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## PROLOGUE

After the murder of George Floyd by former Minneapolis Police Department (MPD) Officer Derek Chauvin and three other MPD officers, the student-run legal academic journals at Minnesota's three law schools, like various institutions across this nation, were forced to reckon with the stark racial inequality that had been present among us long before this nation was created. Abby Oakland, Editor-in-Chief (EIC) of the *Minnesota Law Review*, reached out to other Minnesota Law EICs to collaborate on a joint publication addressing important themes surrounding racial inequality, police brutality, and other issues plaguing our legal justice system. We expanded the scope of the project to include other student-run legal academic journals at Mitchell Hamline and University of St. Thomas.

The objective of the collaboration was to use our platforms and collective effort to work with scholars to publish cutting-edge, timely, and thought-provoking articles addressing social justice issues including racial inequality and policing both at home in Minnesota and in the nation-at-large. We are proud to present our joint publication that has been over a year in the making, *Racial Inequality in the Legal System Locally and Nationally*. This joint venture would not have been possible without the tireless efforts of the staff members and editors across our six journals who went above and beyond and worked selflessly to bring this publication to fruition. Thanks are also due to our wonderful authors who answered our call to create insightful scholarship. Finally, thanks to Abby Oakland for her efforts in leading this initiative and in putting together this joint publication.

In the first article, Ramsey County Public Defender Greg Egan takes an empirical look at second-degree felony murder convictions sentenced from 2012 through 2018 in Hennepin and Ramsey counties to detail the racial inequities in Minnesota's felony-murder doctrine. In the second article, Professor David Schultz conducts a methodological exploration of what it would take to reform the institution of policing in the United States. In the third article, *Minnesota Journal of Law and Inequality's (JLI)* editors trace the history of policing in the United States since its colonial days, outline the decades of failure to achieve meaningful progress in Minneapolis, and advocate for the redirection of MPD funding to violence prevention and alternative responses.

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Then, *Reassessing the Judicial Empathy Debate* examines the science of empathy, suggesting that attempts to remove it from the courtroom may have been counterproductive and that a more equitable society may require a thoughtful embrace of empathy in legal decision making.

*This is Minnesota*, a collaboration among students at the University of Minnesota Law School, examines the lack of diversity at the school by sharing the experience of Black students, comparing the school to its peer groups, and suggesting options for improving both the number of Black students and their experiences once at the school. Then in *Entrenched Racial Hierarchy*, Kevin Woodson explains and connects the various factors that contribute to the lack of diversity and lack of Black students in U.S. law schools.

In *Correction of Monumental Judicial Malpractice*, Michael J. Patrick illustrates the reasoning behind why historical figures who engaged in or supported slavery and segregation in the United States cannot symbolize justice today, and calls on courts to replace such antiquated figures to better symbolize equal justice for all.

In *Educational Adequacy Challenges: The Impact on Minnesota Charter Schools*, Wendy Baudoin explores the challenges to the educational systems in Minnesota, analyzing the history of public education and segregation within the Midwest.

In *The Human Journey Toward Justice: Reflections in the Wake of the Murder of George Floyd from a Community of Practitioners*, Dr. Raj Sethuraju, et. al. examine the community impact following the killing of George Floyd

In *The Seven (at least) Lessons of the Myon Burrell Case*, Leslie E. Redmond and Mark Osler closely examine the Myon Burrell case and how it features many of the most pressing issues in criminal justice.

We hope these articles contribute to a better understanding of the systemic inequality inherent to our legal system and the society-at-large.

#### With Gratitude & In Solidarity

Abby Oakland, *Minnesota Law Review*

Annaliisa Gifford, *Mitchell Hamline Law Journal of Public Policy and Practice*

Elizabeth Orrick, *Mitchell Hamline Law Review*

Jack Brooksbank, *Minnesota Journal of Law, Science & Technology*

Jack Buck, *University of St. Thomas Journal of Law and Public Policy*

Navin Ramalingam, *Minnesota Journal of Law & Inequality*

# 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.<sup>1</sup> 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.<sup>2</sup> 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 charges on which it is commonly predicated.<sup>3</sup> For these reasons, the charging and disposition of

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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.

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

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.<sup>4</sup> 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. 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.<sup>5</sup>

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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.

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

## 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.<sup>6</sup> Defendants of color are more often convicted of the most serious charge when the top count is second-degree felony-murder.<sup>7</sup> They are statistically more likely to be convicted in general and are often sentenced more harshly upon conviction.<sup>8</sup> 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.<sup>9</sup> 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.

### 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.<sup>10</sup> Meanwhile, defendants of color received mitigated and aggravated sentencing departures at roughly the same rate.<sup>11</sup> Judges gave reduced sentences to White defendants 25 percent of the time, compared to 16

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Ramsey and Hennepin counties where the data was gathered from.

6. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2<sup>ND</sup> DEGREE MURDER, § 609.19, SUBD. 2(1); SENTENCED 2012-2018 (2020) (on file with author).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*



percent for defendants of color.<sup>12</sup> One White defendant was sentenced to a mere five years for his involvement in a drug deal where the victim was shot to death.<sup>13</sup> While the defendant did not fire the fatal shots, he was also armed.<sup>14</sup>

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.<sup>15</sup> The defendant had beaten the victim over her entire body.<sup>16</sup> There were scrapes and scratches on her arms and knees, likely from her attempt to crawl away.<sup>17</sup> The defendant fractured her neck before ultimately choking her to death.<sup>18</sup> He admitted to choking her the night before as well.<sup>19</sup> If ever a case warranted an aggravated sentencing departure, this one did. However, the White defendant was given a guideline-range sentence.<sup>20</sup>

Even when an aggravated sentence is arguably warranted for a defendant of color,<sup>21</sup> 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.<sup>22</sup> Sentencing guideline ranges suggest that he had a criminal history score of zero.<sup>23</sup> Meanwhile, a White woman who suffocated her infant to death before almost killing a second child the

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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”).

20. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2<sup>ND</sup> 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).

same way received a sentence of barely half of what the sentencing guidelines prescribed.<sup>24</sup> 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.<sup>25</sup> A higher concentration of people of color reside in the St. Paul/Minneapolis metro area,<sup>26</sup> which is 77.1 percent White.<sup>27</sup> 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.<sup>28</sup> Normalized for demographics, people of color in the Twin Cities are statistically twelve times more likely to be convicted of second-degree felony-murder.<sup>29</sup>

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.<sup>30</sup> Indeed, negotiated plea deals have become the vehicle by which most criminal cases are resolved around the country.<sup>31</sup> 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.<sup>32</sup> For White defendants, a guilty plea to second-degree felony-murder most often represents

24. Complaint at 2, State v. Casey, No. 27-CR-13-22282 (Ramsey Cnty. Dist. Ct. 2013); MINNESOTA SENTENCING GUIDELINES COMMISSION, 2<sup>ND</sup> 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, 2<sup>ND</sup> DEGREE MURDER, *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/9T5N-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, 2<sup>ND</sup> DEGREE MURDER, *supra* note 6.

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.<sup>33</sup> For the rest of the defendants of color, their second-degree felony-murder conviction represented the most serious count.<sup>34</sup> 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.

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.<sup>35</sup> While all six were initially indicted for first-degree murder,<sup>36</sup> the four White codefendants were permitted to plead guilty to a reduced charge under the inherently pliable second-degree felony-murder rule.<sup>37</sup> The Black defendant who fired the gun pled to second-degree intentional murder.<sup>38</sup> While the Black codefendant who did not fire the gun pled guilty to second-degree felony-murder, he received a harsher-than-guideline sentence.<sup>39</sup> The White codefendants all received sentences within guideline sentence range for second-degree felony-murder.<sup>40</sup> None of the four White codefendants received consecutive sentences; both of the Black codefendants did.<sup>41</sup>

According to the complaint and newspaper coverage of the incident, five of the codefendants hatched a detailed plan to break into their drug

33. *Id.*

34. *Id.*

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, 2<sup>ND</sup> 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, 2<sup>ND</sup> DEGREE MURDER, *supra* note 6.

41. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2<sup>ND</sup> DEGREE MURDER, *supra* note 6.

dealer's apartment to steal drugs and take back a gaming system.<sup>42</sup> Newspaper coverage reported that at least part of the group was intent on "beating the [expletive] out of [the drug dealer] then taking everything."<sup>43</sup> The same source recounted an agreement to split what they burglarized, "since it's a group deal."<sup>44</sup> The sixth codefendant was reportedly recruited to bring a gun; he "made sure it was loaded."<sup>45</sup> As a car waited outside, four of the codefendants burst into the apartment, according to the criminal complaint.<sup>46</sup> Some reportedly ransacked it searching for drugs, yelling and swearing at the victim, while others attacked the decedent and "pistol whipped" him.<sup>47</sup> 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.<sup>48</sup> She described holding the decedent as "he took his last breath."<sup>49</sup> The decedent was shot in the neck; the bullet grazed his jugular vein, shattered his spine, and fractured his skull.<sup>50</sup> Prosecutors also noted blunt force trauma to his head and face.<sup>51</sup> The codefendants reportedly left him there and fled with the drugs.<sup>52</sup>

Although it may be argued that lesser charges are warranted because the White codefendants did not actually pull the trigger,<sup>53</sup> it is a well-established tenet of Minnesota criminal law that accomplices are liable for the conduct of the principal at the same level.<sup>54</sup> Even so, the

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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. 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)).

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 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.<sup>55</sup> Burglary is among the predicate felonies specifically enumerated in the first-degree felony-murder statute.<sup>56</sup> Ample facts alleged in the complaints would support this predicate offense.<sup>57</sup> 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.<sup>58</sup>

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

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(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).

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, 2<sup>ND</sup> DEGREE MURDER, *supra* note 6.

laws, accounting for all levels of homicidal and less-than-homicidal liability,<sup>59</sup> 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.

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.<sup>60</sup> Isolated in the basement, the victim shot the defendant.<sup>61</sup> Witnesses say they heard three shots, and the defendant shouted out, "my brother just shot me."<sup>62</sup> It was only then that the

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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).

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

61. *Id.*

62. *Id.*

defendant returned fire.<sup>63</sup> His defensive gunshots killed his brother only after the defendant himself received multiple gunshot wounds.<sup>64</sup>

In their criminal complaint, prosecutors strained to justify their second-degree felony-murder charge by noting that the victim's firearm was only "a small gun,"<sup>65</sup> 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.<sup>66</sup> Self-defense would have negated the second-degree assault on which the felony-murder charge was predicated.<sup>67</sup> Legal scholars have advanced compelling arguments as to why most assaults should not be viable predicate felonies; most states have adapted their laws accordingly.<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup> In attending to the child, the defendant had wrapped the

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63. *Id.*

64. *Id.*

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, 2<sup>ND</sup> DEGREE MURDER, *supra* note 6.

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

child's wrist,<sup>71</sup> which likely would have made it difficult to assess the severity of the burn. This should have been significant to charging attorneys, because the specific cause of death was a blood infection from the burn.<sup>72</sup>

There were injuries consistent with child abuse, which prosecutors implicitly speculated the defendant had caused.<sup>73</sup> But they also acknowledged that more than a dozen other people resided in a home containing rotting food, dead animals, and overall filthy conditions.<sup>74</sup> The complaint further acknowledged a potential accidental fall down the stairs,<sup>75</sup> 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."<sup>76</sup>

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.<sup>77</sup> He described having to feed the children nonperishable food and being relegated to a small room in the basement.<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup>

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.<sup>82</sup> Prosecutors make no mention of which, or how many, adults were in the house for the hour

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71. *Id.* at 2.

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.*



during which he did not, allegedly, “arrange for supervision.”<sup>83</sup> 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.<sup>84</sup> The White defendant drove the killer to the hotel, knocked on the door, then helped force entry.<sup>85</sup> He watched as several shots were fired, then the victims bled to death in the parking lot and on a nearby roadway.<sup>86</sup> 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.<sup>87</sup> Police found the two lifeless bodies and quickly apprehended the defendant.<sup>88</sup> 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.<sup>89</sup> These offenses carry statutory maximum sentences of just ten and five years, respectively.<sup>90</sup>

Prosecutors failed to charge second-degree felony-murder initially.<sup>91</sup> The Black codefendant who was not the gunman in this case was sentenced to the statutory maximum: forty years in prison.<sup>92</sup> The

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

White codefendant was sentenced to just over twelve years.<sup>93</sup> 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.<sup>94</sup> The victim was a Black school cafeteria worker, Philando Castile.<sup>95</sup> The defendant was a veteran of the St. Anthony Police Department, Jeronimo Yanez.<sup>96</sup> Castile had been driving with his girlfriend and her young daughter when Yanez pulled the car over for a broken brake light.<sup>97</sup> Castile “calmly” told the officer that he had a firearm; he also had a valid permit to carry.<sup>98</sup> Yanez suddenly fired seven times into the car, killing Castile and nearly striking

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93. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2<sup>ND</sup> 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](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.*

97. *Id.*

98. *Id.*

his girlfriend and the child.<sup>99</sup> Prosecutors charged Yanez with second-degree manslaughter and intentional discharge of a firearm that endangers safety.<sup>100</sup>

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.<sup>101</sup> When Gutierrez-Gonzales heard someone approaching, he put the rifle down.<sup>102</sup> His friend called out, “Don’t trip, it’s just me.”<sup>103</sup> As Gutierrez-Gonzales picked the rifle back up, it suddenly went off.<sup>104</sup> The bullet struck his friend, who was White, in the head; he died at the scene.<sup>105</sup> Prosecutors did not dispute that the rifle going off was anything other than a tragic accident.<sup>106</sup> Within days, prosecutors charged Gutierrez-Gonzales with second-degree felony-murder.<sup>107</sup> 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.<sup>108</sup> Unlike most other viable predicate felonies, which require intentional or knowing levels of *mens rea* to trigger felony-murder prosecutions,<sup>109</sup> the predicate felony in the case against

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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 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)).

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

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.<sup>113</sup> 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.”<sup>114</sup> The *Engle* Court concluded that any “conscious or intentional act in connection with the discharge of a firearm” satisfies the *mens rea* element.<sup>115</sup>

Arguably, the law just months before Gutierrez-Gonzales was charged required a deliberate, volitional trigger pull.<sup>116</sup> The complaint did not allege one.<sup>117</sup> 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

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.

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”).

any voluntary acts by Gutierrez-Gonzales that would have “increase[d] the likelihood that the gun will discharge accidentally.”<sup>118</sup> 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.”<sup>119</sup> 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.<sup>120</sup> The *mens rea* for the would-be predicate felony was intentional.<sup>121</sup> 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.<sup>122</sup> 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.<sup>123</sup> Regardless of whether it was Yanez’s status as a peace officer or the race of the victims that

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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.

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).

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.<sup>124</sup> In that time there were forty-seven on-duty police killings in the state.<sup>125</sup> 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.<sup>126</sup> The racial inequity of 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

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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].

manslaughter for shooting a young man in the midst of a mental health crisis.<sup>127</sup> The victim was a White, off-duty Emergency Medical Technician.<sup>128</sup> 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.<sup>129</sup> 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 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.<sup>130</sup> While initially Noor was charged with third-degree murder and second-degree manslaughter,<sup>131</sup> prosecutors later elevated charges, bypassing second-degree felony-murder to charge Noor with second-degree intentional murder.<sup>132</sup> Although bringing criminal charges—perhaps even a felony-murder charge—was appropriate, intentional murder was a stretch.<sup>133</sup> There was no body

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.

130. Libor Jany, *Ex-Minneapolis Police Officer Noor to Plead Not Guilty in Damond 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,

camera footage and no incriminating statement by Noor.<sup>134</sup> 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 whole-heartedly 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.<sup>135</sup> 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.<sup>136</sup> A County Attorney promptly charged the officer with Second-Degree Manslaughter, and Minnesota Attorney General Keith Ellison vowed to continue with the prosecution when his office took over.<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup> 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

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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/8PPP-SNRQ].

136. *Id.*

137. Amy Forliti, *Minnesota AG's Office to Prosecute Case Involving Wright's Death*, STAR TRIB. (May 21, 2021), [https://www.startribune.com/minnesota-ags-office-to-prosecute-case-in-wrights-death/600059862/?utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=talkers](https://www.startribune.com/minnesota-ags-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).



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.”<sup>140</sup>

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.<sup>141</sup> 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 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.<sup>142</sup>

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,<sup>143</sup> 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

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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.

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](http://www.latimes.com/opinion/story/2020-06-02/george-floyd-derek-chauvin-murder-charge) [perma.cc/A797-5K3S].

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 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,<sup>144</sup> silencing those who have suffered from a racially and socioeconomically biased law weaponized against the disenfranchised.<sup>145</sup> 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.<sup>146</sup> 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

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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.

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.<sup>147</sup>

So even if Chauvin’s felony-murder conviction is overturned, George Floyd will still have had a lasting impact on the law and on 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.<sup>148</sup> 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.<sup>149</sup> Their calls are for racial equity and police reform.<sup>150</sup> 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.<sup>151</sup> 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.”<sup>152</sup> Finally, the aggressive charging of Chauvin,<sup>153</sup> like the general approach

147. See *supra* Sections II & III.

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

of Ellison and his team to this prosecution, are in and of themselves promising.<sup>154</sup> Things are starting to change.

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."<sup>155</sup> 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,<sup>156</sup> instead holding without ambiguity that "[t]he phrase

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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. (Nov. 18, 2020), <https://www.startribune.com/chaubin-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 breath"); *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. Wetzl*, 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.*

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.”<sup>157</sup> A bold stance this was for the Minnesota Court of Appeals, an error-correcting court not authorized to forge new policy.<sup>158</sup> 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*.<sup>159</sup> 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.

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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*, 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,<sup>1</sup> setting off a similar set of movements nationally.<sup>2</sup> After efforts to place an initiative on the 2020 ballot to eliminate the police failed,<sup>3</sup> and the City Charter Commission rejected the idea,<sup>4</sup> on December 10, 2020 the Minneapolis City Council voted to divert \$8 million from the police budget to fund alternative programs.<sup>5</sup> The Mayor subsequently approved the budget cuts.<sup>6</sup> In taking this action, the City of Minneapolis took its first steps to defunding or reimagining policing.

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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].

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].

