNER & ANDERSON, *supra* note 17, at 8.

26. See, e.g., ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREAT TASK (2016) (generally arguing that law masks or expresses power relationships).

27. See, e.g., CATHARINE A. MCKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1991) (discussing how law itself is gendered in that it often reflects a male viewpoint).

28. KARL MENNINGER, THE CRIME OF PUNISHMENT (1968) (discussing how

punishment via the police is a tool to ensure political and behavioral orthodoxy.²⁹ As Rousseau declared, “Man is born free but is everywhere in chains.”³⁰ To these thinkers, society is the instrument of social control that enslaves us—abolish the state, the laws, and presumably the institution of the police, and we will naturally form non-oppressive freedom and order.³¹

The second function of the police is providing social services.³² Increasingly, police have come to be the front line or first call to address social issues.³³ These are calls related to things for neighborhood disputes, calls for medical assistance, requests to help individuals with cognitive or mental problems, and a range of other issues.³⁴ Police also are asked to give talks at schools, help with neighborhood watch programs, offer assistance to the elderly, and provide other services that have little to do with classic law and order functions.³⁵ Simply, many people call police to help with quality of life or social issues when they can think of no other place to turn.³⁶ Much of contemporary policing is about service, with relatively few officers anymore drawing or shooting a weapon associated with the classic “getting the bad guy” image.³⁷

The law and order and social service functions of policing have merged.³⁸ In urban areas especially, the criminal justice system has

criminal law defines what is socially acceptable or normal behavior).

29. *See, e.g.*, MICHEL FOUCAULT, *THE BIRTH OF THE CLINIC: AN ARCHAEOLOGY OF MEDICAL PERCEPTION* (1963); MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* (1966); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1975) (arguing for a connection between definitions of normalcy, mental illness, and criminal law).

30. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 49 (1762).

31. *See, e.g.*, RALPH MILIBAND, *THE STATE IN CAPITALIST SOCIETY* (1968); RICHARD QUINNEY, *CRITIQUE OF LEGAL ORDER: CRIME CONTROL IN CAPITALIST SOCIETY* (1974); NICO POULANTZAS, *POLITICAL POWER AND SOCIAL CLASSES* (1978).

32. Albert R. Roberts, *Police Social Work: Bridging the Past to the Present*, in *FROM SOCIAL WORK IN JUVENILE AND CRIMINAL JUSTICE SETTINGS* 126 (Albert R. Roberts & David W. Springer eds., 2007) (examining the long history of the connections between policing and social work).

33. *Id.*

34. S.B. Perrott & D.M. Taylor, *Crime Fighting: Law Enforcement and Service Provider Role Orientations in Community Based Police Officers*, *AM. J. POLICE*, Dec. 1995, at 173.

35. *Id.*

36. *Id.*

37. Rich Morin & Andrew Mercer, *A Closer Look at Police Officers Who Have Fired Their Weapon on Duty*, PEW RES. CTR. (Feb. 8, 2017), <https://www.pewresearch.org/fact-tank/2017/02/08/a-closer-look-at-police-officers-who-have-fired-their-weapon-on-duty/> [perma.cc/KSC8-NWDP] (indicating that only 27 percent of police officers have ever fired a gun in the line of duty, even though 83 percent of the public believes they use guns more frequently).

38. Perrott and Taylor, *supra* note 34, at 173.

become not just associated with crime control but also the delivery of social service programs. High percentages of defendants have chronic mental illness or chemical dependency problems where there are currently few other options beyond the use of the police, courts, and prison system to help them.³⁹ Criminal justice, policing, and social service delivery are now often indistinguishable.⁴⁰ Police are thus asked to perform a variety of tasks, some of which they lack the requisite skills or training.⁴¹ Effectively, we have reduced all social ills and issues to matters of policing.⁴²

B. What Should the Role of Police Be Moving Forward?

Closely examining the role of policing today becomes central to understanding what it would mean to reform or even abolish the police. Assuming the police were abolished raises a series of questions. Is there an alternative mechanism to enforce public policy beyond criminalizing behavior? In many ways, the criminal law approach to addressing behavior deemed unacceptable has failed. Prohibition⁴³ and the war on drugs⁴⁴ are two prominent examples. Additionally, perhaps some behavior simply should not be within the purview of the state or criminal law at all, such as personal intoxication, drug use, or sexual behavior. Simply put, the more behavior that a society criminalizes, the more potential there is for criminality and therefore more need for policing. American society has crafted a prison-industrial complex over the last few

39. SHELLI B. ROSSMAN, JANEEN BUCK WILLISON, KAMALA MALLIK-KANE, KIDEUK KIM, SARA DEBUS-SHERILL & P. MITCHELL DOWNEY, CRIMINAL JUSTICE INTERVENTIONS FOR OFFENDERS WITH MENTAL ILLNESS: EVALUATION OF MENTAL HEALTH COURTS IN BRONX AND BROOKLYN, NEW YORK 5 (2012), <https://www.ojp.gov/pdffiles1/nij/grants/238264.pdf> [perma.cc/TM89-XT9T] (reporting on studies finding that “64 percent of jail inmates, 56 percent of state prisoners, and 45 percent of federal prisoners” experience mental health problems).