The movement to defund police has attracted mixed if not negative reviews nationally.<sup>7</sup> Donald Trump ran against the “defund the police” mantra,<sup>8</sup> and there is evidence that his messaging was successful in blunting Democratic Party gains nationwide in the 2020 elections.<sup>9</sup> 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.<sup>10</sup> Most Americans want police accountability and reform, but not necessarily its abolition.<sup>11</sup> 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.<sup>12</sup> The opportunity for police reform that the death of George Floyd created may already be

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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-4W]X]; 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\\_30SXwp255v7cDzXiRi60yBFG\\_cstx2TqzENWhnyWpKwJDoGrbw](https://www.pewresearch.org/fact-tank/2020/12/11/20-striking-findings-from-2020/?fbclid=IwAR1b19K_30SXwp255v7cDzXiRi60yBFG_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/s5jhgpx5/moreincommon\\_americanfabricreport.pdf](https://www.moreincommon.com/media/s5jhgpx5/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).



closing,<sup>13</sup> and we may therefore be in a Post-George Floyd policy location where the chance for serious change has already stalled.<sup>14</sup>

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.<sup>15</sup> In terms of law and order, criminal law serves many purposes including as a tool to secure policy goals.<sup>16</sup> Criminal law then

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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).

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).

can be viewed as a regulatory tool to ensure compliance of policy goals that the state seeks to secure.<sup>17</sup>

Criminal law is necessary for security.<sup>18</sup> In Western thought, dating back at least to Thomas Hobbes<sup>19</sup> and John Locke,<sup>20</sup> 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,”<sup>21</sup> or inconvenient due to the inability of individuals to properly and appropriately punish people who transgressed upon those rights.<sup>22</sup> Except for some utopian or anarchist thinkers, social order and security was considered impossible without law and state enforcement efforts to keep peace.<sup>23</sup>

Criminal law also serves as an instrument of social control and order.<sup>24</sup> For some, this control is a necessary tool to keep the peace and assure orderly relations among people.<sup>25</sup> For others, the social control aspect of criminal law is an instrument of the ruling class to control certain people or behaviors.<sup>26</sup> In this view, law is not objective, but reflects specific perspectives on race, class, and gender.<sup>27</sup> Law defines “normalcy,”<sup>28</sup> and the threat of criminal punishment via the police is a tool to ensure political and behavioral orthodoxy.<sup>29</sup> As Rousseau declared,

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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 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).

“Man is born free but is everywhere in chains.”<sup>30</sup> 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.<sup>31</sup>

The second function of the police is providing social services.<sup>32</sup> Increasingly, police have come to be the front line or first call to address social issues.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> Simply, many people call police to help with quality of life or social issues when they can think of no other place to turn.<sup>36</sup> 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.<sup>37</sup>

The law and order and social service functions of policing have merged.<sup>38</sup> In urban areas especially, the criminal justice system has 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.<sup>39</sup> Criminal justice, policing, and social service

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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.

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]

delivery are now often indistinguishable.<sup>40</sup> Police are thus asked to perform a variety of tasks, some of which they lack the requisite skills or training.<sup>41</sup> Effectively, we have reduced all social ills and issues to matters of policing.<sup>42</sup>

*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. Prohibition<sup>43</sup> and the war on drugs<sup>44</sup> 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 decades whose profits have been fueled by increased sentences and criminal laws.<sup>45</sup> It's a self-fulfilling system.

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(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).

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.”).

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.<sup>46</sup> Second, the criminal law is only one of many regulatory tools that can be used to promote policy goals.<sup>47</sup> Market incentives, civil enforcement tools, alternative dispute resolution, restorative justice, and education might also be ways to address behaviors that are deemed unacceptable.<sup>48</sup> 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.<sup>49</sup> If we do decide to send non-police actors to address a 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.<sup>50</sup>

### *C. Classifying Racially Discriminatory Policing: The Micro, Meso,*

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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 mental health calls. See COMMUNITY OUTREACH & STABILIZATION UNIT (C.O.A.S.T.), SAINT PAUL POLICE DEP'T, <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).

*and Macro Levels*

A different critique regarding policing is more specific to George Floyd. There is a historical connection between policing and race,<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> Finally, as George Floyd's killing demonstrated, people of color are far more likely to be victims of excessive or deadly force than White people.<sup>54</sup> 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

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 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].

white males—can be racist.<sup>55</sup> Racist outcomes are the product of individual officer choices about whom to stop and frisk, stop for vehicular infractions, or use force against.<sup>56</sup> It is about the personality types and attitudes of individual officers.<sup>57</sup>

The meso level refers to institutional racism. This is where a police department or local government has incorporated a set of racist beliefs or practices into its organization,<sup>58</sup> due to historical or recent practices.<sup>59</sup> Ferguson, Missouri, where a Justice Department Report documented how a city systematically discriminated against Black residents, is a prominent example of meso level racism.<sup>60</sup>

Finally, there is macro racism, which is societal or structural racism. Here, the entire society—its practices, institutions, and values—are

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).

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. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEP'T (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](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 its 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.”).

influenced by race.<sup>61</sup> Education, community zoning, health care delivery, and the criminal justice system are all racially biased.<sup>62</sup> This societal-side racism impacts policing institutions,<sup>63</sup> and the solution may need to include political reforms, in addition to simple legal reform.<sup>64</sup>

Distinguishing racism on three levels has two purposes. One, it allows reformers to define and classify the source of the racial problems and discrimination. In order to formulate policy change, it is first necessary to define the problem.<sup>65</sup> 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,<sup>66</sup> or developing individual educational programs that seek to train individual officers to handle matters differently.<sup>67</sup> 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.<sup>68</sup> If the problem is departmental or city-wide, then the choice of remedy may be directed at replacing leaders, changing city-wide policies,

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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).

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-idUSKCN24I204> [perma.cc/QQ4E-Z9RT].

68. *Id.*; see also Lynne Peoples, *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].



initiating receiverships to change control of the police, or perhaps other administrative or governance options within a city.<sup>69</sup> 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.<sup>70</sup> This may include changes in educational policies, health care, anti-discrimination laws, or even constitutional changes.<sup>71</sup> Racism will not disappear from police practices until as society changes.

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.<sup>72</sup> Disparate impact is when there is no explicit or intentional bias, but outcomes vary based on race.<sup>73</sup> 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.<sup>74</sup>

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.<sup>75</sup> 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*<sup>76</sup> can be used as a way to bring constitutional torts or lawsuits

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](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, *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

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.

**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.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> They often identify

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://d3n8a8pro7vhm.cloudfront.net/cuapb/pages/1/attachments/original/1591595256/WHAT\\_WILL\\_IT\\_TAKE\\_TO\\_END\\_POLICE\\_VIOLENCE\\_with\\_Appendices.pdf?1591595256](https://d3n8a8pro7vhm.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-CG CX].

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 INTRODUCTION TO ENTERPRISE RISK MANAGEMENT* (2010); Henry A. Hornstein, *The Integration of Project Management and Organizational Change Management*

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.					

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*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.<sup>80</sup> 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,<sup>81</sup> 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.<sup>82</sup> 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 information, paralleling what we already have with data-gathering tools such as the FBI Uniform Crime Reports.

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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).

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.<sup>83</sup> 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*<sup>84</sup> 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.<sup>85</sup>

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

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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.”).

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.<sup>88</sup> This standard has tipped the balance too far in terms of immunizing police officers from prosecution, blunting whatever incentives *Monell* produced.<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup>

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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/2]4P-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 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->

**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 <sup>92</sup>	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
<b>Total</b>	<b>2,260,212,096</b>		

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 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.<sup>93</sup>

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.<sup>94</sup> The above statistics

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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.

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/>



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.<sup>95</sup> 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.<sup>96</sup> Post-George Floyd's death, Minnesota cities continue to settle for excessive force claims.<sup>97</sup>

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.<sup>98</sup> 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 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.<sup>99</sup> Cities have financially absorbed the cost of abuse and use of excessive force into their operating expenses, often through insurance, instead of initiating reform.<sup>100</sup> If the threat of financial sanctions was meant to change city police practices, it has not worked.

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[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](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].

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

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 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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(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].

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

*JLI* Vol. 39 Editorial Board<sup>1</sup>

“(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<sup>[2]</sup> 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 Baldwin<sup>3</sup>

“Fuck Tha Police,”<sup>4</sup> rapped the revered American hip-hop group N.W.A from Compton, California in their seminal debut studio album, “Straight Outta Compton.”<sup>5</sup> 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*<sup>6</sup>—against the Los Angeles Police Department (LAPD) for possessing the “authority to kill a

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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).

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.

minority.”<sup>7</sup> The LAPD, like police departments in other American cities,<sup>8</sup> had a notorious reputation for corruption,<sup>9</sup> using excessive force, racial profiling, and harassing minority communities in the Greater Los Angeles area.<sup>10</sup> While some citizens<sup>11</sup> and the police<sup>12</sup> gave it their all to curb the

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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-hip-hop-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].

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 . . .”).

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 Floyd<sup>13</sup>—an unarmed Black man—by a police officer<sup>14</sup> with the Minneapolis Police Department (MPD), the popularity of the thirty-two-year old anti-police-brutality anthem skyrocketed.<sup>15</sup> 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.

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.<sup>16</sup> The scale and

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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-VUXX].

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].

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*

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?”<sup>17</sup> Any meaningful survey tracing the roots of modern American policing begins with its relationship to that purported North Star of American prosperity<sup>18</sup>—private property.<sup>19</sup>

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.<sup>20</sup> Enslaved Africans aboard the ship were killed “because of overcrowding, unsanitary conditions, and inadequate provisions on the ships.”<sup>21</sup> Their situation did not improve after they landed.<sup>22</sup> The highly impactful Barbadian Slave Codes,<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> The

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*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-policymakers/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].

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/92B]-683K].

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

25. *Id.* at 552.

enslaved essentially had the same “status of farm animals or chattel.”<sup>26</sup> 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,<sup>27</sup> called the modern police’s predecessors King’s men.<sup>28</sup> These men kept the “king’s peace” since as early as the thirteenth century.<sup>29</sup> Even after Americans overthrew the king—with Thomas Paine famously proclaiming “the law is king”<sup>30</sup>—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.”<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> The goal of these watches was to “warn of impending danger” including activity that would break the law.<sup>34</sup> In the early colonies, and up until the mid-nineteenth century, slavery was legal in large parts of the United States.<sup>35</sup> 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*

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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.*

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/insideloook/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].

*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 Constable<sup>36</sup>

“... 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, 1937<sup>37</sup>

Historian Jill Lepore argues slavery is “not a rule of law . . . [but] a rule of police.”<sup>38</sup> Policing in the early United States followed two distinct but ultimately complementary approaches in the North and the South.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> These slave patrols were formed under state laws, organized by counties, and bankrolled by taxes.<sup>42</sup> 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.<sup>43</sup>

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

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.*



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.<sup>44</sup> 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.<sup>45</sup> 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 extra-judicial discipline for enslaved workers.<sup>46</sup> 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.”<sup>47</sup>

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.<sup>48</sup> 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.”<sup>49</sup>

In the early nineteenth century, American cities experienced huge population growth through immigration and industrialization.<sup>50</sup> Industrialization also increased urbanization.<sup>51</sup> Although public disorder—public drunkenness and prostitution—seemed to have increased with swift urbanization, “evidence of an actual crime wave [was] lacking.”<sup>52</sup> But this did not stop the “emerging commercial elite”<sup>53</sup> nativists<sup>54</sup> 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.’”<sup>55</sup> Around the same time, starting in the early

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

45. *Id.*

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.

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.<sup>56</sup> Professor Michael A. Robinson of the University of Georgia argues that the goal of early police departments was “to protect the financial interest of the wealthy, much like the slave patrols protected financial interests of enslaved African owners.”<sup>57</sup>

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.<sup>58</sup> It is estimated that up to 300 Dakota detainees died in the camp.<sup>59</sup> The Texas Rangers reorganized shortly after in the 1870s to address the pressing “native question.”<sup>60</sup> More recently, in 2016–2017, law enforcement officers in North Dakota inflicted extraordinary violence against Native water protectors at Standing Rock.<sup>61</sup> Over 300 police-inflicted injuries were reported among those protesting the Dakota Access Pipeline.<sup>62</sup>

Although slave patrols were formally dissolved after the Civil War, the formerly enslaved promptly came under the Black Codes.<sup>63</sup> 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.<sup>64</sup> The Black Codes were followed by (1) the Jim Crow laws (a “new kind of slave code”);<sup>65</sup> (2) the emergence of state police

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56. *Id.* at 2–3.

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.

forces and union busting<sup>66</sup>—a proud American tradition<sup>67</sup>—during the Progressive Era; (3) the bipartisan “War on Crime” led by Presidents Lyndon Johnson and Richard Nixon;<sup>68</sup> and (4) the 1990s’ so-called Tough-on-Crime bills.<sup>69</sup> 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.<sup>70</sup>

Today, there are approximately eighteen thousand law-enforcement agencies or police departments in the United States.<sup>71</sup> 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.<sup>72</sup> 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

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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](https://whorulesamerica.ucsc.edu/power/history_of_labor_unions.html) [perma.cc/143H-KFZ9].

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.

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, 2016<sup>73</sup>

Minneapolis has long been described as a paradox.<sup>74</sup> It is part of one of the wealthiest metropolitan areas in the country, but this has been primarily true only for its White residents.<sup>75</sup> Minneapolis is a bastion of progressive politics,<sup>76</sup> but is also a racially segregated city despite a history of welcoming refugees and immigrants from all around the world.<sup>77</sup> The current chief of the MPD, as a young lieutenant, once joined a lawsuit filed against his own department for tolerating racism.<sup>78</sup> Only 7 percent of MPD officers live in the city.<sup>79</sup> Some commute from predominantly White suburbs like Anoka or even exurbs like Hudson, Wisconsin.<sup>80</sup> 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.<sup>81</sup>

Excessive force complaints against the eight-hundred-plus-officer strong MPD are commonplace.<sup>82</sup> 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."<sup>83</sup> Black Minneapolitans are also more likely "to be pulled over,

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

arrested and have force used against them than white residents,”<sup>84</sup> which MPD’s own data demonstrates.<sup>85</sup>

Today in Minneapolis, Native individuals experience more stops and searches relative to their population frequency.<sup>86</sup> In the U.S., Native Americans are more likely to be killed by the police than any other racial or ethnic group.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup> Minnesota’s Native communities continue to protest the state-sanctioned violence against non-White bodies and affirm that Native Lives Matter.<sup>90</sup>

In 2015, an MPD officer killed Jamar Clark, a Black man, claiming that Clark tried to take another officer’s weapon.<sup>91</sup> 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.<sup>92</sup> 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.<sup>93</sup> Only one percent of complaints against MPD officers “that have

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-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>.

been adjudicated since 2012 have resulted in disciplinary action.”<sup>94</sup> The only MPD officer to be convicted of an on-duty, fatal shooting was “a Black MPD officer who shot and killed Justine Ruszczyk, a white woman, in 2017.”<sup>95</sup> 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”<sup>96</sup> and “openly wore a white power patch on his motorcycle jacket.”<sup>97</sup> 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.<sup>98</sup>

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

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.<sup>99</sup> Jamar Clark.<sup>100</sup> David Smith.<sup>101</sup> Tommie Baker.<sup>102</sup> Quincy Smith.<sup>103</sup> Dominic Felder.<sup>104</sup> Christopher Burns.<sup>105</sup> Mark Henderson.<sup>106</sup> 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?<sup>107</sup> Racially discriminatory policing in Minneapolis is not a recent phenomenon,<sup>108</sup> and any suggestion<sup>109</sup> 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 measures.<sup>110</sup> The experience of Minneapolis, one of

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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\\_Pre\\_cinct?Page=24#](https://live.mprnews.org/Event/Black_Lives_Matter_protests_in_Minneapolis_Fourth_Pre_cinct?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://d3n8a8pro7vnm.cloudfront.net/cuapb/pages/17/attachments/original/1556948828/Minnesota\\_Stolen\\_Lives\\_Names\\_2018.pdf?1556948828](https://d3n8a8pro7vnm.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/ZWC8-5HY].

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].

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](https://www.mpd150.com/wp-content/uploads/reports/report_2_compressed.pdf) [perma.cc/65X8-9F5A]; see also

the most “progressive” cities in the United States,<sup>111</sup> 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.<sup>112</sup> When it comes to constraining excessive use of force and holding MPD accountable, we have fallen woefully short.

Complicating Minneapolis’ reputation for racist policing<sup>113</sup> 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.<sup>114</sup> That same year, MPD unveiled its “sanctity of life” policy,<sup>115</sup> which set forth a requirement of de-escalation for officers in “dangerous situations.”<sup>116</sup> In 2017, the Department implemented body cameras to be worn by its officers,<sup>117</sup> a measure viewed by some as “key to police reform.”<sup>118</sup> There was also cause for optimism when, in August 2017, Medaria Arradondo was appointed the City’s first Black police chief.<sup>119</sup> Arradondo had previously joined other Black police officers in

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-0d52f8accbbdab6a29b781d75e9aeb01> [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].

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].



Minneapolis in suing the MPD for racial discrimination; the case eventually settled for \$740,000.<sup>120</sup>

In 2018, the City Council shifted \$1.1 million of the MPD budget to fund community-led public safety initiatives.<sup>121</sup> However, the City Council added \$8.2 million to the department budget in December of 2019.<sup>122</sup> 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.<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup> MPD 150—a collective of local organizers, researchers, artists, and activists—have compiled resources that analyze the history of the Minneapolis Police Department.<sup>126</sup> In the late 1960s, the City Council created a “Civil Rights Commission” designed to provide an outlet for investigating civilian complaints about police officers.<sup>127</sup> 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, leaving the Minneapolis Police Department as the only entity capable of investigating police misconduct.<sup>128</sup> 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.<sup>129</sup> Unfortunately, the Civilian Review Authority was stripped of power by the Minnesota Legislature in 2012—at the request of the Minneapolis

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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.

128. *Id.*

129. *Id.* at 13.

Police Federation—and replaced by the City with the Office of Police Conduct Review.<sup>130</sup>

The current process of filing complaints against Minneapolis police officers is complicated, based on theories of self-accountability, and is, ultimately, ineffective.<sup>131</sup> 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.”<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup>

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.<sup>135</sup> Between 2013 and 2018, MPD fired five officers and demoted one officer from its 800-person force.<sup>136</sup> When asked to comment or respond to these jarring numbers, MPD did not respond,<sup>137</sup> apparently running from scrutiny rather than facing it. In more recent years, some have observed the Minneapolis Police

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=COOR\\_TIT9FIPOPR\\_CH172POCOOV](https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=COOR_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-T6CW].

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.

Department engaging in a pattern of “stonewalling, evading and deflecting the slightest suggestion of police brutality” in response to racially discriminatory policing.<sup>138</sup> 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.”<sup>139</sup> 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.”<sup>140</sup> Carrying on with the status quo is an act of complicity to the cruelty Black people in Minneapolis experience on a daily basis.<sup>141</sup>

*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.<sup>142</sup> In

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 BY JENKINS AND CUNNINGHAM, DECLARING RACISM A PUBLIC HEALTH EMERGENCY IN THE CITY OF MINNEAPOLIS, <https://lims.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),

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.<sup>143</sup> The officer who had forced his knee on Floyd's neck was charged with third degree murder just four days after Floyd's death.<sup>144</sup> 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,<sup>145</sup> a cause that community groups such as Black Visions<sup>146</sup> and Reclaim the Block<sup>147</sup> 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 the MPD in its current form<sup>148</sup> and on June 26, the Council unanimously passed an ordinance seeking an amendment to the City Charter.<sup>149</sup> 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.<sup>150</sup> The amendment, which would need approval by the Charter Commission, Mayor, and voters of Minneapolis, would mark a major transition from

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<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].

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](https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=CH_ARTVIIAD).

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.<sup>151</sup> 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.<sup>152</sup> The Commission rejected the Council's proposal in November.<sup>153</sup> In December 2020, the City Council voted to divert \$8 million from the MPD to the Office of Violence Prevention and other city services.<sup>154</sup> This amount reflects just 4.5% of MPD's budget.<sup>155</sup> The City Council narrowly voted to not diminish the size of the police force, keeping it above the threshold size required by the City Charter.<sup>156</sup> 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.<sup>157</sup> 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.<sup>158</sup> Black residents of

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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.*

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.*

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.<sup>159</sup> When something goes wrong, people still want someone to count on to protect their families.<sup>160</sup>

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.<sup>161</sup> 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.<sup>162</sup> Members of the Council, however, insist that the lack of detail is part of the design and will allow them to spend time with stakeholders devising a workable replacement.<sup>163</sup>

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.<sup>164</sup>

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,

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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].

163. *Id.*

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

along with just 22% of rapes in 2016.<sup>165</sup> These clearance rates trend lower than those nationally, where, in corresponding years, 61% of murder offenses<sup>166</sup> and 41% of rape offenses<sup>167</sup> were cleared. Additionally, we should be able to “resolve confusion over a \$20 grocery transaction without drawing a weapon or pulling out handcuffs.”<sup>168</sup> Clearly, the current system is not working.

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,<sup>169</sup> as well as inside,<sup>170</sup> 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.<sup>171</sup>

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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. DEP’T 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].

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/SV8]-5B]6] (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/

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 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).<sup>172</sup> Since its inception, the OVP has implemented programs which are designed to treat community violence as a public health concern.<sup>173</sup> Three program highlights include:

- i. Project LIFE, a group violence intervention initiative, focuses its efforts on group-involved gun violence.<sup>174</sup> 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.<sup>175</sup>

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[perma.cc/UL6P-N3PW].

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 Phillippe 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\(2:33:20\)](https://mpls.dev.implex.net/?p=9460(2:33:20)).



- 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.<sup>176</sup> 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.<sup>177</sup>
- iii. Most recently, the OVP rolled out MinneapUs.<sup>178</sup> Modeled after Cure Violence,<sup>179</sup> 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 fund<sup>180</sup> successful community programs such as MAD DADS,<sup>181</sup> St. Stephen's Homeless Outreach,<sup>182</sup> and the Domestic Abuse Project.<sup>183</sup> 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,<sup>184</sup> 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

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

past several decades.”<sup>185</sup> 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.<sup>186</sup>

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.”<sup>187</sup> 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.<sup>188</sup> 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.<sup>189</sup>

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”<sup>190</sup> throughout Minneapolis neighborhoods and hosted teach-ins about community safety.<sup>191</sup> The American Indian Movement

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%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.

(AIM) has long engaged in informal community security initiatives, one being AIM Patrol.<sup>192</sup> Bolstering the funding of these non-city associated organizations through fundraising or grants will not only serve as a continued check on 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.<sup>193</sup> 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.<sup>194</sup> In the years leading up to his shooting, Castile had been pulled over fifty-two times for traffic violations.<sup>195</sup> Removing armed police officers from these types of routine interactions could prevent the deadly escalation of commonplace encounters.<sup>196</sup>

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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].

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].

Other cities within the nation have proposed moving towards police-less traffic stops, including Berkley<sup>197</sup> and Cambridge.<sup>198</sup> Minneapolis should follow their lead and implement a non-police traffic enforcement system. This system could be staffed with civilian employees and housed within the Minneapolis Regulatory Services Department,<sup>199</sup> a division which already manages Minneapolis Traffic Control.<sup>200</sup>

Demographic data shows the need for traffic stop reform. In 2019, Minneapolis was over 60 percent White,<sup>201</sup> yet 70 percent of traffic stops were of non-Whites.<sup>202</sup> If a traffic stop progressed to a search of the vehicle, 78 percent of those searches were of Black individuals' vehicles.<sup>203</sup> 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.<sup>204</sup> Yet Minneapolis police "issued White drivers the vouchers at a rate three times higher than Black and East African ones in equipment stops."<sup>205</sup> The outcome of the voucher disbursement is especially discouraging, given that Black drivers are pulled over at a much higher rate than White drivers.<sup>206</sup>

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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].

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-

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 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.<sup>207</sup> 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.<sup>208</sup> 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.<sup>209</sup> Previous drug possession convictions, or allegations of gang activity, can also lead to charges.<sup>210</sup>

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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).

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.<sup>211</sup> 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.<sup>212</sup> 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.”<sup>213</sup> 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.<sup>214</sup> 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.<sup>215</sup> Despite broad public support<sup>216</sup> and recent federal action towards decriminalization,<sup>217</sup> legislative pushes for

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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](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].

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].

legalization of recreational marijuana in Minnesota have failed.<sup>218</sup> Legalizing recreational marijuana use for adults in Minnesota would result in fewer arrests,<sup>219</sup> 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. Obama<sup>220</sup> and Representative James E. Clyburn,<sup>221</sup> 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 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

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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/ULR9-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].

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.



# Reassessing the Judicial Empathy Debate: How Empathy Can Distort and Improve Criminal Sentencing

Warren Cormack\*

*The things that make a good Judge, or good Interpreter of the Laws, are, first, A right understanding of that principal Law of Nature called Equity; which depending not on the reading of other mens Writings, but on the goodness of a mans own natural Reason, and Meditation, is presumed to be in those most, that have had most leisure, and had the most inclination to meditate thereon. Secondly, Contempt of Unnecessary Riches, and Preferments. Thirdly, To be able in judgment to devest himself of all fear, anger, hatred, love, and compassion. Fourthly, and lastly, Patience to hear; diligent attention in hearing; and memory to retain, digest and apply what he hath heard.<sup>1</sup>*

– Thomas Hobbes, *Leviathan*, 1651

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1. THOMAS HOBBS, *LEVIATHAN* 146–47 (London, Andrew Crooke 1651).

## I. INTRODUCTION

Judges are supposed to be impartial arbiters of justice. They weigh the merits of cases and decide punishments for convicted defendants. With these responsibilities comes power over criminal defendants' lives. Yet because judges are human, their minds operate through similar cognitive processes as any other human mind. In practice, this means that their power is not always exercised impartially and may be subject to the same innocent, yet insidious, cognitive deficits and biases experienced by humanity at large.

To be a judge is, then, to be a human trying to relate facts to law while deciding cases and ambiguities in the most just manner. The case of judicial empathy in criminal sentencing is a particularly challenging issue, as it is an example of how human processing may affect another person's rights and freedoms. Empathy allows judges to more fully understand the situations of the parties in front of them, but it also introduces empathetic bias into the judicial process.

Assessing empathy's effects on judicial sentencing is important, as disparate empathy likely causes significant racial disparities within the criminal justice system.<sup>2</sup> Disparate empathy against Black Americans may change trial outcomes<sup>3</sup> and contribute to disparate levels of capital sentencing.<sup>4</sup> It also contributes to longer prison sentences for Black Americans.<sup>5</sup>

This paper investigates the role empathy plays in the judicial decision-making process, for better or worse. To do this, it first explores the judicial empathy debate and identifies what empathy is. It then explores connections between empathy, bias, and punishment, and relates these conclusions to judges and the sentencing process. Finally, it concludes with suggestions on how judges may improve their decision-making. Empathy is a

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2. Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 901–02 (1996) (“The low probability that white jurors will empathize with African-American defendants is not simply a function of race, but also of the linguistic, cultural, experiential, and economic differences that divide white and blacks in America.”).

3. *See id.* at 907 (describing the effects of *Batson v. Kentucky*, 476 U.S. 79 (1986)).

4. *Id.* at 908–10 (“The ability of white jurors to empathize more easily with white victims than black victims contributes to race-of-victim disparities.”).

5. M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1327 (2014) (stating that studies have generally shown “that prosecutors favor white defendants”).

near-universal human experience and judges can effectively regulate and employ it to positive ends, particularly when working within their wide sentencing discretion.

## II. EMPATHY AND BIAS: CLARIFYING TERMS AND COGNITIVE PROCESSES

This section first defines empathy, and then discusses how it works within the brain. Contemporary debates about empathy tend to employ varying definitions of empathy, so such clarification is important before discussing empathy's effects on the judicial system.

### A. THE CONTEMPORARY DEBATE CONFLATES EMPATHY WITH OTHER ISSUES

The debate as to whether empathy is valuable in the judicial decision-making process was reignited when President Barack Obama, shortly after Justice David Souter's retirement, said, "I view that quality of empathy, of understanding and identifying with people's hopes and struggles as an essential ingredient for arriving at just decisions and outcomes."<sup>6</sup> Since then, the debate reignites occasionally, such as when a Santa Clara County Superior Court judge issued a light sentence to a Stanford University student convicted of rape.<sup>7</sup> In 2018, the topic came up surrounding then-Judge Kavanaugh's Supreme Court confirmation hearings.<sup>8</sup> When these debates occur, some argue that judicial

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6. Jesse Lee, *The President's Remarks on Justice Souter*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA BLOG (May 1, 2009, 4:23 PM), <https://obamawhitehouse.archives.gov/blog/2009/05/01/presidents-remarks-justice-souter> (describing the elements that President Obama will consider in selecting a replacement for Justice Souter).

7. Jill Suttie, *Do We Need More Empathetic Judges?*, GREATER GOOD MAG. (June 22, 2016), [https://greatergood.berkeley.edu/article/item/do\\_we\\_need\\_more\\_empathic\\_judges](https://greatergood.berkeley.edu/article/item/do_we_need_more_empathic_judges) ("In pronouncing the sentence, the judge seemed to show more empathy for the perpetrator, who went to the same university as [the judge], than the rape victim, who didn't.").

8. Compare Steven Greenhouse, *SeaWorld's and Kavanaugh's Missing Empathy Gene*, AM. PROSPECT (Sept. 21, 2018) (criticizing one of then-judge Kavanaugh's dissents, where he argued that SeaWorld should not be subject to OSHA regulations, on empathy grounds), with Ruben Navarrette Jr., *Kavanaugh's Emotions Showed He's Human. That's a Good Thing in a Supreme Court Justice*, USA TODAY (Oct. 18, 2018) ("I like my judges with an emotional streak. It reminds me they're human. It's the robotic ones who terrify me. I want judges who show compassion and empathy when needed, but also anger and outrage when appropriate.").

decision-making requires impartiality and emotional distance, while others argue that empathy is a critical ingredient of just decision-making.<sup>9</sup>

One paper, for example, distills criticism of judicial empathy into four main arguments.<sup>10</sup> The first criticism is that empathy might blind a judge to the “formally logical” elements of the law.<sup>11</sup> The second argues in favor of a tranquil legal mind, claiming that empathy “may alter the dispassionate mental attitude necessary to formulate good judgments.”<sup>12</sup> The third argument criticizes moral sentimentalism, which might cause a judge to eschew the law in favor of sympathy or compassion.<sup>13</sup> The last argument contends that judges must favor the law over their own views or opinions.<sup>14</sup> For critics of empathy, judges must prevent empathy from shifting their determination of the law, as they should make impartial decisions based on empirical methods.<sup>15</sup> For example, an “anti-empathy” person might argue that if an ambiguous case arises, the judge must only consider their best approximation of the law, without relying upon empathy.<sup>16</sup>

Those in favor of empathy argue that judicial empathy towards minority populations enables judges to uphold minority

9. *Judicial Empathy*, BALLOTPEDIA, [https://ballotpedia.org/judicial\\_empathy](https://ballotpedia.org/judicial_empathy) (last visited May 2, 2020) (outlining the arguments for and against judicial empathy).

10. Lucia Corso, *Should Empathy Play any Role in the Interpretation of Constitutional Rights?*, 27 *RATIO JURIS*, 94, 100 (2014).

11. *Id.* at 100 (stating that determining “the largest possible number of major premises from which to infer conclusions for single cases” is clouded by “emotions, personal points of view, and personal memories of the individual judge”).

12. *Id.* at 100 (asserting that a tranquil mind allows “a certain degree of detachment and disinterest” necessary for impartiality).

13. *See id.* at 101.

14. *See id.* at 101–02.

15. *See* Ilya Somin, *Understanding the Point at Issue in the Judicial Empathy Debate*, VOLOKH CONSPIRACY (May 29, 2009), <http://volokh.com/2009/05/29/understanding-the-point-at-issue-in-the-judicial-empathy-debate/> (“When critics of the *Ledbetter* decision claim that the conservative justices lacked ‘empathy’ for the plaintiff, they mean not that the conservative justices were unaware of her feelings, but that they failed to identify with them sufficiently.”).

16. *See* Orin Kerr, *Legal Ambiguity, Empathy, and the Role of Judicial Power*, VOLOKH CONSPIRACY (May 13, 2009, 5:51 PM), <http://volokh.com/2009/05/13/legal-ambiguity-empathy-and-the-role-of-judicial-power/> (“To those who see legal ambiguity as inviting a careful judicial weighing—indeed, who think that the critical role of a judge is to engage in that careful judicial weighing—emphasizing the need for ‘empathy’ is an invitation to replace law with politics.”).

rights and understand the minority experience.<sup>17</sup> On this view, empathy enables judges to understand “all sides” of an issue.<sup>18</sup> Proponents of judicial diversity might argue that diverse benches better empathize with less privileged litigants.<sup>19</sup> Some in the pro-empathy camp acknowledge that empathy has positive and negative aspects in a judge’s ability to decide cases.<sup>20</sup>

The long-entrenched debate about judicial empathy may have staying power for several reasons. First, discussing emotions objectively is difficult. Emotional terminology changes over time and lacks fixed meaning in popular conversation.<sup>21</sup> Discourse among legal critics defines “empathy” in various ways, sometimes conflating it with bias and sometimes with justice.<sup>22</sup> The confusion may also occur because “empathy” has become

17. Erwin Chemerinsky, *Is There a Conflict Between Empathy and Good Judging?*, LA TIMES (May 28, 2009, 12:00 AM), <https://www.latimes.com/opinion/opinion-la/la-oe-w-chemerinsky-somin28-2009may28-story.html> (“In fact, all justices as human beings inevitably feel empathy. Most of today’s Supreme Court justices apparently feel it more for businesses than employees, and more for victims of crimes than criminal defendants. Obama’s wish that justices feel empathy for minorities and the poor should hardly be controversial, for the Constitution above all exists to protect minorities. The majority generally doesn’t need a constitution for its protection because it can control the political process.”).

18. See Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 1964–66 (2012) (describing how judges might use empathy to relate to multiple sides of litigation).

19. See *id.* at 2001–02 (“President Obama wants to make sure that he appoints judges who can also empathize with those whose experiences tend to be very far afield from those of most judges.”).

20. See Chemerinsky, *supra* note 17 (arguing that empathy can increase a judge’s ability to relate to those in the courtroom but may also impede accurate evaluation of cases).

21. Susan A. Bandes, *Compassion and the Rule of Law*, 13 INT’L. J.L. CONTEXT 184, 185 (2017).

22. Compare Somin, *supra* note 15 (“When critics of the *Ledbetter* decision claim that the conservative justices lacked ‘empathy’ for the plaintiff, they mean not that the conservative justices were unaware of her feelings, but that they failed to identify with them sufficiently.”), and Steven G. Calabresi, Op-Ed., *Obama’s “Redistribution” Constitution*, WALL ST. J., <https://www.wsj.com/articles/SB122515067227674187> (last updated Oct. 28, 2008, 12:01 AM) (“[Obama] believes—and he is quite open about this—that judges ought to decide cases in light of the empathy they ought to feel for the little guy in any lawsuit.”), with Colby, *supra* note 18, at 1958 (quoting *Empathy*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003)) (“Empathy is ‘the action of understanding, being aware of, being sensitive to, and vicariously experiencing the feelings, thoughts, and experience of another of either the past or present without having the feelings, thoughts, and experience fully communicated in an objectively explicit manner; also: the capacity for this.’”).

shorthand for political orientation, with some viewing “liberal” positions as ones that entail empathy, and “conservative” positions as ones that incorporate other moral foundations, such as loyalty, authority, or sanctity.<sup>23</sup> Still, this is likely a simplification of political discourse, as figures from across the political spectrum appeal to empathy to defend their positions, even if those positions are on different sides of the same issue.<sup>24</sup>

Recent accounts of judicial empathy primarily address common psychology, discussing prejudice and bias without addressing the neural correlates of empathy.<sup>25</sup> A full account of the effects of empathy on judges must first account for how human brains experience empathy.<sup>26</sup> Defining empathy before locating its role in judicial decision-making and sentencing can help refine the debate.

## B. WHAT IS EMPATHY?

Empathy may be conflated with compassion, perspective-taking, or informed experience.<sup>27</sup> The neuroscientific study of empathy refines the debate, providing insights into how empathy operates in the brain and its possible effects on people.