40. See Perrott & Taylor, *supra* note 34, at 173.

41. See Roge Karma, *We Train Police to Be Warriors—and Then Send Them Out to Be Social Workers*, VOX (July 31, 2020), <https://www.vox.com/2020/7/31/21334190/what-police-do-defund-abolish-police-reform-training> [perma.cc/2MSK-RD3D] (discussing various social service obligations officers are asked to perform).

42. *Id.*

43. See, e.g., DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION (2010); NORMAN H. CLARK, DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION (1976) (generally describing the failures of prohibition, including the lawlessness that ensued).

44. NINA M. MOORE, THE POLITICAL ROOTS OF RACIAL TRACKING IN AMERICAN CRIMINAL JUSTICE 199–204 (2015) (describing the racial impact of the war on drugs); David Schultz, *Rethinking Drug Criminalization Policies*, 25 TEX. TECH L. REV. 151 (1993) (assessing the failed efforts and costs associated with the war on drugs).

decades whose profits have been fueled by increased sentences and criminal laws.⁴⁵ It's a self-fulfilling system.

Perhaps fewer police would be needed if we had a serious discussion on the law's limits or what behaviors to criminalize. We might also ask whether the police are the proper street-level actors to administer social service programs to those with social, economic, cognitive, or emotional needs.⁴⁶ Second, the criminal law is only one of many regulatory tools that can be used to promote policy goals.⁴⁷ Market incentives, civil enforcement tools, alternative dispute resolution, restorative justice, and education might also be ways to address behaviors that are deemed unacceptable.⁴⁸ An effort to reform the police then requires asking what policy goals we have in our society, what tools do we have to secure them, and what role law enforcement officials should have compared to other street level administrators?

Additionally, as noted, police perform a host of non-law and order social service functions. Reforming the police may mean asking if these are the individuals—or the institution—that should be entrusted to address these issues. Do we need police to be the first call for help with these functions? Perhaps triage could filter out many calls away from police to be performed by other non-police state actors.⁴⁹ If we do decide to send non-police actors to address a

45. There are many scholarly works which refer to the prison-industrial complex. See, e.g., Earl Smith & Angela J. Hattery, *African American Men and the Prison Industrial Complex*, 34 WEST. J. BLACK STUD. 387, 388 (Winter 2010) ("The [Prison Industrial Complex] has a similar growth history as the Military Industrial Complex (MIC) that we learned about in 1961 when [President Eisenhower] warned the American public about the growing interconnected relationships among American big business, government and worldwide military expansion."); Rose M. Brewer & Nancy A. Heitzeg, *The Racialization of Crime and Punishment: Criminal Justice, Color-Blind Racism, and the Political Economy of the Prison Industrial Complex*, in RACE AND CRIME: A TEXT/READER 384 (Helen Taylor Greene & Shaun L. Gabbidon eds., 2011) ("The criminal justice system and its culmination in the prison industrial complex also continues to guarantee the perpetual profits from the forced labor of inmates, now justifying their slavery as punishment for crime.").

46. MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980) (describing police, inter alia, as one of several actors or institutions who interact with the public to deliver services).

47. See, THOMAS A. BIRKLAND, AN INTRODUCTION TO THE POLICY PROCESS: THEORIES, CONCEPTS, AND MODELS OF PUBLIC POLICY MAKING 342–72 (2019); PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN 127–61 (2014) (examining the various tools government has to secure its policy objectives); see also STONE, *supra* note 16, at 265–84 (2002) (discussing the means government has to enforce policy).

48. GERRY JOHNSON & DANIEL W. VAN NESS, HANDBOOK OF RESTORATIVE JUSTICE (2013) (describing the various methods of alternative dispute resolution).

49. Several cities have begun experimenting with different systems. Saint Paul, Minnesota, across the river from where George Floyd was killed, utilizes a hybrid mental health unit where social workers and police officers respond jointly to certain

problem, how does the triage work? How do we address emergencies? What if a situation turns violent?

This preliminary set of questions asks us to examine who is responsible for keeping order or peace in society. Who responds to violent behavior? Who addresses social service calls? These are core questions regarding how a free society wishes to allocate authority and perform state functions, and may vary in different communities.⁵⁰

C. Classifying Racially Discriminatory Policing: The Micro, Meso, and Macro Levels

A different critique regarding policing is more specific to George Floyd. There is a historical connection between policing and race,⁵¹ and specifically the racial impact that policing and the criminal justice system has upon people of color. In part, the historic origins of policing are rooted in efforts to control freed slaves and people of color.⁵² Over time, people of color have been racially profiled by police, subjected to more arrests, disproportionately incarcerated, disproportionately executed, faced greater collateral damages to their voting rights, and were targeted more often for selective enforcement of the law.⁵³ Finally, as George Floyd's killing

mental health calls. See COMMUNITY OUTREACH & STABILIZATION UNIT (C.O.A.S.T.), SAINT PAUL POLICE DEPT, <https://www.stpaul.gov/departments/police/administration-office-chief/community-engagement-division/community-outreach> [perma.cc/N363-8HYT].

50. ROBERT A. DAHL, AFTER THE REVOLUTION? AUTHORITY IN A GOOD SOCIETY 1–6 (1970) (arguing that a democratic society needs to address basic questions regarding the use of authority and the performance of essential functions).