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23. See PAUL BLOOM, *AGAINST EMPATHY* 120 (Dec. 6, 2016) (discussing Jonathan Haidt’s proposal that liberals and conservatives operate from different moral foundations, as well as the relationship between political discourse and empathy).

24. See *id.* at 81–82 (“Political debates typically involve a disagreement not over whether we should empathize, but over who we should empathize with . . . [I]n late 2014, ex-vice-president Dick Cheney was asked to defend the United States’ record on torture. Now you might imagine that his argument would involve abstract appeals to security and safety. And yet when asked to define torture, Cheney gave this example: ‘an American citizen on a cell phone making a last call to his four young daughters shortly before he burns to death in the upper levels of the Trade Center in New York City on 9/11.’ This is an empathic argument, defending torture by talking about the suffering of a single identifiable individual.”); JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 160 (2013) (comparing political signs from different perspectives that appeal to fairness and equality).

25. See Susan A. Bandes, *Moral Imagination in Judging*, 51 *WASHBURN L.J.* 1, 1 (2011) (“The empathy debate has revealed a tenaciously hardy folk conception of judicial deliberation and the judicial role.”).

26. See, e.g., Gary Low, *Emphatic Plea for the Empathic Judge*, 30 *SINGAPORE ACAD. L. J.* 97, 97 (2018).

27. *Id.* at 105 (“Modern scholarship on the subject is confusing, contributed chiefly by divergent or overlapping meanings of empathy.”); see, e.g., Colby *supra* note 18, at 1952–54 (discussing the various ways in which people perceive empathy in judging).

Empathy is a complex, not fully understood, process. Scientists have broken empathy down into the capacity to feel for others, called “emotional empathy” or “affective empathy,”<sup>28</sup> and “cognitive empathy,” the ability to take another person’s perspective.<sup>29</sup>

Other frameworks discuss responses to the experience of empathy, including “compassionate empathy,” which is one’s response to experiencing of empathy,<sup>30</sup> and “emotional self-regulation,” which addresses the neural inhibition of empathy so people can function while experiencing empathy.<sup>31</sup> Emotional self-regulation helps contribute to the “self/other” divide, which keeps personal emotions separate from empathetically-experienced emotions.<sup>32</sup> Empathetic responses may also be categorized as “compassion,” which manifests as concern for the target, and “empathic distress,” which manifests as personal distress over feelings of empathy.<sup>33</sup> Note that “compassion” may be a response to feelings of empathy, but it is a separate experience,<sup>34</sup> with different affective responses and different neurological signatures.<sup>35</sup>

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28. Robert Eres & Pascal Molenberghs, *The Influence of Group Membership on the Neural Correlates Involved in Empathy*, 7 FRONTIERS IN HUMAN NEUROSCIENCE Art. 176 at 1 (2013).

29. Simone G. Shamay-Tsoory, Editorial, *Dynamic Functional Integration of Distinct Neural Empathy Systems*, 9 SOCIAL, COGNITIVE & AFFECTIVE NEUROSCIENCE 1–2 (2014).

30. Sandip Roy, *5 Dangers Of Empathy: How Can Empathy Hurt You Bad*, HAPPINESS INDIA PROJECT, <https://happyproject.in/empathy-hurts/> (last visited May 2, 2020).

31. Eres & Molenberghs *supra* note 28, at 3.

32. Kim Armstrong, *‘I Feel Your Pain’: The Neuroscience of Empathy*, 31 ASSOC. PSYCHOLOGICAL SCI. 29, 30 (2017) (describing studies associated with the self/other divide).

33. Tania Singer & Olga M. Klimecki, *Empathy and Compassion*, 24 CURRENT BIOLOGY R875, R875 (2014) (“[A]n empathic response to suffering can result in two kinds of reactions: empathic distress, which is also referred to as personal distress; and compassion, which is also referred to as empathic concern or sympathy.”).

34. Larry Stevens & Jasmine Benjamin, *The Brain that Longs to Care for Others: The Current Neuroscience of Compassion*, in THE NEUROSCIENCE OF EMPATHY, COMPASSION, AND SELF-COMPASSION 55 (Larry Stevens & C. Chad Woodruff, eds., Academic Press 2018) (“[Compassion] differs from Empathy in that empathy is the general vicarious experiencing or sharing of another person’s emotional state, not just their suffering. Empathy lacks the motivational component of compassion.”).

35. *Id.* at 56–62 (summarizing neurological studies on compassion, breaking down the neural correlates of compassion into nine affective regions).

When we see someone in a highly emotional situation, “mirror” neurons in our brain activate, reflecting the target’s perceived state in our own brain.<sup>36</sup> Scientists hypothesize that these mirror neurons “enable us to understand other people’s actions in terms of our own movements and goals . . . .”<sup>37</sup> Though the role of mirror neurons within systems of human empathy may have been over-hyped,<sup>38</sup> and once-expansive claims about their predominance have come into question in recent years,<sup>39</sup> social neuroscientists still acknowledge that various forms of empathy

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36. Jaime A Pineda, *Sensorimotor Cortex as a Critical Component of an ‘Extended’ Mirror Neuron System: Does it Solve the Development, Correspondence, and Control Problems in Mirroring?*, 4 BEHAVIORAL & BRAIN FUNCTIONS (Oct. 18, 2008), <https://behavioralandbrainfunctions.biomedcentral.com/articles/10.1186/1744-9081-4-47>.

37. Ben Thomas, *What’s So Special About Mirror Neurons?*, SCI. AM. GUEST BLOG (Nov. 6, 2012), <https://blogs.scientificamerican.com/guest-blog/whats-so-special-about-mirror-neurons/>.

38. See J.M. Kilner & R.N. Lemon, *What We Know Currently About Mirror Neurons*, 23 CURRENT BIOLOGY R1057, R1057 (2013) (“Indeed so much has been written about mirror neurons that last year they were referred to, rightly or wrongly, as ‘The most hyped concept in neuroscience’. Here we try to cut through some of this hyperbole and review what is currently known (and not known) about mirror neurons.”).

39. See Susan Lanzoni, *Empathetic Brains*, in EMPATHY: A HISTORY 251, 252 (Yale University Press 2018) (“[T]he expansive claims that mirror neurons subserve the understanding of actions, the capacity to empathize, and even the use of language have recently come under critique.”); see also GREGORY HICKOK, THE MYTH OF MIRROR NEURONS: THE REAL NEUROSCIENCE OF COMMUNICATION AND COGNITION (2014) (offering a comprehensive rebuttal of mirror neuron theory by one of its most prominent critics).



have automatically-triggered neural correlates.<sup>40</sup> Mirror neurons play a role in empathy,<sup>41</sup> as do other neurological systems.<sup>42</sup> Examples of other neural triggers for empathy include the limbic system and the neurotransmitter oxytocin.<sup>43</sup> The “insula, amygdala, and anterior cingulate cortex” also help regulate affective empathy.<sup>44</sup> Regardless as to which neurological correlate manifests empathy, highly emotional situations elicit neurological state-matching reactions.<sup>45</sup> Some of these brain systems create emotional contagion, which is when one’s mental state reflects that of the person they see.<sup>46</sup> As people become more empathetic,

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40. LANZONI, *supra* note 39, at 252 (“If the mirror neuron literature views empathy as an automatic neural simulation, other neuroscientific models characterize empathy as an emotionally regulated feeling response, sensitive to social context and dependent on an awareness of the difference between the self and the other. Different empathies have been found to possess different neural correlates: emotional contagion has neural patterns distinct from perspective taking, for instance. Some contend, however, that emotional contagion, as well as self-oriented perspective taking, is only pseudo-empathy and should not be called empathy at all.”).

41. John Mark Taylor, *Mirror Neurons After a Quarter Century: New Light, New Cracks*, HARVARD UNIVERSITY: THE GRADUATE SCHOOL OF ARTS AND SCIENCES: SCIENCE IN THE NEWS BLOG (July 25, 2016), <http://sitn.hms.harvard.edu/flash/2016/mirror-neurons-quarter-century-new-light-new-cracks/> (“[I]t is important to remember that despite recent criticism, [mirror neuron] activity may still play an important role in many behaviors.”).

42. Vera Flasbeck et al., *The Brain that Feels Into Others: Toward a Neuroscience of Empathy*, in THE NEUROSCIENCE OF EMPATHY, COMPASSION, AND SELF-COMPASSION 23, 34–35 (Larry Stevens & C. Chad Woodruff eds., 2018).

43. *Id.* at 35.

44. David D. Vachon, Donald R. Lynam & Jarrod A. Johnson, *The (Non)Relation Between Empathy and Aggression: Surprising Results From a Meta-Analysis*, 140 PSYC. BULL. 751, 752 (2014).

45. *See generally* Flasbeck et al., *supra* note 42 at 28 (“From a proximate perspective, perceiving the affective state of a target individual activates autonomic responses that may (or may not) result in empathy.”).

46. *See id.* at 24 (“Hence, [emotional contagion’s] behavioral correlate is restricted to the display of the same behavior as that perceived in the initiating individual.”); Simone G. Shamay-Tsoory, *Dynamic Functional Integration of Distinct Neural Empathy Systems*, 9 SOC., COGNITIVE & AFFECTIVE NEUROSCIENCE 1, 2 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3871737/pdf/nst107.pdf> (“The existence of mirror neurons related to emotional facial expressions in the human [inferior frontal gyrus] suggests that the human [mirror neurons system] may be used to convert observed facial expressions into a pattern of neural activity that would be suitable for producing similar facial expressions and would provide the neural basis for emotional contagion.”).

networks in the brain connecting theory of mind (conceptualization of other mental states) to embodied simulation (our ability to reflect a perceived action's goal-state) fire.<sup>47</sup>

In summary, our brains appear to automatically respond to highly emotional situations, reflecting the perceived neural state. This likely causes us to mimic the emotions we perceive. For the sake of scientific accuracy and clarity, this paper will therefore refer to “empathy” as embodied perspective-taking. It is an automatic process that all people experience.

### C. THE RELATIONSHIP BETWEEN EMPATHY AND BIAS

Empathy can lead to cognitive distortion in several ways. It can narrow a judge's perspective, cause a judge to over-value one perspective over others, can cause benevolence or aggression, and can result in disparate impact.

As discussed above, empathy is primarily a mechanism for perspective-taking. Because empathy often involves individual perspective-taking, it can draw the judge's attention away from the good of a collective.<sup>48</sup> This may actually be desirable if, for instance, it enables a judge to weigh the social value of punishment against the harm of such punishment to an individual. Still, it may cause the judge to overvalue an individual's perspective, or to reduce complex socio-legal considerations to a mere conflict between two parties. This may undermine the collective good and make judges take less prudent actions.<sup>49</sup> These effects occur even when participants believe their decision will be public.<sup>50</sup> For this reason, the publicity of judges' written decisions does not protect against the effects of empathy bias.

Another issue with empathy and bias is the possibility of “imaginative resistance,” a phenomenon in which people find it

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47. See Vittorio Gallese, *Mirror Neurons, Embodied Simulation, and the Neural Basis of Social Identification*, 19 INT'L J. RELATIONAL PERSPECTIVES 519, 524 (Oct. 15, 2009) (discussing how social identification is built and what neural mechanisms enable its emergence).

48. See C. Daniel Batson & Nadia Y. Ahmad, *Empathy-Induced Altruism: A Threat to the Collective Good*, 26 ADVANCES IN GROUP PROCESSES: ALTRUISM AND PROSOCIAL BEHAVIOR IN GROUPS 1, 18 (2009) (discussing the results of an experiment that introduces egotistic and altruistic motives separately and its impact on the collective good).

49. *Id.* at 14–15 (explaining the results of an experiment measuring empathic concern).

50. *Id.* at 16–17 (explaining the results of an experiment introducing egoistic and altruistic motives separately).

difficult to empathize with different moral frameworks from their own.<sup>51</sup> Understanding imaginative resistance might enable judges to engage in critical, neutral reflection on alternative moral perspectives by “plac[ing] rational demands on the viewpoints of the simulator and his target.”<sup>52</sup> Though some may argue that sentencing judges should not probe “into the motives that led the defendant to commit a crime,”<sup>53</sup> an understanding of such motives might be essential to assessing an offender’s mental state, and the correspondingly appropriate punishment.

Sometimes, empathy may have positive effects. For example, there is much support for the hypothesis that empathy causes altruism.<sup>54</sup> This altruism comes in the form of care for the other person’s welfare.<sup>55</sup> It often manifests as compassion, inclining people to treat the subject of their empathy with kindness.<sup>56</sup>

Empathy also has other, less intuitive effects. For example, empathy does not necessarily only flow to the disenfranchised side in litigation. Judges may empathize with corporate or government litigants, or may have empathy for all parties in a case.<sup>57</sup> Empathy also does not only cause prosocial behavior towards the target but can also facilitate aggression on behalf of the target’s interest.<sup>58</sup> It may also cause judges to identify with enraged aggressors, treating aggression more charitably as the

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51. Karsten R. Stueber, *Imagination, Empathy, and Moral Deliberation: The Case of Imaginative Resistance*, 49 SOUTHERN J. PHIL. 156, 160 (2011) (“The examples also reveal that imaginative resistance does point to some real limits and real difficulties in making sense of another person’s point of view, particularly in moral matters.”).

52. *Id.* at 175.

53. Corso, *supra* note 10, at 103 (defending empathy in the constitutional law context while dismissing it in the criminal context).

54. Batson & Ahmad, *supra* note 48, at 23.

55. *Id.* at 7 (defining altruism “as [a] motivational state with the ultimate goal of increasing another person’s welfare”).

56. *Id.*

57. Bandes, *supra* note 21, at 192 (discussing distinctions between empathy and compassion in the judicial process).

58. Anneke E. K. Buffone & Michael J. Poulin, *Empathy, Target Distress, and Neurohormone Genes Interact to Predict Aggression for Others—Even Without Provocation*, 40 PERSONALITY AND SOC. PSYCHOL. BULL. 1406, 1418 (2014) (“The present research found that assessed or elicited empathy predicted aggression to benefit a distressed empathy target, and that the effect of empathy may be partially explained by the empathy-linked neurohormones vasopressin and oxytocin.”).

target of empathy.<sup>59</sup> Finally, if someone feels overwhelming empathy, it may prevent them from acting altruistically.<sup>60</sup>

These aggression-triggering effects are important to note for the judicial sentencing context, as harsh facts in a violent trial may invite a judge to sentence a defendant harshly on a victim's behalf. Notably, more or broader empathy may not be the solution to combat empathy-induced aggression. A meta-analysis of affective empathy and aggression studies determined that empathy has minimal effect on the inhibition of aggression.<sup>61</sup>

Finally, empathy may result in racial disparities. Some studies focusing on this phenomenon measure amygdala activation to assess empathy levels.<sup>62</sup> The amygdala is a set of neurons involved in the limbic system, responsible for processing emotions and fear responses.<sup>63</sup> These studies have found that the brain distinguishes between in-group and out-group members, and greater amygdala activation occurs when people see fear in the faces of people of their own race.<sup>64</sup> Less activation occurs when seeing fear in a person of a different race's face.<sup>65</sup> When people see their own race experiencing physical pain, they experience more amygdala activation than when they see a different

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59. See, e.g., Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 376 (1996) ("Consider, for example, the dark underbelly of empathy, as illustrated in a recent notorious case. In that case, the defendant found his wife in bed with another man at midnight, chased the man away, drank and argued with his wife until four a.m., and then fatally shot her in the head with a hunting rifle. A Baltimore County Circuit Court judge sentenced the defendant to eighteen months in prison for voluntary manslaughter, saying 'I seriously wonder how many men married five, four years would have the strength to walk away without inflicting some corporal punishment.' The judge's reaction was the one that came most easily—prereflective and self-reflexive.")

60. Steve Taylor, *Negative Empathy*, PSYCH. TODAY (May 12, 2016), <https://www.psychologytoday.com/us/blog/out-the-darkness/201605/negative-empathy>.

61. See generally Vachon, Lynam & Johnson, *supra* note 44, at 754 (summarizing the meta-analysis).

62. See, e.g., Armstrong, *supra* note 32 (introducing the neuroscience of empathy).

63. *Amygdala*, SCIENCEDAILY, <https://www.sciencedaily.com/terms/amygdala.htm> (last visited Nov. 12, 2020).

64. See, e.g., Armstrong, *supra* note 32, at 29, 31 ("Cultural emphasis on ingroups and outgroups may create an 'empathy gap' between people of different races and nationalities . . ." "People have been found to show greater activation in the amygdala when viewing fearful faces of their own race . . .").

65. *Id.* at 31.

race in physical pain.<sup>66</sup> The empathetic reactions to fear and pain may be amplified in more collectivist societies.<sup>67</sup> These findings are important to consider in the sentencing context, as it may be more difficult for typically white, male judges<sup>68</sup> to empathize with minority defendants than white,<sup>69</sup> well-educated prosecutors and victims of all stripes.<sup>70</sup>

Empathy entails emotional entanglement with the subject of the empathy. Colloquially, it is “putting oneself in another’s shoes.”<sup>71</sup> It can be compassionate, but it also can cause negative or antisocial consequences. For these reasons, empathy may properly be considered amoral, with positive and negative effects.<sup>72</sup>

#### D. HOW COGNITIVE PROCESS THEORIES ILLUMINATE SOLUTIONS

Given that human empathy is an automatic system that can affect decision-making in both positive and negative ways, it is important to discuss cognitive systems that may help mitigate its negative effects. Theories of cognitive processes divide human processing into two systems: System 1 and System 2.<sup>73</sup> System 1

66. *Id.*

67. *Id.* (“One study comparing the in-group/out-group bias in Korea, a more collectivist society, and the United States, a more individualistic society, found that more interdependent societies may foster a greater sense of in-group favoritism in the brain.”).

68. See Tracey E. George & Albert H. Yoon, Am. Const. Soc’y, *The Gavel Gap: Who Sits in Judgment on State Courts?* 7 (2016) (finding that more than half of state trial judges and state appellate judges are white men).

69. See Amita Kelly, *Does It Matter That 95 Percent of Elected Prosecutors Are White?*, NPR (July 8, 2015, 4:59 PM), <https://www.npr.org/sections/itsallpolitics/2015/07/08/420913118/does-it-matter-that-95-of-elected-prosecutors-are-white> (noting that 95 percent of the country’s elected prosecutors are white and 83 percent are men).

70. See generally BUREAU JUST. STAT., U.S. DEP’T JUST., *CRIMINAL VICTIMIZATION, 2018: SUMMARY* (Sept. 2018), [https://www.bjs.gov/content/pub/pdf/cv18\\_sum.pdf](https://www.bjs.gov/content/pub/pdf/cv18_sum.pdf) (illustrating a wide range of victim types).

71. See BLOOM, *supra* note 25, at 41 (“[R]egardless of how one describes it, we’ll see that there are many people who really do think morality is rooted in empathy in the sense that I am discussing here, people who talk about the importance of standing in another’s shoes, feeling their pain, and so on.”).

72. Batson & Ahmad, *supra* note 48, at 6–7.

73. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 20–21 (2013) (“System 1 operates automatically and quickly, with little or no effort and no sense of voluntary control. System 2 allocates attention to the effortful mental activities that demand it, including complex computations. The operations of System 2 are often associated with the subjective experience of agency, choice, and concentration.”).

processes are rapid and autonomous, whereas System 2 processes are “higher order,” often entailing reasoning, hypothetical thinking, and working memory.<sup>74</sup> Much of our lives are spent using System 1 processes.<sup>75</sup> When someone thinks deeply, they engage System 2 processes.<sup>76</sup> System 2 processes can intervene in System 1 processes, overriding default responses.<sup>77</sup> Emotions and decisions often come before justifications,<sup>78</sup> and rational thought processes may play less of a role in our decision-making than it seems.<sup>79</sup>

Though these conclusions may become more nuanced over time,<sup>80</sup> it is likely that they form a framework by which people can modify and check their impulses and autonomic responses to stimuli.<sup>81</sup> For example, if a judge notices that their natural empathy is causing them to side in one direction, cognitive theories suggest that this judge might override their cognition, enabling reflective decision-making. At least one person has already appealed to dual-process systems to justify empathetic judging in general.<sup>82</sup> Empathy and its coextensive biases operate on an autonomous level, and higher-order thought may be able to counteract its more pro-aggressive effects.

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74. Jonathan St. B. T. Evans & Keith E. Stanovich, *Dual-Process Theories of Higher Cognition: Advancing the Debate*, 8 PERSP. PSYCHOL. SCI. 223, 223–24 (2013).

75. *Id.*

76. *Id.*

77. *Id.*

78. See, e.g., John A. Bargh & Ezequiel Marsella, *The Unconscious Mind*, 3 PERSP. PSYCHOL. SCI. 73, 75 (2008) (“The idea that action precedes reflection is not new . . . . [C]onscious processes kick in after a behavioral impulse has occurred in the brain—that is, the impulse is first generated unconsciously, and then consciousness claims (and experiences) it as its own.”).

79. See Antonio R. Damasio et al., *The Somatic Marker Hypothesis and the Possible Functions of the Prefrontal Cortex*, 351 PHIL. TRANSACTIONS: BIOLOGICAL SCI. 1413 (1996). See generally ANTONIO R. DAMASIO, *THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS* 35–81 (1999) [hereinafter DAMASIO, *BODY AND EMOTION*].

80. See generally Aaron Sloman, *Damasio’s Error*, THE PHIL. MAG. 5 (2004), <https://www.cs.bham.ac.uk/research/projects/cogaff/phil-mag-emotions-slo-man.pdf> (critiquing Antonio Damasio’s theories and reasoning on emotional reactions).

81. See Evans & Stanovich, *supra* note 74, at 223–24.

82. Low, *supra* note 26, at 102–03 (applying dual-process theories to judicial reasoning and inhibition of System 1 processing).

Research suggests, however, that higher-order intervention may not be effective in every context.<sup>83</sup> When people make implicit, unconscious decision-making explicit, they may be less in accordance with experts and less satisfied with their decision.<sup>84</sup> Additionally, for basic decision-making, intuitive processes may be more effective at coming to better decisions.<sup>85</sup> This may be because the vast amount of decision-making comes from implicit processing.<sup>86</sup> Later, this paper will assess the effects of System 1 and System 2 processing on judges.

### III. EMPATHY IMPACTS JUDGES AND CRIMINAL SENTENCES

The empathetic distortions outlined above impact sentencing in various ways. First, this section addresses the contention that judges may be different from the average person, concluding that generally-applicable conclusions about cognition are also applicable to judges. Then, this section addresses federal criminal sentencing, analyzing empathy as a possible source of distortion through discussions of white-collar sentencing and victim impact statements.

#### A. STUDIES OF JUDGES SHOW THEY ARE SUBJECT TO SIMILAR PROCESSING AND BIASES AS ANYONE ELSE

There are some reasons to believe that judges have somewhat different attributes than the average person. Judges have been through law school. Legal scholarship values “abstract rationality,” devaluing emotion.<sup>87</sup> After discussion of the mechanisms of empathy and bias, however, it may come as no surprise

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83. Christian Keysers et al., *Explicit and Implicit Strategies in Decision Making*, in *BETTER THAN CONSCIOUS?: DECISION MAKING, THE HUMAN MIND, AND IMPLICATIONS FOR INSTITUTIONS* 225, 244 (Christoph Engel & Wolf Singer eds., 2008).

84. *Id.*

85. Marius Usher et al., *The Impact of the Mode of Thought in Complex Decisions: Intuitive Decisions Are Better*, 2 *FRONTIERS PSYCHOL.* 1, 9 (2011) (“The four experiments reported here provide support for the claim that intuitive–affective strategies can outperform deliberation/analytic strategies in value integration, an operation that is critical for complex decision-making.”).

86. *See generally* DAMASIO, *BODY AND EMOTION*, *supra* note 79 (discussing the role of implicit processing in decision-making).

87. *See* Angela P. Harris & Marjorie M. Shultz, *A(nother) Critique of Pure Reason: Toward Civic Virtue in Legal Education*, 45 *STAN. L. REV.* 1773, 1775, 1805 (1993).

to hear that judges do make systematic cognitive errors,<sup>88</sup> like most people. They also have the same amount of implicit bias as laypeople.<sup>89</sup> These effects occur even though the public's expectation is that judicial officers make only occasional mistakes.<sup>90</sup>

Judges are also subject to the same distortions and biases as an average person.<sup>91</sup> These include, in addition to empathetic distortions, anchoring biases, framing biases, hindsight bias, representativeness heuristics, and egocentric biases.<sup>92</sup> Each of these “cognitive illusions” distorts decision-making through the use of heuristics, or cognitive shortcuts.<sup>93</sup> Cognitive illusions are not the only way that judicial decision-making may be distorted. For example, judges issue significantly less favorable parole decisions as time passes since their last meal break.<sup>94</sup>

Whether through cognitive distortions or otherwise, identity biases play a systematic role in judicial decision-making.<sup>95</sup> For example, gender is relevant to judicial decisions. Though female judges rarely decide cases differently from male judges, they do decide sex discrimination disputes differently and can help shift

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88. See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 779 (2001) (“Empirical evidence suggests that even highly qualified judges inevitably rely on cognitive decision-making processes that can produce systematic errors in judgment.”).

89. Suja A. Thomas, *What Judges Can Do About Implicit Bias*, JOTWELL (May 22, 2017) (reviewing Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It*, in ENSURING JUSTICE: REDUCING BIAS 87 (Sarah Redfield ed., 2017)), <https://courtslaw.jotwell.com/what-judges-can-do-about-implicit-bias/>.

90. *Id.*

91. See Guthrie, Rachlinski, & Wistrich, *supra* note 88, at 784 (summarizing findings of judicial decision making studies conducted for various cognitive biases and influences).

92. *Id.*

93. *Id.*

94. Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. U.S. 6889, 6892 (2011).

95. Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37, 52–53 (2015) (“Third, this fact has broader implications for descriptive representation on the courts. Scholarship has demonstrated that female judges decide cases differently from men, and that African Americans also decide cases differently from whites. However, what we see here is that male judges who have daughters are more likely to vote in a liberal direction—despite not having those ascriptive characteristics that would otherwise be linked to more progressive views on women's rights issues.”) (internal citations omitted).



a panel's decision-making.<sup>96</sup> Similar effects also occur in sexual harassment cases.<sup>97</sup> When judges have daughters, they are more likely to vote in a more feminist fashion on gender issues.<sup>98</sup> Conversely, male judges may also side with rapists and domestic abusers more frequently than other defendants, as male judges find it easier to empathize with predominantly male defendants.<sup>99</sup>

Race also affects judicial decision-making. For cases brought under the Voting Rights Act, race plays a more prominent role in judicial decision-making than other factors, such as ideology.<sup>100</sup> Other studies show that white judges are less likely to believe that employees have "credible grievances of racial harassment," even though both African American and white judges agree on the relevant factual features of the cases.<sup>101</sup> Given race's prominent effect on judicial decision-making, and the already-present racial disparities in the criminal justice system,<sup>102</sup>

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96. See Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406 (2010) (statistically analyzing the likelihood of a ruling in favor of the plaintiff based on the gender makeup of the panel of judges).

97. Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005) (analyzing a data set to find that for Title VII sex discrimination and sexual harassment cases, "female judges were significantly more likely than male judges to find for plaintiffs").

98. Glynn & Sen, *supra* note 95, at 52 ("[A]cross cases involving gender issues, judges who parent daughters as opposed to sons are more likely to reach liberal decisions . . .").

99. Susan Bandes, *supra* note 59, at 376–77 ("[E]asy identification for the judge . . . is more often true in cases of rape and domestic violence, in which predominantly male judges find it easier to make the empathetic link with male defendants, than in cases of other crimes.").

100. See Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 53 (2008) (providing statistical analysis demonstrating that "a judge's race and partisan affiliation are important determinants of liability in [Voting Rights Act] section 2 cases").

101. Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1161 (2009).

102. See Radley Balko, *21 More Studies Showing Racial Disparities in the Criminal Justice System*, WASH. POST (Apr. 9, 2019, 6:00 AM), <https://www.washingtonpost.com/opinions/2019/04/09/more-studies-showing-racial-disparities-criminal-justice-system/> (providing summaries of twenty-one studies conducted between 2008 and 2018 quantifying current racial disparities in the United States criminal justice system).

solutions which mitigate empathy-sourced racial sentencing disparities are particularly important.

Studies show that politics can affect a judge's decision-making in limited ways,<sup>103</sup> but other studies question the significance of this, suggesting that political party affiliation does not change how judges rule on, for example, summary judgment in employment civil rights cases.<sup>104</sup> Overall, judges experience sufficient cognitive distortions to suggest that larger-scale cognitive processing findings which apply to the general public apply to them as well.

#### B. HOW DOES FEDERAL SENTENCING WORK?

An understanding of United States sentencing policy helps one understand how findings on empathy, cognitive heuristics, and bias affect judicial decision-making during punishment. In the current United States federal court system, sentencing guidelines set the standard sentences for a given charge, factoring in mitigating and aggravating factors to create a suggested sentence.<sup>105</sup> Since the passage of the Federal Sentencing Guidelines, downward departures have been gradually increasing.<sup>106</sup>

Several United States Supreme Court cases have affected how courts may apply the Federal Sentencing Guidelines.<sup>107</sup> *Blakely v. Washington* held that maximum sentences could not exceed the maximum sentence which could be imposed for a

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103. See generally CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006) (providing a high-level analysis of judicial appointees and their decision-making based on their political party, finding party affiliation highly predictive only on abortion and capital punishment).

104. Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 320–21 (2012).

105. Joshua B. Fischman & Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, 40 J. LEGAL STUD. 405, 405–06 (2011).

106. Becky Gregory & Traci Kenner, *A New Era in Federal Sentencing*, 68 TEX. B.J. 796, 798 (2005) (“[D]ownward departures steadily increase[d] from 20 percent to 35 percent during the previous eight years.”).

107. See Carol A. Pettit, *Writing the Book(er) on Blakely: The Challenge to the Federal Sentencing Guidelines*, 41 TULSA L. REV. 365 (2005) (covering legal challenges to Federal Sentencing Guidelines and how cases have impacted implementation of those guidelines).

crime without additional judicial findings.<sup>108</sup> In *United States v. Booker*, the Supreme Court then determined that sentences were unconstitutional when based on judge-found facts.<sup>109</sup> These decisions made Federal Sentencing Guidelines advisory, instead of mandatory.<sup>110</sup> After *Booker*, many federal courts further reduced the effect of the Guidelines.<sup>111</sup>

These decisions occurred in a landscape of difficult and changing sentencing issues. Prior to the Federal Guidelines, courts exercised indeterminate sentencing, which was almost unfettered discretion.<sup>112</sup> Now, the advisory Guidelines help judges come to decisions. These decisions do not need to follow proportionality standards,<sup>113</sup> and district courts may deviate from the ranges based on policy disagreement.<sup>114</sup> Decisions must merely be “reasonable.”<sup>115</sup>

During balancing tests, judges often have to weigh the balances of justice, and this necessarily implicates the exercise of

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108. See *Blakely v. Washington*, 542 U.S. 296, 304 (2004) (“The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea.”).

109. Pettit, *supra* note 107, at 366.

110. *Id.* at 369.

111. *Id.* at 366–67 (“Initially a number of federal district courts found the Guidelines unconstitutional. Some held the Federal Sentencing Guidelines wholly unconstitutional, while others found them salvageable through severability. Those holding the Guidelines unconstitutional, whether in whole or in part, disagreed about how sentences should be determined post-*Blakely*. Some preferred a return to indeterminate sentencing using the Federal Sentencing Guidelines as actual guidelines rather than as mandates. Others believed the Guidelines were still valid so long as the sentence imposed would not exceed the maximum presumptive sentence.”).

112. See generally Adam Shajnfeld, *The Eleventh Circuit’s Selective Assault on Sentencing Discretion*, 65 U. MIAMI L. REV. 1133, 1133–37 (2011) (discussing the evolution of federal sentencing law).

113. See *Gall v. United States*, 552 U.S. 38, 49–50 (2007) (“[Judges] may not presume that the Guidelines range is reasonable. [They] must make an individualized assessment based on the facts presented.”).

114. See *Kimbrough v. United States*, 552 U.S. 85, 93 (2007) (explaining that the Defendant’s sentence was shorter than the Guidelines recommended because the Court felt the crack cocaine Guidelines were “disproportionate and unjust”).

115. See generally Shajnfeld, *supra* note 112, 1137–38 (discussing different interpretations of “reasonableness” review).

empathy.<sup>116</sup> Judges are allowed discretion in, for example, compassionate release and asylum cases.<sup>117</sup> The federal sentencing guidelines create a unique situation, however, because outcomes are partially dictated by maximum and minimum penalties.<sup>118</sup> Though this system was intended to be more fair, some judges believe that the low limits of the federal guidelines are unfair when applied to certain cases.<sup>119</sup> Some of these judges have resigned or refused to comply with the guidelines.<sup>120</sup>

Proponents of the guidelines offer familiar retributive proportionality arguments. For example, they suggest that the guidelines enable judges to only punish charged conduct<sup>121</sup> and make punishments fairer.<sup>122</sup> The guidelines also prevent judges from imposing unjust consecutive sentences.<sup>123</sup>

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116. See Bandes, *supra* note 21, at 186 (discussing the Justices' application of empathy in a Supreme Court oral argument about the strip search of a thirteen-year-old).

117. See *id.* at 187 (discussing contexts where judicial compassion is explicitly permitted).

118. See *id.* at 187–88 (addressing compassion and federal sentencing guidelines).

119. See *id.* (“[T]he guidelines impose mandatory minimum sentences that have shocked the conscience of many judges—decades in prison for a first time, low-level drug offence . . .”).

120. See *id.* (addressing compassion's role as a “stopgap” for the federal sentencing guidelines—a role that empathy may also share).

121. See Pettit, *supra* note 107, at 403 (“Punishment for real conduct is something that Justice Breyer has maintained is an essential part of the Congress's goal for the Federal Sentencing Guidelines — so essential that in his view, Congress would have preferred that the Guidelines be only advisory rather than to have modified judges' ability to punish real conduct. ‘Real conduct’ is a euphemism for uncharged conduct that is not subject to the usual requirement of proof beyond a reasonable doubt.”).

122. See Sarah Hyser, *Two Steps Forward, One Step Back: How Federal Courts Took the “Fair” Out of the Fair Sentencing Act of 2010*, 117 PENN ST. L. REV. 503, 512 (2012) (“In April 2009, President Barack Obama's administration expressed a desire to end the sentencing disparity. The following month, the House of Representatives held a subcommittee hearing to discuss the issue of reforming crack sentencing and to consider five proposed bills.” (internal citation omitted)).

123. Jon O. Newman, *The Federal Sentencing Guidelines: A Good Idea Badly Implemented*, 46 HOFSTRA L. REV. 805, 813 (2018) (“The Guidelines curb abusive use of consecutive sentences by providing that sentences for defendants convicted of multiple counts should run concurrently, with just two exceptions.” (internal citation omitted)).

In the judicial process, the appellate system generally reduces the effects of an individual judge's personal preferences.<sup>124</sup> This may have less of an effect in sentencing, where judges may make decisions under a lenient standard of review. Under current law, the federal standard of appellate review for criminal sentences is a deferential "abuse of discretion" standard.<sup>125</sup> Evidence suggests that judges change their sentencing decisions based on the standard on which their decisions are reviewed.<sup>126</sup>

As addressed before, one of the primary concerns of those who reject empathy in the judiciary is that it might obscure the judge's ability to assess the balance of the law, as it might cause undue bias towards one side of the case. Given the wide discretion judges have in criminal sentencing, the important role of empathy in such proceedings is difficult to ignore, for people on all sides of the greater empathy debate.<sup>127</sup>

### C. A NOTE ON PROSECUTORS AND THE FEDERAL GUIDELINES

Important to any discussion of punishment is an acknowledgement of the realities of American sentencing. From 2006 to 2016, the "number of criminal trials declined by 47%, and the jury trial rate declined by almost 40%."<sup>128</sup> The Federal Sentencing Guidelines may contribute to this trend, as "[a]cceptance of responsibility and substantial assistance reductions are the two most common ways defendants can mitigate their sentences."<sup>129</sup> These "normally entail admissions of guilt and . . . follow guilty

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124. See Brandy A. Karl, *Why Judges' Personal Preferences Play A Role in Their Decisionmaking, and How the Appellate System Controls That Role*, FINDLAW (Jan. 8, 2003), <https://supreme.findlaw.com/legal-commentary/why-judges-personal-preferences-play-a-role-in-their-decisionmaking-and-how-the-appellate-system-controls-that-role.html>.