51. WALKER, *supra* note 15; Julian Go, *The Racist Origins of U.S. Policing: Demilitarization Will Require Decolonization*, FOREIGN AFFAIRS (July 16, 2020), <https://www.foreignaffairs.com/articles/united-states/2020-07-16/racist-origins-us-policing>.

52. Go, *supra* note 51; [eds. note: See also *Refunding the Community: What Defunding MPD Means and Why It Is Urgent and Realistic*, 39 LAW & INEQ. 511 (2021).].

53. There is a robust literature discussing the intersectionality of policing and race in the United States. See David Schultz, *How We Got Here: Race, Police Use of Force, and the Road to George Floyd*, INEQ. INQUIRY (Apr. 2021), <https://lawandinequality.org/?s=how+we+got+here> [perma.cc/76CV-EFPN] (reviewing the research on the racialized impact of police upon people of color); MILTON HEUMANN & LANCE CASSAK, GOOD COP, BAD COP: RACIAL PROFILING AND COMPETING VIEWS OF JUSTICE (2007) (discussing racial profiling among police officers generally); MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA (2012) (demonstrating the enduring racism within the criminal justice system); DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK, ACLU (2002) (arguing that racial profiling is both legally and morally wrong given its ineffectiveness at reducing or catching criminal behavior and its disproportionate impact on people of color); David Rudovsky, *Law Enforcement by*

demonstrated, people of color are far more likely to be victims of excessive or deadly force than White people.⁵⁴ The problem of policing is the problem of racism. One of the tasks of police reform is eliminating the racism. How do we create a non-racist, or better yet, an anti-racist institution of policing?

If racism within policing is located at the micro, meso, or macro levels—how so? At the micro level, individual police officers—historically white males—can be racist.⁵⁵ Racist outcomes are the product of individual officer choices about whom to stop and frisk, stop for vehicular infractions, or use force against.⁵⁶ It is about the personality types and attitudes of individual officers.⁵⁷

The meso level refers to institutional racism. This is where a police department or local government has incorporated a set of

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); see also Wenei Philimon, *Not Just George Floyd: Police Departments Have 400-year History of Racism*, USA TODAY (June 7, 2020), <https://www.usatoday.com/story/news/nation/2020/06/07/black-lives-matters-police-departments-have-long-history-racism/3128167001/> [perma.cc/VVQ3-3GPF] (discussing the long and racist history of police departments through the modern day).

54. 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> [perma.cc/Q3N7-LFJK]; Tom McCarthy, *The Uncounted: Why the US Can't Keep Track of People Killed by Police*, THE GUARDIAN (Mar. 18, 2015), <https://www.theguardian.com/us-news/2015/mar/18/police-killings-government-data-count> [perma.cc/8NYP-ZYHR].

55. Jeremy Ashkenas & Haeyoun Park, *The Race Gap in America's Police Departments*, N.Y. TIMES (Apr. 8, 2015), <https://www.nytimes.com/interactive/2014/09/03/us/the-race-gap-in-americas-police-departments.html> [perma.cc/LRT5-BAPC]; Dan Keating & Kevin Uhrmacher, *In Urban Areas, Police Are Consistently Much Whiter Than the People They Serve*, WASH. POST (June 4, 2020), <https://www.washingtonpost.com/nation/2020/06/04/urban-areas-police-are-consistently-much-whiter-than-people-they-serve/> [perma.cc/983H-ZQES].

56. Rich Morin, Kim Parker, Renee Stepler & Andrew Mercer, *Police Views, Public Views*, PEW RES. CTR. (Jan. 11, 2017), <https://www.pewsocialtrends.org/2017/01/11/police-views-public-views/> [perma.cc/JF5Y-VRLP] (noting the divergent patterns between the public and police views on race); Joshua Correl, Bernadette Park, Charles M. Judd, Bernd Wittenbrink, Melody S. Sadler & Tracie Keese, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006 (2007) (examining the way race factors into decisions to use force).

57. THEODOR W. ADORNO, ELSE FRENKEL-BRUNSWIK, DANIEL LEVINSON & NEVITT SANFORD, *THE AUTHORITARIAN PERSONALITY* (1950) (describing the traits of authoritarian personalities); Kirsten Weir, *Policing in Black & White*, 47 MONITOR ON PSYCH. 11 (2016) (describing how some research points to individual psychological attributes in police as the source of racism); Louis Laguna, Ashley Linn, Kyle Ward & Rasa Rupslaukyte, *An Examination of Authoritarian Personality Traits Among Police Officers: The Role of Experience*, 25 J. POLICE CRIM. PSYCH. 99 (2010).

racist beliefs or practices into its organization,⁵⁸ due to historical or recent practices.⁵⁹ Ferguson, Missouri, where a Justice Department Report documented how a city systematically discriminated against Black residents, is a prominent example of meso level racism.⁶⁰

Finally, there is macro racism, which is societal or structural racism. Here, the entire society—its practices, institutions, and values—are influenced by race.⁶¹ Education, community zoning, health care delivery, and the criminal justice system are all racially biased.⁶² This societal-side racism impacts policing institutions,⁶³ and the solution may need to include political reforms, in addition to simple legal reform.⁶⁴

Distinguishing racism on three levels has two purposes. One, it allows reformers to define and classify the source of the racial

58. Robin Oakley, *Institutional Racism and the Police Service*, 72 POLICE J. 285 (1999).

59. See Anna Souhami, *Institutional Racism and Police Reform: An Empirical Critique*, 24 POLICING & SOC'Y. 1 (2014) (reviewing the evidence on institutional racism and solutions in policing).