125. *Gall v. United States*, 552 U.S. 38, 56 (2007) ("[T]he appropriate standard of review was abuse of discretion.").

126. Joshua B. Fischman & Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, 40 J. LEGAL STUD. 405, 431 (2011) ("Changes to standards of review clearly have an impact on district judges' sentencing behavior.").

127. See Colby, *supra* note 18, at 1996 n.248 (describing a "limited" role of empathy as still encompassing criminal sentencing, and pointing out Justice Scalia's support for empathy in criminal sentencing).

128. The Honorable Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 105 (2018).

129. *Id.* at 122.

pleas.”<sup>130</sup> In fact, some argue that the “most glaring change imposed by” the shift to determinate sentencing is a “shift in sentencing discretion from the judge to the prosecutor.”<sup>131</sup> Many other factors also contribute to the plea deal trend, resulting in a system where defense attorneys accept pleas because those deals are in their client’s best interest.<sup>132</sup>

Due to the decline in criminal trials and rise in plea deals, prosecutors are often the people who are in charge of determining a defendant’s sentence.<sup>133</sup> Prosecutors likely face empathetic biases similar to judges, with added distortions caused by the adversarial system. Though an investigation of the role of empathy and bias in prosecutors is likely warranted, this paper addresses judicial bias, as likely trial sentences constrain the plea options that prosecutors may offer.<sup>134</sup>

#### D. COMBINING BIAS, PUNISHMENT, AND JUDGING: FAIRNESS AND WHITE-COLLAR CRIMINALS

White-collar criminal cases provide particularly interesting insights into the role of bias in sentencing. Judges generally share attributes with white-collar criminals, including race and employment status.<sup>135</sup> White-collar criminals can also often call

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130. *Id.*

131. AM. COLL. OF TRIAL LAWYERS, UNITED STATES SENTENCING GUIDELINES 2004: AN EXPERIMENT THAT HAS FAILED 14 (2004), [https://www.actl.com/docs/default-source/default-document-library/newsroom/united\\_states\\_sentencing\\_guidelines\\_2004\\_an\\_experiment\\_that\\_has\\_failed](https://www.actl.com/docs/default-source/default-document-library/newsroom/united_states_sentencing_guidelines_2004_an_experiment_that_has_failed).

132. *See generally* Conrad, Jr. & Clement, *supra* note 128 (2018) (explaining that in addition to the Federal Sentencing Guidelines, other factors such as mandatory minimum sentences, precedential United States Supreme Court cases, United States Attorneys General’s prosecutorial policies, stronger evidence due to technological advancement, expense, and overarching expectations directly contribute to the increase in plea deals).

133. *See* AM. COLL. OF TRIAL LAWYERS, *supra* note 131, at 14 (“The most glaring change imposed by this sentencing system over the last decade and a half has been the shift in sentencing discretion from the judge to the prosecutor.”).

134. *Cf.* Conrad, Jr. & Clement, *supra* note 128, at 119 (“[C]harging fewer [mandatory minimum penalties] could result in prosecutors offering more attractive plea terms . . .”).

135. *See* Peter J. Henning, *The Challenge of Sentencing White-Collar Criminals*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/business/dealbook/sentencing-white-collar-criminals.html> (“White-collar defendants often have more in common with the federal judge who will sentence them than most criminals do.”); *see also* Paul M. Klenowski & Kimberly D. Dodson, *Who Commits White-Collar Crime, and What Do We Know About Them?*, in THE

on a network of people to vouch for their interests during sentencing,<sup>136</sup> which may cause a judge to weigh a sentence from the defendant's point of view. Perhaps unsurprisingly, given these facts and the above findings on judicial bias, judges often issue mitigated sentences to white-collar defendants.<sup>137</sup> Most white-collar defendants in a federal district known for prosecuting white-collar crimes receive sentences shorter than the federal guidelines recommend.<sup>138</sup>

White-collar criminals have caused unique sentencing issues for some time. The sentencing guidelines for white-collar criminals have shifted over the years.<sup>139</sup> These guidelines were designed, in part, to make the playing field between white-collar criminals and other criminals fairer.<sup>140</sup> The disparity in mitigated sentences between white collar and violent crime may be due to factors aside from bias. For example, white collar sentencing guidelines may be generally high<sup>141</sup> or may be primarily related to the amount of money lost.<sup>142</sup> Adhering to such guidelines

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OXFORD HANDBOOK OF WHITE-COLLAR CRIME 2–3 (Shanna R. Van Slyke et al. eds., 2016) (summarizing findings of various studies that describe the “demographic profile” of white-collar criminals).

136. See Henning, *supra* note 135 (“White-collar defendants . . . can generate letters from family and friends attesting to their generosity and good works—something that is not likely to come up in sentencing a drug trafficker.”).

137. See Jillian Hewitt, *Fifty Shades of Gray: Sentencing Trends in Major White-Collar Cases*, 125 YALE L.J. 1018, 1059–60 (2016) (writing that in white-collar cases, “the government . . . sponsor[s] below-range sentences on the basis of cooperation, and the court . . . frequently impos[es] below-range sentences in cases not involving cooperation . . .”).

138. See *id.* at 1060 (“Defendants in major white-collar cases in S.D.N.Y. are more likely than not to receive a sentence below the Guidelines range. Moreover, when a below-range sentence is imposed, it is generally vastly shorter than the sentence recommended by the Guidelines.”).

139. Mark W. Bennett, Justin D. Levinson & Koichi Hioki, *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. 939, 942–43 (2017) (briefly detailing the changes the Federal Sentencing Guidelines have gone through since the 1980s).

140. *Id.* at 947–49.

141. See *id.* at 975 n.151 (“[S]ome defense advocacy groups[ ] feel that the guideline is fundamentally flawed, produces unduly high sentences for defendants across the loss spectrum, and needs to be completely rewritten.”) (quoting Frank O. Bowman, III, *Damp Squib: The Disappointing Denouement of the Sentencing Commission’s Economic Crime Project (and What They Should Do Now)*, 27 FED. SENT’G REP. 270, 271 (2015)).

142. Walter Pavlo, *Few Meaningful Changes Proposed on White Collar Crime Sentences*, FORBES (Apr. 15, 2015, 7:35 AM), <https://www.forbes.com/>

may prevent a judge from engaging in empathetic interest balancing. For example, a judge's degree of favor towards retributive philosophy does not generally affect the severity with which they sentence white-collar criminals.<sup>143</sup>

Empathy still likely has some impact on white collar sentencing, however. For example, philosophies of mercy affect the sentence length of white-collar criminals.<sup>144</sup> The presence of such mercy has been tested using empathy-triggering statements such as “[p]eople who commit serious crimes often should receive treatment instead of punishment,” and “[p]eople who commit serious crimes sometimes deserve leniency.”<sup>145</sup>

There is a perfect storm in favor of empathy towards white-collar criminals. On top of their often-similar identities, white-collar criminals such as fraudsters and corporate criminals engage in financial crimes. Such crimes lack tangible violence that might otherwise arouse empathetic violence within judges. Remember, strong emotional experiences are more likely to arouse empathetic reactions. Without empathetic triggers, judges may find it difficult to issue high sentences.

Note that this paper does not necessarily intend to argue that white-collar criminals should not receive mitigated sentences nor necessarily that violent criminals should be treated more leniently in comparison to white-collar criminals. Studying the sentencing of white-collar criminals illustrates how empathy during the sentencing process works and how it might contribute to disparity. The contributions of cognitive effects and empathy may help explain the difficulties that judges and legislatures have in comparing white collar sentences to sentences issued to violent offenders. Given that white collar criminal demographics align disproportionately with judicial demographics,<sup>146</sup> white-collar crime also provides an example of how unequally-applied

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sites/walterpavlo/2015/04/15/few-meaningful-changes-proposed-on-white-collar-crime-sentences/#6d8227ad6e70 (“The primary driver that determines a prison term in an economic crime is the dollar amount ‘lost’ in the crime.”).

143. See Bennett, Levinson, & Hioki, *supra* note 139 at 971 (“Despite the differences in retribution sentencing philosophy, the judges from . . . three groups [with different religious affiliations] did not sentence the defendant differently.”).

144. *Id.* (“The more the judges agreed with mercy punishment philosophies . . . the shorter they sentenced the defendant.”).

145. *Id.*

146. See Henning, *supra* note 135.



empathy could lead to racial disparity within the criminal justice system.

#### E. EMPATHY AND PUNISHMENT: VICTIM IMPACT STATEMENTS AND THE DISTORTIVE EFFECTS OF EMPATHY

In many contexts, judges are constrained by the law. This has been a central theme of those who argue against empathy in judicial decision making.<sup>147</sup> The federal sentencing rules and the cases that came thereafter, however, allow judges significant leeway in deciding sentences. Judges are even encouraged to exercise their empathetic impulses during sentencing. “[C]riminal law is one of the few areas of doctrine in which an examination or assessment of emotions . . . has been a standard feature of the doctrinal and adjudicative landscape.”<sup>148</sup> Empathy, then, plays a crucial role in criminal sentencing.<sup>149</sup> Still, empathy may foster both positive and negative effects. It can cause bias in favor of those who are similar to the judge,<sup>150</sup> but it might also reduce the amount of unjust punishment that a judge might be willing to inflict.<sup>151</sup>

In some ways, the criminal justice system is geared to elicit directed empathy in certain ways. Take, for example, victim impact statements. Such statements help “prime” a judge’s empathy, which could trigger the judge to have a narrow view of their sentencing decision. In this way, judicial empathy may focus on the victims of crime more than it focuses on defendants. If this happens, sentences would be more severe than merited. This paper does not address in detail whether judges should think about society in general or defendants and victims in particular during sentencing. Still, a perspective shift towards the victims of crime

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147. See Corso, *supra* note 10, at 100–01 (describing the main arguments against “the role of empathy in legal reasoning”).

148. Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2009 (2010).

149. See *Garner v. Jones*, 529 U.S. 244, 258 (2000) (Scalia, J., concurring in part in the judgment) (“Discretion to be compassionate or harsh is inherent in the sentencing scheme . . .”).

150. Bennett, Levinson, & Hioki, *supra* note 139, at 947 (“White-collar defendants received ‘special empathy’ because their position in society was more like the judge’s own position.”).

151. See Hewitt, *supra* note 137, at 1050 (“Non-government-sponsored below-range sentences, meanwhile, are imposed when the judge independently determines that the Guidelines sentencing range is inappropriately high relative to the defendant’s culpability.”).

may result in distortions during sentencing. Since high levels of emotions trigger empathy and crimes often entail very high levels of emotion, the judge may issue harsher rulings in cases with victim impact statements. This paper is not the first to discuss the possible distortive effects of such statements.<sup>152</sup> Another author who has written extensively on the effects of emotion in law has argued that “victim impact statements are narratives that should be suppressed because they evoke emotions inappropriate in the context of criminal sentencing [such as] hatred, . . . undifferentiated vengeance, and even bigotry.”<sup>153</sup>

Victim statements offer a valuable opportunity for victims to speak during the criminal justice process. When the State files criminal charges, the prosecutor makes the decisions and the agency of victims may be diminished. However, whether these statements should be presented before a sentencing judge, subject to the same cognitive biases as everyday people, is still an important question.

#### IV. HOW MIGHT JUDGES APPLY EMPATHY APPROPRIATELY DURING SENTENCING?

Crucial to the criminal sentencing process is the determination of the role of punishment.<sup>154</sup> Judges may choose to punish on utilitarian grounds to serve a purpose such as deterrence.<sup>155</sup> Alternatively, incapacitation would suggest that a person should be punished to separate them from society in order to prevent further harm.<sup>156</sup> Judges may also choose to punish on retributive grounds to give the criminal a deserved punishment.<sup>157</sup> Other punishment justifications exist in a vast literature, such as communitarian-focused punishment or educative punishment.<sup>158</sup> Each punishment justification has different implications for the role of empathy.

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152. See, e.g., Bandes, *supra* note 21, at 184 (proposing that compassion “aid[s] decision-makers in understanding what is at stake for the litigant.”); Bandes, *supra* note 59 (discussing the academic writing on narratives and victim impact statements).

153. Bandes, *supra* note 59, at 365.

154. See generally Hugo Adam Bedau & Erin Kelly, *Punishment*, STAN. ENCYCLOPEDIA PHIL., (July 31, 2015), <https://plato.stanford.edu/entries/punishment/>.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

For example, if a judge punishes a convicted person on purely incapacitative grounds, they may not need to employ empathy in their decision-making. Incapacitation would logically result from the likelihood of future harm. Empathy is unable to assess the factors associated with recidivism. Such harm could, however, be calculated without emotion. For example, assume that gender, age, crime severity, social support, and other factors correlate with a certain likelihood of re-offense. To embrace empathetic impulses under such a framework would be irrelevant to the calculation. Empathy for possible future victims may be triggered, but not to the point of changing the calculus.

For a retributivist, empathy helps the judge understand the mental state of the defendant, which can help the judge determine how deserving of punishment the person is. For an example, compare two cases of a baby's homicide. In the first, someone negligently leaves a baby in a car seat. In the second, someone intentionally and maliciously stabs a baby. The former person may be "deserving" of less punishment than the latter due to their less culpable mental state. Empathetic brain-states would help the judge consider each defendant's perspective, and may require the judge to reckon with each defendant's moral framework. This could enable a judge to come to a reasoned decision about punishment. Empathy for the victim may also be useful, as it might help the judge assess the severity of harm. Still, this type of retributive judge may want to be mindful of the vengeance-triggering effects of empathy.

Under some retributive frameworks, however, aggression on behalf of the victim may even be beneficial. An example of this framework comes from James Fitzjames Stephen, a retributivist who believes that punishment is morally justified because it gives satisfaction through the expression of hatred.<sup>159</sup> He has argued, "[i]t [is] highly desirable that criminals should be hated, and that punishments inflicted upon them should be so contrived as to give expression to that hatred . . ."<sup>160</sup> Under this retributive framework, the empathetic aggression of the judge may channel that of the victim and society, causing a just expression of criminal hatred. Judicial anger may have varying

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159. CYNDI BANKS, CRIMINAL JUSTICE ETHICS: THEORY AND PRACTICE 112 (1st ed. 2004).

160. *Id.* at 112; cf. Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 BRIT. J. AM. LEGAL STUD. 263, 285 (2013) (arguing that retribution can often be reduced to revenge impulses).

effects, independent of those caused by empathy.<sup>161</sup> Still, unchecked empathetic aggression in these cases may cloud a judge's perspective, preventing a reasoned, moral sentence.

Some retributive punishment may not require empathy to decide punishments. Some retributivists might prefer a strict ordinal/cardinal sentencing structure,<sup>162</sup> focusing on a crime's effects more than the defendant's culpability. On this view, empathy may obscure an otherwise mechanical operation to decide the appropriate punishment. It might weigh towards the victim or the defendant unfairly, based on the judge's bias or identity.

For a utilitarian, empathy may play a number of different roles. General empathy for people in society may trigger a concern for the ideals of deterrence. Empathy for the criminal might trigger a utilitarian limit to punishment, causing the judge to not impose punishment on the person that does not serve a consequential purpose. It may also cause a judge to be better able to assess the effects of punishment on an individual and its benefits to society. Under some utilitarian conceptions, however, it would play no role. For example, a utilitarian might suggest that the balance of utility cannot be approximated through empathy. Under this account, the distortions of empathy outweigh its benefits, and mere calculated standards are preferable.

Rehabilitative theories could use judicial empathy for the better. If the purpose of the theory is to better an individual, empathy may be required to assess the individual's state and to tailor a program that would work with that person. Rehabilitative programs often focus on the offender, so the aggression-inducing effects of focusing on victims may be mitigated.

Empathy may also help judges understand what sentences look like. Though judges might not fully understand what it is like to be an imprisoned individual, an understanding of the experiences of imprisoned people could help judges weigh the effects of prison sentences on people convicted of charges. Understanding the long-standing harms experienced by formerly incarcerated people may also be possible through exposure to

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161. See generally Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207 (2012) (addressing the effect of judicial anger).

162. See generally Julian V. Roberts, *The Time of Punishment: Proportionality and the Sentencing of Historical Crimes*, in *OF ONE-EYED AND TOOTHLESS MISCREANTS: MAKING THE PUNISHMENT FIT THE CRIME?* 149, 150 (Michael Tonry ed., 2019) (describing ordinal and cardinal proportionality).

such situations combined with the natural empathetic response.<sup>163</sup>

#### V. RECOGNIZING THE EFFECTS OF COGNITIVE DISTORTIONS SUCH AS EMPATHY CAN HELP JUDGES BE FAIRER SENTENCERS

Judges may benefit from longer, thought-out cognitive processing. Though sentences within the federal guidelines may not require detailed elaboration, judicial decisions must be accompanied by a legally sufficient explanation.<sup>164</sup> Sentencing that deviates from the sentencing guidelines must come with an adequate explanation for the deviation.<sup>165</sup> This means that judges cannot rely on automatic processes and must generally check their reasoning thoroughly.<sup>166</sup> Judges are not making decisions for their own personal benefit, so they are not able to rely as easily on the studies suggesting that intuition creates better personal outcomes. Research generally suggests that knowing about bias, and consciously checking for such bias, helps combat the effects of such bias.<sup>167</sup> Automatic processes such as empathy

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163. See Katie J. MacDowell, *Thinking Beyond Ban the Box: How to Alleviate Disproportionate Sentencing to Assist Ex-Offenders in Rejoining Society*, 25 GEO. MASON L. REV. 809, 810–11 (2018) (describing the post-prison effects of sentences on formerly incarcerated individuals).

164. See *Rita v. United States*, 551 U.S. 338, 339 (2007) (“[T]he sentencing judge should articulate enough to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking [sic] authority. He may say less when his decision rests upon the Commission’s own reasoning that the Guidelines sentence is proper in the typical case, and the judge has found that the case before him is typical.”); see also *Commonwealth v. Johnson*, 666 A.2d 690 (Pa. Super. Ct. 1995) (applying sentencing explanation standards to two counts on appeal, with differing outcomes).

165. See *United States v. Ballard*, 950 F.3d 434, 439 (7th Cir. 2020) (“Because the district court did not provide an adequate explanation for the extreme upward departure from Ballard’s recommended Guidelines range, we hold that it committed procedural error.”).

166. Cf. R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381, 1420–21 (2006) (“Crucially, an opinion accompanying an intuitionist outcome can itself amount to reasonable evidence that the judge has taken full, careful, empathetic, and detailed account of all of the main interests and concerns of the opposing and other affected parties. In this way, the opinion can properly add to (or inadvertently undermine) the persuasiveness and legitimacy of even an intuition-based outcome.”).

167. See, e.g., Alexander R. Green et al., *Implicit Bias Among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN.

have the capacity to create systemic inequities in the way cases are decided, because it addresses how individuals relate to judges.<sup>168</sup> For these reasons, refining the ability of higher-order processes to intervene on lower-order processes may benefit the field of law.<sup>169</sup>

Given that judges will experience empathy, the question arises as to whether they should put their empathy aside or “integrate their feelings with those of the subject being judged; law and precedent setting a broad framework.”<sup>170</sup>

#### A. GUIDELINES ARE NOT ENOUGH

Sentencing guidelines alone are unlikely to be an effective way to combat biases in the criminal justice system. Though this technique may be effective at limiting the spread of divergent outcomes, the freedom within which judges decide sentences means that recognizing and combating bias is still important.<sup>171</sup> Guidelines might also constrain the ability of a judge to do the right thing in certain circumstances.<sup>172</sup>

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INTERNAL MED. 1231, 1237 (2007) (“This [study] suggests that implicit bias can be recognized and modulated to counteract its effect on treatment decisions.”).

168. See Corso, *supra* note 10, at 101 (“If empathy is identified with sympathy or compassion or any other form of benevolence towards one party in the case (typically one party’s claim), judicial impartiality could be undermined.”).

169. See *New Study by Prof. David Abrams and Co-Authors Confirms Racial Bias in Criminal Sentencing*, PENN LAW (Aug. 22, 2012), <https://www.law.upenn.edu/live/news/2170-new-study-by-professor-david-s-abrams-confirms> (“No judge is likely to acknowledge, on his or her own, ‘Well, of course, I take race into account.’ And likely they don’t in any explicit way. But they probably do implicitly, because we take all kinds of things into account implicitly. And I think making judges aware of it could potentially help going forward.”) [hereinafter Abrams].

170. MH, *‘Empathy’ and Compassion Are Attributes a Judge Should Possess*, SILIVE.COM (last updated Mar. 21, 2019), [https://www.silive.com/opinion/letters/2009/07/empathy\\_and\\_compassion\\_are\\_att.html](https://www.silive.com/opinion/letters/2009/07/empathy_and_compassion_are_att.html).

171. Abrams, *supra* note 169, (discussing the findings from a study that provides statistically conclusive evidence of racial discrimination in criminal sentencing, and analogizing the situation to the field of medicine where a study found that the doctors, who suspected the study to center around race, realized race was an issue and no longer varied treatment decisions based on race).

172. *Id.* (“They are a way to try to constrain variation in sentencing, but they also limit a judge’s ability to be fairer in particular cases.”).

## B. MINDFULNESS

Mindfulness can play a key role in regulating one's emotions. The ideal of a mindful judge has long roots in legal scholarship, as articles have suggested that judges who recognize their own prejudices and biases may nullify the effect of such biases.<sup>173</sup> For a long time, "introspective self-criticism [and] attempting to feel empathy" have been offered as solutions to discrimination in judging.<sup>174</sup> Given that "[p]ersonal experience, identification, [and] compassion" "will always influence decision-making," judges can examine and evaluate compassionate impulses and "determine whether they are relevant."<sup>175</sup> Mindfulness, along with other emotional-regulation techniques, can allow judges to experience the positive effects of emotions without the harmful effects of emotional suppression.<sup>176</sup>

Fatigue, depleted resources, and multitasking can lower a judge's ability to adjudicate fairly.<sup>177</sup> These effects, as well as empathetic distortive effects, can be mitigated by tackling the central issues. If over-work causes judges to resort to System 1 processing and use heuristics and biases,<sup>178</sup> then a reduction of judicial workload may be in order. If judges are sentencing more harshly before their lunch break,<sup>179</sup> then mandated breaks may be crucial to a just system. Reflective mindfulness can help

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173. See JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 414 (1973).

174. Colby, *supra* note 18, at 2005 n.286 (citation omitted).

175. Bandes, *supra* note 21, at 194.

176. See Terry A. Maroney & James J. Gross, *The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective*, 6 EMOTION REV. 142, 144–48 (2014) (discussing the benefit and uses of various emotional-regulation techniques over the idea of emotional suppression, and ultimately suggesting cognitive change to be the most effective and appropriate form of emotional-regulation for judges).

177. Pamela Casey, Kevin Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, 5 INT'L J. CT. ADMIN. 45 (2013) (stating the negative effects that fatigue, diminished resources, and multitasking has on performance).

178. See Low, *supra* note 26, at 102–03 (discussing System 1 and System 2 processes).

179. See Danziger, Levav & Avnaim-Pesso, *supra* note 94, at 6890 (finding that the greatest likelihood of a favorable ruling occurs at the beginning of the day and after a food break, and that further along in the sequence of cases the likelihood of a favorable ruling decreases to "nearly zero" but then "jumps back" after a meal or break to the initial likelihood value).

judges assess why they decide what they decide, improving sentencing decisions.<sup>180</sup> Empathy will affect judicial decisions, and self-awareness of such empathy can help judges come to just decisions.

In an adversarial system, the key may also be to cultivate compassion instead of empathy. Still, compassion is not the only emotion that judges must employ, as empathy maintains a strong role when judges are sentencing under specific philosophical rationales. “[M]oral outrage by and on behalf of the victims of injustice” may play a stronger role,<sup>181</sup> depending on a judge’s punishment rationale. Healthy emotional regulation can help prevent negative effects of various emotional states.<sup>182</sup>

### C. DIVERSE JUDICIAL PANELS

Another solution to the sentencing issue lies in having a panel of judges decide sentences. Since judges on a panel affect other judges’ perspectives, causing them to consider other viewpoints, having diverse panels of judges consider sentencing decisions would help mitigate the effects of empathetic bias. Studies already suggest that judges are highly affected by other judges with whom they share panels.<sup>183</sup> Other authors have already recommended increasing diversity on the bench.<sup>184</sup> Diverse judicial panels can cause judges to change their views, reducing the effects of disparate empathy.<sup>185</sup> The negative effects of empathy

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180. Casey, Burke & Leben, *supra* note 177, at 45 (“Understanding how the brain processes information and the various factors that can influence decisions and courtroom behaviors is a first step to practicing more mindful decision making that is consistent with the principles of procedural justice.”).

181. Bandes, *supra* note 21, at 191.

182. See Maroney & Gross, *supra* note 176, at 148 (summarizing the benefits and drawbacks of various emotional-regulation strategies that a judge may utilize).

183. See Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality*, 82 U. CIN. L. REV. 145, 180–81 (2013) (discussing the findings of a study that found a positive correlation between the number of female judges on an appellate panel and the likelihood a plaintiff prevails in sex discrimination cases, and using this to suggest “male judges are likely to acknowledge the different life experiences of female judges and thus may give greater weight to female jurists’ understanding of a case when it involves gender discrimination”).

184. See, e.g., Colby, *supra* note 18, at 2002 (arguing that a diverse judiciary may help judges empathize with “those whose experiences tend to be very far afield from those of most judges”).

185. See Boyd, Epstein & Martin, *supra* note 96, at 390 (“[W]hen a woman serves on a panel with men, the men are significantly more likely to rule in favor of the rights litigant.”).



may therefore be outweighed by the benefit of group work. Having a set of judges with different perspectives, and different propensities to empathize with different sides in the system, may enable just decision-making to prevail.

Necessary to this concept would be a panel with different empathetic distortions. If the panel was composed of judges with identical life experience, then that panel might empathize with the perspective of one side of the conflict more than another.<sup>186</sup> Discussion among diverse judges may help them come to a more holistic understanding of the conflict.

## VI. CONCLUSION

Empathy is a capacity that everyone experiences. Legal discourse should accommodate this reality by addressing how it might be used to come to more just sentencing decisions. Important to this process is focusing on all sides of a conflict, empowering victims without enabling empathetic aggression in judges, diversifying the judiciary, and creating judicial panels for sentencing decisions. If these proposals are followed, judges will be able to work with the sentencing guidelines, issuing fairer sentences and reducing disparities in the justice system.

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186. See Colby, *supra* note 18, at 2001 (stating it is human tendency to empathize with those “whose perspectives, experiences, and situations” are most similar to the individual); Lee, *supra* note 183, at 176–81 (arguing that diversifying the bench would lead to a more empathic judiciary).

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## Article

### **This is Minnesota: An Analysis of Disparities in Black Student Enrollment at the University of Minnesota Law School and the Effects of Systemic Barriers to Black Representation in the Law**

*Maleah Riley-Brown, Samia Osman, Justice C. Shannon,\* Yemaya Hanna, Brandie Burris, Tony Sanchez, Joshua Cottle†*

#### INTRODUCTION

Lawyers often occupy powerful positions in the highest levels of our government and economy. Whether drafting legislation, prosecuting or defending crimes, representing indigent clients in housing court, or finalizing corporate mergers, attorneys influence and operate within one of the most critical professions in the United States. Lawyers can have a profound impact in designing and changing laws, influencing major policy regimes, and leading cities and communities.

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\* Maleah Riley-Brown is a second-year law student at the University of Minnesota Law School. Copyright © 2021 by Maleah Riley-Brown. Samia Osman is a first-year law student at the University of Minnesota Law School. Copyright © 2021 by Samia Osman. Justice C. Shannon is a first-year law student at the University of Minnesota Law School. Copyright © 2021 by Justice C. Shannon. Maleah, Samia, and Justice each contributed their own invaluable perspective and personal stories within this article, in addition to their insightful empirical research and writing on enrollment disparities.

† Yemaya Hanna is a second-year law student at the University of Minnesota Law School. Copyright © 2021 by Yemaya Hanna. Brandie Burris is a second-year law student at the University of Minnesota Law School. Copyright © 2021 by Brandie Burris. Tony Sanchez is a first-year law student at the University of Minnesota Law School. Copyright © 2021 by Tony Sanchez. Joshua Cottle is a third-year law student at the University of Minnesota Law School. Copyright © 2021 by Joshua Cottle. Yemaya, Brandie, Tony, and Joshua contributed empirical research on enrollment disparities, writing on the legal implications of these disparities, and compiled interviews and stories from alumni and students. All authors are grateful for the research and contributions of Mallory Harrington and Michaela Liesenberg. We are also appreciative of the editors of the *Minnesota Law Review* for their invaluable editorial assistance. This Article was originally published in *Minnesota Law Review Headnotes*. See Maleah Riley-Brown, Samia Osman, Justice C. Shannon, Yemaya Hanna, Brandie Burris, Tony Sanchez & Joshua Cottle, *This is Minnesota*, 105 MINN. L. REV. HEADNOTES 251 (2021).

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The law is often lauded for being a tool to guide society—a method to promote a system of justice and fairness. But for too long, the law has enforced a system of justice based in White supremacy and oppression. Laws were designed and implemented to steal land from indigenous communities, to enslave and oppress Africans, and to force Japanese-Americans into internment camps, amongst many other atrocities.<sup>1</sup> To this day, the law is used to both expand and diminish civil rights as we continue to struggle to ensure all people are treated equitably within our society. Whether the level of power and influence in the hands of attorneys is overinflated remains an important question. However, this Article seeks to bring attention to those we are training and educating to wield this power and influence. Within the legal profession and legal education system, we must be more proactive in examining who we are leaving out and whose voices are not given a chance to be a part of this profession.

The University of Minnesota Law School, like so many other institutions in the legal field, must contend with the reality of which students it is educating and positioning to be leaders in its community. As students of Minnesota Law, we must look inward at our own student body and institution. Minnesota Law is often touted as the preeminent law school in the state of Minnesota, educating students who have become Vice President of the United States, State Attorneys General, Minnesota Supreme Court Justices, Congressmembers, City and County Attorneys, and many more. With such an illustrious alumni base, it is critical to examine the students the law school

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1. Indian Removal Act of 1830; 21st Congress, Session 1, Ch. 148, <https://guides.loc.gov/indian-removal-act> (“The Indian Removal Act was signed into law by President Andrew Jackson on May 28, 1830, authorizing the president to grant lands west of the Mississippi in exchange for Indian lands within existing state borders. A few tribes went peacefully, but many resisted the relocation policy. During the fall and winter of 1838 and 1839, the Cherokees were forcibly moved west by the United States government. Approximately 4,000 Cherokees died on this forced march, which became known as the “Trail of Tears.”); Stephen Middleton, *Repressive Legislation: Slave Codes, Northern Black Laws, and Southern Black Codes*, OXFORD RSCH. ENCYCLOPEDIAS (Feb. 28, 2020), <https://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-634> [<https://perma.cc/C4QA-NT68>] (“After the Revolution, many states passed black laws to deprive blacks of the same rights as whites. Blacks commonly could not vote, testify in court against a white, or serve on juries. States barred black children from public schools. The Civil War offered the promise of equality with whites, but when the war ended, many southern states immediately passed black codes to deny blacks the gains won in emancipation.”); Slave Codes, BRITANNICA, <https://www.britannica.com/topic/slave-code>; *Korematsu v. United States*, 323 U.S. 214 (1944) (ruling that the U.S. government could force Japanese-Americans into “relocation camps” because of national security concerns during World War II).

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educates because they may soon become leaders in Minnesota, the Midwest, across the United States, and even internationally. In the 2019–20 academic year, 0.6 percent of Minnesota Law students identified as Black or African-American. Out of 667 students enrolled, four identified as Black or African-American. At the same time, over 75 percent of students enrolled in the J.D. program at the University of Minnesota identified as White. Even more alarming, the total number of self-identifying male Black or African-American students was lower than in 1894, the first year that a Black or African-American student graduated from Minnesota Law.<sup>2</sup>

With many students becoming leaders within the legal, political, and business community, it is imperative that Minnesota Law make a more concerted effort to attract, admit, and educate a student body representative of the communities we live in and the communities we serve. We must reckon with the nature of the legal system within which we are trained: one that is built upon a system of oppression and inequity often touted as justice, safety, and fairness. A student body more reflective of the communities we live in and serve is only the first step in enhancing the legal profession's capacity to equitably and effectively serve all individuals and communities who seek legal assistance.

This Article seeks to emphasize perspectives often pushed away from legal education and the legal system. Not only does this Article present the experiences of Black students to highlight their unique and nuanced perspectives, but also to offer an alternative to the supposed objective nature of our legal system and education. In the classroom, law students are encouraged to subvert their individual experience with the presumed objectivity of the law. However, this lens of "objective logic" is rooted within the same system of White supremacy and oppression which has guided our society and legal system for centuries. Through this lens, the law diminishes the ideas and voices of those who do not share these experiences. Our legal system and legal education must adapt by incorporating and understanding perspectives of all those who seek to become attorneys, as well as those within the communities we serve.

Part I of this Article presents the personal narratives of three students currently enrolled at Minnesota Law. These courageous students have chosen to share stories of their path to law school and the barriers they faced as Black students traversing the United States'

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2. *History*, UNIV. OF MINN. L. SCH., <https://www.law.umn.edu/about/history> [<https://perma.cc/R3XG-5QVE>].

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educational system. Part II discusses the experiences of students and alumni of Minnesota Law collected through interviews and surveys within the Minnesota legal community. Part III presents an empirical analysis of the disparities within student enrollment at Minnesota Law. Part IV explores the ways in which these disparities inhibit the legal profession and legal system. Finally, Part V proposes a series of actions that Minnesota Law should take to remedy some of the harms caused by these disparities and enhance the educational environment to contend with the realities of racism within the law.

#### I. PERSONAL EXPERIENCES OF BLACK STUDENTS AT THE UNIVERSITY OF MINNESOTA LAW SCHOOL

In this Part, we present stories and experiences from three current students of Minnesota Law. These narratives come from three of our authors and current students, Maleah Riley-Brown, Samia Osman, and Justice C. Shannon.

##### A. MALEAH RILEY-BROWN

“You have to be twice as good to get half as much as them, remember that.” I’m sure most Black and Brown Americans have heard this phrase uttered by a parent, a mentor, or an educator who sternly whispered it to you the one time you chose to slack off, even if it was just for a second. However, growing up in the Bronx and attending public school, I didn’t encounter them. I was learning amongst my Black and Brown peers at P.S. 78 in the North Bronx. There was no them, there were just Black kids—approximately 35 of us to be exact—with dreamy eyes toward the world where we believed that we could be anything. Of course, we learned about American history and how Martin Luther King, Jr. had this amazing speech that saved us all from segregation and racism. I had written a paper about Madame C.J. Walker and played her in a church production. It was this budding hope that gave me the idea that I could go to law school and medical school (of course, I only ended up in law school, but that’s another story). I reasoned that it would be out of this world for a Black girl to become a doctor twice. “They’d have to call me Dr. Dr. Riley-Brown!” I often exclaimed to my teachers who fostered that belief in me.

I carried that same sentiment in middle school. Again, surrounded by only Black and Brown peers, we never encountered them, but we knew they were out there. When it came time to prepare for the Specialized High School Admissions Exam (SHSAT), only a handful of Black students were chosen out of my gifted and talented middle school to stay after class and prepare for the exam. The school couldn’t

afford to sponsor us all for SHSAT prep, so they chose the ones they felt were best able to compete with them. My middle school teachers would teach me SHSAT material after school during the week, and on the weekend, a 13-year-old Maleah traveled on the bus to Fordham University to take prep classes. On the day of the exam, New York City got hit with a random snowstorm on a mid-October Saturday. I pulled my hood close over my head and continued as the snow got deeper (I had no one to drive me to and from the exam). Luckily, halfway home from the exam, my uncle found me trudging alongside Mosholu Parkway and took me home. I never did remember how I scored on the exam, but I remember my teacher telling me that it wasn't enough to go to school with them at Stuyvesant High School.