60. U.S. DEPT OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPT (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [perma.cc/9KES-XBZY] ("Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs. This emphasis on revenue has compromised the institutional character of Ferguson's police department, contributing to a pattern of unconstitutional policing, and has also shaped bias in the municipal court, leading to procedures that raise due process concerns and inflict unnecessary harm on members of the Ferguson community. . . . This culture within FPD influences officer activities in all areas of policing, beyond just ticketing. . . . Ferguson's approach to law enforcement both reflects and reinforces racial bias, including stereotyping. The harms of Ferguson's police and court practices are borne disproportionately by African Americans, and there is evidence that this is due in part to intentional discrimination on the basis of race.").

61. EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* (2009).

62. Keith Lawrence & Terry Keleher, *Chronic Disparity: Strong and Pervasive Evidence of Racial Inequalities*, RACE & PUB. POL'Y CONF. (2004), <https://www.intergroupresources.com/rc/Definitions%20of%20Racism.pdf> [perma.cc/TXZ3-U56N].

63. Aldina Mesic, Lydia Franklin, Alev Cansever, Fiona Potter, Anika Sharma, Anita Knopov & Michael Siegel, *The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the State Level*, 110 J. NAT'L MED. ASS'N 106 (2018).

64. *Six Months After Mass Protests Began, What Is the Future of BLM?*, ECONOMIST (Dec. 12, 2020), <https://www.economist.com/united-states/2020/12/10/six-months-after-mass-protests-began-what-is-the-future-of-blm> (discussing how the Black Lives Matter movement is splintered over reform tactics, such as seeing the problem inherent in capitalism or solvable by legal and legislative reform); see also STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (2004) (criticizing the traditional legal myth that politics is subordinate to the law and therefore that legal reform alone can promote institutional or societal change).

problems and discrimination. In order to formulate policy change, it is first necessary to define the problem.⁶⁵ Two, it focuses in on appropriate remedies to address the problem. By that, assume that the source of the problem is that racism is a consequence of hiring racist police officers or individuals—then the remedy would either be better screening and hiring procedures to root out racists,⁶⁶ or developing individual educational programs that seek to train individual officers to handle matters differently.⁶⁷ If racial profiling is, for example, choices individual officers make, then better training, education, or discipline are possible solutions, and individual lawsuits or criminal prosecutions are options.⁶⁸ If the problem is departmental or city-wide, then the choice of remedy may be directed at replacing leaders, changing city-wide policies, initiating receiverships to change control of the police, or perhaps other administrative or governance options within a city.⁶⁹ Finally, if the issue is societal-wide racism, the problem is far more complex. Changing policing is altering the background social values or institutions that drive American politics.⁷⁰ This may include changes in educational policies, health care, anti-discrimination laws, or even constitutional changes.⁷¹ Racism will not disappear from police practices until as society changes.

65. Paul Burstein & Marie Bricher, *Problem Definition and Public Policy: Congressional Committees Confront Work, Family, and Gender, 1945-1990*, 76 SOC. FORCES 135 (1997); Ander Hanberger, *What Is the Policy Problem?*, 7 EVAL. 45 (2001); JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES*, UPDATE EDITION, WITH AN EPILOGUE ON HEALTH CARE (2011) (discussing the role of problem definition and perception in the policy making process).

66. CHRISTOPHER D. DESANTE & CANDIS WATTS SMITH, *RACIAL STASIS: THE MILLENNIAL GENERATION AND THE STAGNATION OF RACIAL ATTITUDES IN AMERICAN POLITICS* 24 (2020).

67. Nathan Layne, *In Wake of Floyd Killing, Screening of U.S. Police Recruits is Under Focus*, REUTERS (July 17, 2020), <https://www.reuters.com/article/us-global-race-usa-policing/in-wake-of-floyd-killing-screening-of-u-s-police-recruits-is-under-focus-idUSKCN24I2O4> [perma.cc/QQ4E-Z9RT].

68. *Id.*; see also Lynne Peebles, *What the Data Say About Police Brutality and Racial Bias—and Which Reforms Might Work*, NATURE (June 19, 2020), <https://www.nature.com/articles/d41586-020-01846-z> [perma.cc/SP34-GJKU].

69. Anna Souhami, *Institutional Racism and Police Reform: an Empirical Critique*, 24 POLICING & SOC. 1 (2014).

70. DESANTE & SMITH, *supra* note 66, at 10 (defining structural racism as a “feature of society whereby patterns of public policy, institutions, dominant ideologies, and popular representations serve to perpetuate social, political, and economic inequities along racial lines.”). This definition points to how the police are embedded into a larger fabric of racist policies in a society, whereby reforming them is a prerequisite to addressing racism in law enforcement.

71. Jules Holroyd, *Implicit Racial Bias and the Anatomy of Institutional Racism*, CTR. FOR CRIME & JUST. STUD. (2015), https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/09627251.2015.1080943_1.pdf [perma.cc/48BE-9F2C] (reviewing the linkages between societal racism and crime); BONILLA-SILVA,

In addition to the micro, meso, and macro distinction, another distinction needs to be made between intentional discrimination and disparate impact. Intentional discrimination is when policies are intentionally or consciously directed in a way that they target people of color on account of race.⁷² Disparate impact is when there is no explicit or intentional bias, but outcomes vary based on race.⁷³ For example, individuals may be affected disproportionately or hurt when certain facially-neutral employment practices are used, but the practices themselves are not intentionally targeting or discriminating against people of color.⁷⁴

This distinction between intentional discrimination or purpose and disparate impact is significant, both legally and in terms of policy construction. In *Washington v. Davis*, the Supreme Court ruled that the Fourteenth Amendment Equal Protection clause only extends to or addresses intentional discrimination and not disparate impact.⁷⁵ The intent versus impact distinction means that remedies to address racial disparities vary regarding the intentionality. If one can allege intentional impact, Equal Protection lawsuits under either 42 U.S.C. § 1942 or *Bivens*⁷⁶ can be used as a way to bring constitutional torts or lawsuits against individual officers, police departments, or cities. Whereas in cases of disparate impact, these constitutional remedies may not be available, leaving it up to traditional state tort remedies or in some cases state criminal laws to address discrimination.

The micro, meso, and macro versus intentional and disparate impact distinctions provide a sixfold way of classifying the problem of race and policing. Table I, below, shows a way to both classify the nature of the racial problems as well as the remedies.

supra note 61.

72. Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'Y REV. 95 (2006) (sorting out the differences between these terms and pointing out how even the U.S. Supreme Court is confused in its analysis and understanding of intentional or purposive treatment and disparate impact).

73. *Id.*

74. *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (prohibiting facially-neutral employment policies that result in a disparate impact toward a protected class).

75. *Washington v. Davis*, 426 U.S. 229, 247–48 (1976).

76. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 395–97 (1971) (holding that individuals can directly sue the U.S. government for constitutional violations).

Table I: Classification of Police Reform Strategies

	Individual (micro)	Institutional (meso)	Societal (macro)
Intentional			
Disparate Impact			

The utility of this chart is that it allows for one to identify the different problems associated with race and policing, thereby also allowing for classification of possible remedies. First, it forces one to identify specific problems, and problem definition is critical to the process of policy solution. Thus far, critiques of policing and race have failed to isolate the problems in a systematic way, which has made it difficult to link problems to solutions. This chart allows for this type of conceptualization and is consistent with many models for doing policy analysis and reform.⁷⁷ Nothing here suggests that there has to be one identified problem or that the issues are confined to one level or type of analysis. Racism and policing are polycentric issues that need to be addressed across a range of levels. Reformers seeking to change policing need to think across these three levels and the type of discrimination in order to both identify the source or sources of problems, as well as craft reform solutions. Some are doing that.⁷⁸ This classification of the nature of the problem, by looking at intentionality or impact, also provides a focus for deciding if and when a litigation strategy to affect reform might be appropriate.

Second, classic approaches to risk and strategic management have developed well-established models and processes.⁷⁹ They often

77. Hanberger, *supra* note 65.

78. See e.g., COMMUNITIES UNITED AGAINST POLICE BRUTALITY, WHAT WILL IT TAKE TO END POLICE VIOLENCE? RECOMMENDATIONS FOR REFORM (2020), https://d3n8a8spro7vhmx.cloudfront.net/cuapb/pages/1/attachments/original/1591595256/WHAT_WILL_IT_TAKE_TO_END_POLICE_VIOLENCE_with_Appendices.pdf?1591595256 [perma.cc/MH6B-ZBGW]; Haley Byrd & Devan Cole, *Movement for Black Lives Unveils Sweeping Police Reform Proposal*, CNN (July 7, 2020), <https://www.cnn.com/2020/07/07/politics/movement-for-black-lives-police-reform-proposal/index.html> [perma.cc/M2PD-L86S]; *We Can End Police Violence in America*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/#vision> [perma.cc/LQ9E-CGCX].

79. See e.g., Oriana-Helena Negulescu, *Using a Decision-Making Process Model in Strategic Management*, 19 REV. GEN. MGMT. 111 (2014); Kathleen M. Eisenhardt & Mark J. Zbaracki, *Strategic Decision Making*, 13 STRATEGIC MGMT. J. 17 (1992); Daniel Anthony Kolkman, Paolo Campo, Tina Balke-Visser & Nigel Gilbert, *How to Build Models for Government: Criteria Driving Model Acceptance in Policymaking*, 49 POL'Y SCI. 489 (2016); Gary R. Vanlandingham & Elizabeth K. Drake, *Using Evidence-Based Policy Models in State Policymaking*, 35 PUB. PERFORMANCE & MGMT. REV. 550 (2012); KAREN HARDY, *MANAGING RISK IN GOVERNMENT: AN*

identify areas of operation, define and rank problems, determine goals, assign benchmarks and times for success, and locate resources or personnel for performing duties. Table II provides an adaptation of this idea when it comes to policing.

Table II: Police Reform Map

Problem Identification	Risk Identification and Rank	Goal	Who Is Responsible?	How Is the Problem to Be Addressed?	When (timetable)?	Measurement of Success
Use of Force	1. 2. 3.					
Profiling	1. 2. 3.					
Sentencing	1. 2. 3.					
Incarceration	1. 2. 3.					
Staffing	1. 2. 3.					

INTRODUCTION TO ENTERPRISE RISK MANAGEMENT (2010); Henry A. Hornstein, *The Integration of Project Management and Organizational Change Management is Now a Necessity*, 33 INT'L J. PROJ. MGMT. 291 (2015) (offering various methods for decision-making, planning, or risk management).

The purpose of this table is heuristic. Its purpose is to draw upon research in organizational change and provide a mechanism for schematizing ways to reform policing. It forces one to ask basic questions about areas identified for reform or change, how to prioritize, and other difficult questions that thus far have not been at the forefront when it comes to addressing the problem of racially discriminatory policing. Tables I and II should not give the impression that police can be reformed by merely tinkering. Reforming police, especially if it involves societal change, is a political process that may require more than simply changing the law. Additionally, it is questionable whether changes in the law or litigation alone can affect institutional reform.⁸⁰ Instead, the purpose again is to provide a way to structure debate and chart pathways for reform that need to be thought through if change is to happen.

II. What Has Failed and Why

Fixing the problems of racially discriminatory policing will not be easy. There are a host of issues that need to be addressed. The death of George Floyd focused America on the use of force against people of color. Looking simply at this issue here, there are several questions. One, what is the scope of the problem? Two, what is causing the problem? Three, what are possible remedies?

To begin, we have little idea on the scope of the problem,⁸¹ which is critical to fashioning solutions. Under the original 1994 Crime Bill, local governments were encouraged to create a database of statistics regarding use of force.⁸² Largely, that data-gathering never happened. We do not have good data on what is considered force, how often it is used, the type of force employed, the reason for its use, against whom the force was employed, or the outcome of that use—death, injury, etc. There are numerous anecdotal reports of use of police force against all people— especially people of color— but nothing that can define the scope of the problem. Any reform of police practices needs to start with assembling this type of

80. SCHEINGOLD, *supra* note 64.

81. Sarah DeGue, Katherine A. Fowler & Cynthia Calkins, *Deaths Due to Use of Lethal Force by Law Enforcement: Findings from the National Violent Death Reporting System, 17 U.S. States, 2009-2012*, 51 AM. J. PREV. MED. S173 (2016).

82. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210402, 108 Stat. 1796, 1804; *see also* Oppel & Gamio, *supra* note 54 (discussing the lack of a national police of use of force database).

information, paralleling what we already have with data-gathering tools such as the FBI Uniform Crime Reports.

A. The Scope of Excessive Use of Force

Prior to 1978, the use of excessive force by police was generally treated under state tort and criminal law.⁸³ Police officers were held responsible in their private capacity as individuals. Individual officers could be sued for assault and battery under tort law, for example. Conversely, they could be prosecuted for murder or other charges by local district attorneys. Obtaining civil judgments or criminal convictions was difficult. Juries seldom second-guessed police decisions, prosecutors were loath to indict police with whom they had close working relationships, and often those suing were not the most sympathetic plaintiffs. As a result, these state remedies failed to deter bad police behavior.

In 1978, the Supreme Court ruled in *Monell v. Department of Social Services*⁸⁴ that in some instances state and local governments could be sued under civil rights laws for violations of the constitutional rights of individuals. This meant an individual officer, if acting as an agent of the local government, used what was deemed to be excessive force, then the city itself could be held liable for damages. The idea here was that holding a city responsible for the actions of individual officers would provide financial compensation and remedies to victims under federal law. It would also punish cities that failed to take appropriate action to end civil rights abuses. Additionally, it would deter future bad actions by the police, creating incentives for reform. *Monell* suggested change was on its way.⁸⁵

However, that change was forestalled by decisions such as *Tennessee v. Garner*⁸⁶ and *Graham v. Connor*⁸⁷ where the Supreme Court created a qualified immunity for use of force or other forms of

83. VICTOR E. KAPPELER, CRITICAL ISSUES IN POLICE CIVIL LIABILITY 17–30 (2006).

84. *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690 (1978).

85. KAPPELER, *supra* note 83, at 56–63. *Contra* Peter H. Schuck, *The Other Police Immunity Problem: Departments Escape Accountability Under a 1978 Supreme Court Ruling*, WALL ST. J. (June 24, 2020), <https://www.wsj.com/articles/the-other-police-immunity-problem-11593039526> [perma.cc/H2S5-YQ75] (contending that *Monell* held out less promise or potential for police reform than some thought).

86. *Tenn. v. Garner*, 471 U.S. 1 (1985) (indicating that there are situations where police use of lethal force is reasonable, based on what the office knew at the time).

87. *Graham v. Connor*, 490 U.S. 386, 397 (1989) (“[T]he reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”).

misconduct, narrowly restricting the situations where police officers could be held liable for their use of force. The qualified immunity doctrine established that use of force would only be judged excessive when viewed from the perspective of a reasonable officer at the time of the incident, not with 20/20 hindsight, and would be considered reasonable when officers thought that the person posed a serious physical threat to them or others.⁸⁸ This standard has tipped the balance too far in terms of immunizing police officers from prosecution, blunting whatever incentives *Monell* produced.⁸⁹ Entities such as the Cato Institute have called for the elimination of qualified immunity as one means of disciplining police for excessive use of force.⁹⁰ Clearly, this is a policy option that needs consideration. Any serious reform of policing needs to confront the legal standards for constitutional liability in *Garner* and *Graham* and think about potential changes if constitutional civil rights enforcement is a means to punish, deter, and reform police behavior.

B. Estimating the Price of Injustice

It is possible to do some very crude estimates on the scope of police abuse of rights and with that, use of excessive force. Constitutional lawsuits against cities provide us with a starting point to estimate the scope of the problem with cities. As noted, there is no national database that collects such data. Moreover, many cities do not reveal settlement amounts under confidentiality agreements. The existing data has often been gathered by journalists or researchers sketching together bits and pieces of information. The nature of the alleged police infraction or the race of the victim is not always clear. With those caveats, Table III pulls together estimated settlement costs for police abuse or misconduct in a small number of cities.⁹¹

88. *Id.* at 396.

89. See, e.g., Zachary Newman, *Constitutional Interpretation Without Judges: Police Violence, Excessive Force, and Remaking the Fourth Amendment*, 105 VA. L. REV. 425, 430 (2019); Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1796 (2016).

90. CATO INSTITUTE, END QUALIFIED IMMUNITY, <https://www.cato.org/qualified-immunity> [perma.cc/2J4P-TD6R].

91. The numbers here were produced or accumulated from a variety of sources. First, during the month of October 2020, *Minnesota Journal of Law & Inequality* staff members Caroline Headrick and Chase Lindemann filed numerous freedom of information requests with several cities, including Houston, Los Angeles, Minneapolis, and St. Louis, seeking information on total settlements or payouts to victims of police misconduct. Some cities responded or had information which was included here. Second, the staff members also performed an internet search for

Table III: Municipal Settlements for Police Misconduct in Selected Cities (2010–2020)

City	Payout (in dollars)	Time Period	Annual Average
Atlanta	4,900,000	2015-2020	\$816,666.67
Baltimore	18,400,000	2015-2020	\$3,066,666.67
Chicago	500,000,000	2015-2019	\$100,000,000
Dallas	3,700,000	2015-2020	\$616,666.67
Detroit	21,625,000	2010-2019	\$2,162,500
Indianapolis	6,600,000	2010-2020	\$600,000
Los Angeles	336,903,527	2009-2020	\$28,075,293.90
Louisville	28,000,000	2015-2020	\$4,666,666.67
Milwaukee	40,000,000	2010-2020	\$3,636,363.64
Minneapolis ⁹²	42,183,569	2003-2020	\$2,343,531.61
New Orleans	13,300,000	2010-2019	\$1,330,000
New York	1,100,000,000	2015-2020	\$183,333,333.33
Philadelphia	64,900,000	2010-2020	\$5,900,000
Phoenix	10,000,000	2010-2020	\$909,090.91
Washington, D.C.	69,700,000	2015-2020	\$11,616,666.70
Total	2,260,212,096		

Looking at some of the 15 largest cities in the U.S., since 2010 the total known or estimated payout of these cities exceeds \$2.2

information on the same, including cities such as Louisville. Third, the Author also consulted several articles where journalists or other parties had found information on municipal settlement costs for police misconduct. See John Floyd, *Police Misconduct—A Growing Epidemic?*, (Feb. 24, 2011), <https://www.johntfloyd.com/police-misconduct-a-growing-epidemic/> [perma.cc/YV2L-UBFS]; Cheryl Corley, *Police Settlements: How the Cost of Misconduct Impacts Cities and Taxpayers*, NPR (Sept. 19, 2020), <https://www.npr.org/2020/09/19/914170214/police-settlements-how-the-cost-of-misconduct-impacts-cities-and-taxpayers> [perma.cc/5TW9-MWJ3]; Scott Calvert & Dan Frosch, *Police Rethink Policies as Cities Pay Millions to Settle Misconduct Claims*, WALL ST. J. (Oct. 22, 2020), <https://www.wsj.com/articles/police-rethink-policies-as-cities-pay-millions-to-settle-misconduct-claims-11603368002> [perma.cc/4DUC-R36T]. Based on these sources, this author estimated \$2.26 billion in settlements or payouts in these cities.

92. 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/> [perma.cc/HS79-GVY7]. Since this data was compiled in 2020, the total payout for Minneapolis does not include the \$27 million George Floyd settlement.

billion. According to the *Wall Street Journal*, from 2010 to 2014, settlement payouts increased in select cities by 48 percent, and estimated payouts have exceeded \$2 billion since 2015.⁹³

There are many conclusions one can draw from these statistics. First, \$2.2 billion is an underestimate of total police settlement costs. There are nearly 19,500 cities in the United States.⁹⁴ The above statistics cover merely fifteen of them. The total annual settlement costs for police misconduct could be in the hundreds of millions or billions of dollars each year. Beyond these 15 cities, there are many lawsuits for police conduct that rarely make the headlines and they often involve small payouts.⁹⁵ Even prior to George Floyd's death, many Minnesota cities tendered payouts for police misconduct, with race often being at the center of the dispute.⁹⁶ Post-George Floyd's death, Minnesota cities continue to settle for excessive force claims.⁹⁷

Second, imagine if all this money was spent on something else, such as the delivery of social services, quality education, housing, or the eradication of racial disparities in many other areas of life.⁹⁸ This does not defund the police, but rather makes it less necessary to spend money on police.

Third, the promise of *Monell* has failed. By that, holding cities legally and financially responsible for the conduct of their police departments and officers was meant to punish and deter behavior, forcing reforms. Lawsuits, as a form of structural reform, were a

93. Calvert & Frosch, *supra* note 91.

94. Statista, *Number of Cities, Towns and Villages (Incorporated Places) in the United States in 2019, by Population Size* (June 2, 2020), <https://www.statista.com/statistics/241695/number-of-us-cities-towns-villages-by-population-size/> [perma.cc/3HRF-DAYT].

95. Paul Schwartzman, *These Are the Police Misconduct Lawsuits the Public Hears Little About*, WASH. POST (Dec. 25, 2020), https://www.washingtonpost.com/local/legal-issues/dc-police-lawsuits/2020/12/24/e986472c-2375-11eb-8672-c281c7a2c96e_story.html [perma.cc/V24F-77LY].

96. Randy Furst & MaryJo Webster, *Minnesota Cities, Counties Paid \$60.8m in Police Misconduct Claims in Past Decade*, STAR TRIB. (Apr. 15, 2018), <https://www.startribune.com/minnesota-cities-counties-paid-60-8m-in-police-misconduct-claims-in-past-decade/479781413/> [perma.cc/GK54-DSZM].

97. Melissa Turtinen, *Worthington Settles Police Brutality Lawsuit for \$590,000, Agrees to Reforms*, BRING ME THE (MN) NEWS (Dec. 1, 2020), <https://bringmethenews.com/minnesota-news/worthington-settles-police-brutality-lawsuit-for-590000-agrees-to-reforms>.

98. See Frosch, *supra* note 93 (indicating what other programs could be funded instead of municipal payouts for police misconduct); Madison Hoff, *8 Charts That Show How Major US Cities Spend Taxpayer Dollars on Police Versus Social Programs*, BUSINESS INSIDER (June 19, 2020), <https://www.businessinsider.com/police-spending-compared-to-other-expenditures-us-cities-2020-6> [perma.cc/YMD5-72PK].

means of addressing constitutional violations. However, this approach has failed. Instead of changing behavior, police settlements have become a cost of doing business, with taxpayers absorbing the costs for police misconduct.⁹⁹ Cities have financially absorbed the cost of abuse and use of excessive force into their operating expenses, often through insurance, instead of initiating reform.¹⁰⁰ If the threat of financial sanctions was meant to change city police practices, it has not worked.

This path of reform has failed. If qualified immunity were eliminated and cities had to pay out even more, perhaps the threats of greater financial exposure would induce institutional change. That is not a certainty, however, and more comprehensive reforms may be necessary. These reforms could be changes to the law, but there may be limits to what changes in the law can accomplish. The change may need to be more fundamentally political in nature regarding the control purpose of policing in American society, but exactly what that means is what reformers and civil rights advocates need to grapple with.

Conclusion

The problem of racially discriminatory policing is the defining civil rights problem of the twenty-first century. George Floyd's death brought this point back to American consciousness, but for how long is not clear. His death at least temporarily forced many to ask questions about the nature and function of police in American society and how the various duties this institution performs intersect with race. But the problem of policing is complex. It also intersects with class, gender, and a host of other social, economic, and political identities in the United States. It is also a question about social order in the United States.

After George Floyd's death it is understandable why many would want to reform, defund, or abolish the police. The purpose of this Article is to pose numerous questions that need to be asked and answered to transform policing in the United States and, along with it, how our society addresses racism. It suggests that reforming

99. Brentin Mock, *How Cities Offload the Cost of Police Brutality*, BLOOMBERG CITYLAB (June 4, 2020), <https://www.bloomberg.com/news/articles/2020-06-04/the-financial-toll-of-police-brutality-to-cities> [perma.cc/N6JR-L2AW].

100. Eleanor Lumsden, *How Much is Police Brutality Costing America*, 40 HAW. L. REV. 141 (2017); David Brancaccio, Candace Manriquez Wrenn & Alex Schroeder, *Understanding "The Hidden Costs of Police Misconduct" for Cities Nationwide*, MARKETPLACE (June 1, 2020), <https://www.marketplace.org/2020/06/01/george-floyd-protests-police-misconduct-cases-settlements-judgments/> [perma.cc/VZ5Q-6XEU].

policing in the United States needs to be approached across a variety of levels, and it questions whether mere legal reform will suffice or whether more fundamental changes in the social fabric are necessary. For those committed to vindicating George Floyd's death, and the many anonymous victims of police misconduct, the call for reform is only the first step.



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