The first time I went to school with them was in high school. It was a prominent Lower East Side early college high school I had never heard of and only attended after I ignorantly applied because a friend of mine wanted to go—she didn't get in, but I did. That was enough for my guidance counselor to convince my parents and force me into a high school I had no interest in attending. "Do you know what this can do for you? You'll thank me one day!" Unfortunately, I never did thank my middle school guidance counselor, because the first time I went to school with them is when I felt uneasiness and doubt about my academic capabilities. My trip to school was a little under two New York hours, which is an important measurement of time when you take the train. I caught the random gem of a Manhattan bound 5 train at E 225<sup>th</sup> street coming from Nereid Ave on the 2 line. I'd sit on the 5 train until I made it to 14<sup>th</sup> Street—Union Square. I'd run with my bag strapped across my back because if you missed the M14D to Delancey and Essex, you'd be waiting forever and miss first period. I never made first period on time, and I never made many friends. The curriculum was odd, and suddenly I no longer knew how to do math. They taught algebra differently, and everyone seemed to understand it but me, making me appear stupid. I remember in ninth grade, a girl named Julia used to mimic Brooklyn accents, but I never paid it much mind. She turned to me one day and asked if I was from Red Hook, Brooklyn. "Why would I be from Red Hook? Where did you get that idea from? I don't even know Red Hook." She laughed it off and said I just seemed like I was from there. I went and googled Red Hook, and sure enough, it was a poor, predominantly Black neighborhood in Brooklyn. It made me angry. I never attended school much after that. I went from a straight A student who loved to do math, to a teenager who skipped school every other day because I hated the environment. I transferred in the middle of the school year to another early college high school in

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the South Bronx, surrounded entirely by Black and Hispanic students. When it came time to apply for college, I was eighth in my class and had the highest SAT score, despite never taking prep classes because I couldn't afford it. I always considered the idea of law school, but I didn't have anyone I knew who had gone outside of my Government teacher. My guidance counselor spent most of her time focusing on the less fortunate students. I had always had a dream of attending NYU or Stony Brook. "You *could* apply for those schools, sure! But NYU is hard to get into. Don't we want to apply to somewhere safe, too? Like somewhere we *know* you can get in? Let's look at CUNY;<sup>3</sup> did you look at CUNY?" I was the only student who applied to NYU and Stony Brook out of the class of 2016 who got accepted to NYU and Stony Brook. I finished with an associate degree and high school diploma at eighteen, but I didn't attend either school. I simply couldn't afford to.

I went to college for two years at Pace University, the quietly known sister school of NYU (but not really) where I was a Criminal Justice major. I encountered them full on. During orientation, everyone had their parents with them, but mine had to work. I felt it wouldn't serve me any good anyhow, as neither of my parents nor my siblings attended college. Quite often, I was one of two Black students at any given moment inside of a classroom. I was navigating this process alone and in doubt. It was in the heat of the 2016 election, and I was more excited than ever that I could vote. I sat in my Law Mock Trial course as this one student attempted to explain why she was voting for Donald Trump. "I just don't think he's racist, I mean look at what he's going to do for our economy. He is going to drain the swamp, and that is what is *most* important." That same semester I took an Organized Crime class with a professor who was also an ATF agent and United States Probation officer. I had a good relationship with him despite his right leaning ideologies. He worked in the Southern District of New York, covering Manhattan, and the Bronx. It was that semester that I developed a sort of mentoring relationship with the officer who would help lead a 5:00 AM raid at a Bronx public housing complex. Sweeping up dozens of men, the officers bulldozed into the homes of friends and family that I knew and accused them of drug offenses and other RICO crimes. I listened to him boast about the arrests, and I felt uneasy. I listened to them parade and cheer about the bust. The rest of my time at Pace as a Criminal Justice major was spent listening to them say astronomically incorrect things. "'Stop and Frisk' actually worked; it didn't harm anybody." In fact, former mayor Michael

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3. The City University of New York.



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Bloomberg apologized for the disproportionate impact that “Stop and Frisk” had on Black people in New York City. I know for a fact “Stop and Frisk” harmed me, and when I spoke up and announced how I was profiled, a student replied, “Well in that instance they were wrong, but overall ‘Stop and Frisk’ wasn’t bad. Like you aren’t committing crimes; you’re actually smart and stuff.” That was the first time ever that someone had done the classic “you’re not the Black people we are talking about” approach to me. I’m Black, but I’m not *those* Black people we read about in class, so I must be safe.

I didn’t fully decide that I wanted to go to law school until I was rejected from a master’s program I didn’t really want to attend. I was twenty years old and too afraid to go to law school, so I spent the summer after college working two jobs to afford LSAT prep classes. Twice a week, I would sit in a classroom somewhere near Grand Central terminal and learn tactics to score well on the exam. I was poor, so I had already decided this was my one and only shot at law school. Through encouragement and support, I took my LSAT and scored relatively well. After a not so intense application process and being waitlisted at the University of Michigan and a slow application process to Cornell, I decided to attend the University of Miami on a full tuition scholarship. I was hesitant about Florida; the last time I had gone, I was ten years old and it was my grandma’s funeral. I had just read *The Watsons Go to Birmingham - 1963*,<sup>4</sup> and I was terrified of the South. But as a poor kid from the Bronx, there was nothing in the world that could keep me from a full tuition scholarship to law school.

It was in my first year of law school that I felt suffocated—not by the normal mental obstacles of law school or the heightened anxiety and panic attacks I faced, but by the sheer amount of micro-aggressive racism and prejudice that my peers and I faced. Ultimately, this led to some of us transferring. On my first day we were warned about a tenured Torts professor who had a habit of saying extremely racist things and often quoted Hitler. I had a roommate for about two months who I will only say falls into the category of them. I remember trying to explain to him that it’s important for Black students to have the Black Law Student Association because we needed a safe space on campus. “Well there’s no way you *all* feel that way. Even \*inserts the name of a Black 1L man\* feels this way? But he talks to me! There’s no way you people *always* feel threatened. I mean Florida is racist, but Miami isn’t like that. It’s Miami! I just don’t believe that *all* of you experience racism.” I moved out shortly after. The remaining year was riddled with

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4. CHRISTOPHER PAUL CURTIS, *THE WATSONS GO TO BIRMINGHAM - 1963* (1995).

endless instances of overt or covert racism—a swastika was drawn in the law school library; my friends in Section D profusely argued with them about their incessant need to say “N\*gga;” a fellow friend had to yell, scream, and cry for the professor and students of her Constitutional Law class to understand that, although *Dred Scott* says words like “Mulatto” and “Negro,” it is not okay to use such words, especially in the presence of Black and mixed race classmates. Out of 90 students in my section, I was one of five Black students, and for law school, that is a pretty large number. However, I was the only Black American woman in my section, and I always had to be the voice for “the people.” I raised my hand every chance I got and made my voice known because if I didn’t—who would? Perhaps one of the most interesting times was in Criminal Procedure, where my Professor asked a student if it was okay for police to pull Black men over based on their race alone. It was the fourth question that the professor had asked this student, and the student had not stumbled once. However, this question appeared to stump the student. It was a simple question—is it okay for police to pull over a vehicle solely on the race of the driver? “Uh, um, well I mean there may be reasons . . .” The awkward silence grew deafening as I turned in my seat to look at the student. “Let me stop you right there,” the professor said, “the answer is no. It is never okay to profile a driver based solely on race.” My professor continued, but I met the gaze of the Black men in my class who appeared absolutely stupefied by the interaction. In a friend’s Contracts class, the professor attempted to teach the class about “certain types of people who abuse their kids.” After a repeated mention of “those people,” a student spoke up and asked, “Professor, exactly *what* kind of people are you talking about.” Ever so boldly, the professor replied, “Oh, Haitians definitely. Yeah, they beat their kids because they just don’t know how to deal with them. I see it all the time; they are an abusive people.” There was a Haitian student in the class who walked out. It was hard to grasp such an atmosphere when administrators would publicly admire and openly gush over the diversity at the school as a “beautiful mosaic” of Black and Brown faces (yes, this was actually said). For Black law students to be reduced to an art piece that makes the school more “pretty” is to miss the mark of our existence in these spaces.

For these reasons and others, I transferred to the University of Minnesota’s law school. This time I knew that I would be walking into a new atmosphere of passive racism and aggression. I had received my second acceptance letter from Minnesota three days after George Floyd was murdered by Minneapolis police. Riots had begun across the country, and I couldn’t focus on petitioning for law review without

feeling like a failure to my people. For Black Americans, the televised revolution was now, and due to the current Coronavirus pandemic, the world was forced to pay attention. All eyes were on Minneapolis, where thousands took to the streets and rioted, fed up from the murder and residual resentment from the murder of Philando Castille by St. Paul police a few years earlier. Here in Minneapolis, my blackness is a distant cousin twice removed but with all the same ancestral flaws. The air here is thick with the tension of the aftermath of what some have described as the new aged civil rights movement, and Black Americans can only hope educational institutions are paying attention. Before I came to Minnesota, I asked to speak directly to the Black students. I wanted the raw truth about Minnesota Law, and I got exactly that. "There's just not enough Black students. I think BLSA had seven members last year. There are virtually no Black faculty members. If you come here, you'll be sure to succeed. The school is really pushing for more diversity." But "more diversity" is an understatement. In many of my classes, I am the *only* Black person. It is so glaringly obvious that people have begun to recognize me by name, though they have never formally met me in person. In two of my classes, I am one of two Black students, and the other student is also a transfer. But this is a typical law school classroom. In a lot of them, you can't even find *one* Black student. In my first month at Minnesota, a sit-in was organized to protest a fourth-year medical student who defaced the George Floyd memorial in an attempt to dehumanize the Black Lives Matter movement.

So, what's the point of my life story? To navigate the world as a Black person is to navigate this essay and feel the same uneasiness deep in the pit of your moral compass that I felt at fourteen, at seventeen, and at twenty-two. I share my life story to say that higher education is not simply a few extra years in school for Black people. It is conscious awareness that we will be voluntarily placing ourselves into violent situations for the next however many years because higher education was not made for Black people. We have no safe space, no protection from constant mental warfare from them, even when we are just as good as them. "We need more Black people!" higher institutions say but make no effort to protect the Black people they seek to bring into such a violent space. Perhaps the reluctance of Black students to attend predominantly White institutions is due to the lack of protection we have when we arrive. A lifetime of educators doubting our capabilities and classmates subtly impaling their academic heels into our foreheads, shoving us further down the ladder back into poverty and struggle, manifests into the glaring rhetoric we face in law school.

“You do not belong here, but we will bring you here because it makes *us* look good. Good luck finishing, though.” Such an issue is systemic and does not cease to exist because a city or state is viewed as “progressive.” We grow up fighting twice as hard to be half as good, but when we are just as good, we are given a steeper hill to climb. Achieving the feat of “being good” is no longer enough. Law schools recognize that we can be *just as good*, and also recognize that our ancestral trauma makes us *just as tough*, if not tougher, to face the lackluster environment they choose to thrust us into. It would be asinine to place all the blame on higher education; after all, they are following the same path conditioned by our elementary, middle, and high schools, as well as some undergraduate colleges.

But in 2020, law schools are *finally* listening, or so they allege. They are vowing to listen to Black voices more, to increase Black enrollment, to create safe spaces for Black students. If my incomplete, less than box office breaking, autobiography were to be any indicator, it is that higher education should attempt to foster a learning environment where professors and students do not have free reign to practice covert racism and prejudice in the faces of the two Black students in the class just because they can. It is that the administration should not tolerate such divisive or offensive tactics and hide behind the rhetoric of “Oh, well that’s how it was said in the textbook.” Law schools can usher in as many Black people they can find until the school is flooded with a “beautiful mosaic,” but without administrative and curriculum changes, law schools are asking Black people to participate in a three year costly and unethical study of just how much academic violence this year’s cohort of Black students can face before we send them off to a nationwide profession where only *five* percent of the practicing attorneys are Black.

#### B. SAMIA OSMAN

For as long as I can remember, the ideal for an immigrant family’s success came from whether or not their kids became doctors, lawyers, engineers, or businessmen and women. To some, that may seem like too much pressure to put on a child’s shoulders. But for me, it was the guiding principle I lived by during my childhood. A necessary regiment of classes, religious studies, and cultural activities that helped mold me into a new person after the realities of being a refugee. This routine became a constant feature of my life that I could understand and follow without question or confusion. Looking back, I now understand that was because the rest of my life was full of questions and confusion. I constantly felt alone every time I left my little cultural

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bubble. Criticized and ostracized for the clothes I wore, the food I ate, the god I worship, and the color of my skin. But none of these were within my power to change without incredible insult to my culture, religion, and the foundation of my identity. I retreated to my communities to the point of extreme isolation. In a state like Minnesota, where White people and White culture is the norm, I somehow managed to avoid any meaningful contact with those outside of my culture and community aside from necessary communications.

One can imagine the culture shock I felt when I went to a primarily White institution for college. Until that time, I had been sheltered and had grown to love and accept who I was. However, I also rarely had to navigate who that person was in relation to American culture. College was the first time people turned to me with the expectation that I knew what racism and Islamophobia were and could handle them. I was expected to educate others on what I did not understand. Suddenly, I found myself completely lost on how parts of my identity interacted with American culture. I knew I was a Somali woman, but I did not understand that also meant I was a Black woman.

So, I did what I usually do when I don't understand something. I read. I questioned. I listened and I learned. I stumbled and felt overwhelmed. But most of all, I found my communities—those who had also stumbled, felt alone, confused, and ostracized for no more than living. Before long, I finally felt like I understood myself as a Black woman in this country. It was during that realization that I had to also take on all the burden of being a Black woman in this country. The disrespect, stereotyping, judgment, and constant expectation of failure. So why am I telling you this? Why am I writing this?

Despite these experiences in learning what it means to be who I am, I am incredibly proud of the journey I took to find myself. A journey that led to a top tier law school. But my journey is not unique. By many standards, it is the norm of being a Black kid in America. The fight to love yourself and excel in life against all odds, against all the people and systems that tell you are not good enough and cannot be good enough to sit at the table. A fight that includes superhuman patience and forgiveness. A fight that is driven by our community. Because without community, I would have believed every teacher who told me I was bright but to have backup plans when I said I wanted to be a doctor or lawyer. I would have stopped when advisors kept ignoring me even when it was obvious I was struggling in college. I would have believed the people who looked at me and replied that law school isn't as easy as I think it is when I asked about the LSAT or for study materials. I would be hurt by the dismay that fills people's voices

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when I tell them I am a law student. But instead, I choose to go back to the schools and communities I come from. To be their mentor, their friend, and their community so that when the world tells them they cannot do it, I showed them my incredible Black mentors, friends, and colleagues who will show that they can because we did.

C. JUSTICE C. SHANNON

When I was in the ninth grade, there was a student at lunch that would not stop saying nigger. One day, when he would not stop saying nigger at lunch I told him to stop saying it again, and he refused. I looked to my left and there was a student eating an apple with his head down, avoiding the clearly uncomfortable moment. I took the half-eaten apple out of his hands, and I rubbed it in the cursing student's face. He and I had a stare down for a moment before he stood up and left.

Racism in Minnesota is White students deciding to have a "ghetto spirit day," wearing gold chains, doo-rags and sagging their pants. This led to Black students putting up posters demanding that the school administration do better. The police came to take down the posters. The students went to reclaim the posters from the police. The police claim that one of the students put his hands on them, and two Black students were charged with improper conduct. Yes, racism in Minnesota is two Black students getting charged with improper conduct after White students wear modern-day blackface to school.<sup>5</sup>

Racism in Minnesota is White children wanting to know why they can't say nigger or nigga because "there were no lynchings in Minnesota," even though there were. But they'll never know that because our public schools don't properly teach or address Minnesota's history with racism.

Racism in Minnesota is someone having the audacity to call me a nigger at midnight because I took too long to cross the crosswalk. How safe they must have felt in Coon Rapids, Minnesota, in their lifted F-150 at midnight, without another car on the road and no one in sight to accost them for racial discrimination of a 16-year-old. They must have felt empowered to say whatever came to mind, like a 13-year-old with an XBOX live headset.

Racism in Minnesota is a White officer asking me why I am so uncomfortable when I got pulled over the month after George Floyd

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5. Tim Post, *Two Hopkins High School Students Charged After Protest Over Alleged 'Ghetto Spirit Day'*, MPRNEWS (Apr. 17, 2013), <https://www.mprnews.org/story/2013/04/17/two-hopkins-high-school-students-charged-after-protest-over-alleged-ghetto-spirit-day> [<https://perma.cc/P9PR-GB89>].

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was murdered. Plainly stated, racism in Minnesota is ignoring the elephant in the room when police pull Black Minnesotans over, leaving us to address the elephant on our own.

Racism in Minnesota is Lake Calhoun finally getting its name changed, but not without significant resistance. The name was changed to Bde Mka Ska, but only after an organization named “Save Lake Calhoun” sued the state over the change and Minnesota state senators sought to preserve the name of a slaveholder as a reminder of the racism underlying Minnesota’s history.<sup>6</sup> This is racism in Minnesota, it’s constant resistance to removal of tribute to slaveholders and racists in 2020, even though white people swiftly removed the Dakota name, Bde Mka Ska, when they moved to Minnesota in the 1800s.<sup>7</sup>

Racism in Minnesota is having a city named Coon Rapids, because nobody acknowledges that ‘coon’ is a word used to dehumanize Black people by comparing them to racoons before lynching them.

Racism in Minnesota is Philando Castille being killed in his car by a police officer in 2016. Then in response, the University of Minnesota Law School does nothing, and in fact the law school enrolled the fewest Black law students of any high ranking law school in the country for the next three years. This failure only enables the cycle to repeat by keeping the number of Black lawyers who can fight for policing reform limited. Racism in Minnesota is George Floyd being killed by a police officer three years after Philando Castille. This is not to say the University’s failure to enroll more Black students killed George Floyd. This is to say the failure to enroll more Black students keeps the population that is most proximate to the cause from fighting for the cause, which can only be seen as stifling progress towards that cause.

Racism in Minnesota looks like public schools that are suspending Black students at a rate that is fifteen percent greater than White students. Then everyone throws up their hands and wonders why the Black students give up on the education system before they can even apply for postgraduate education opportunities. If the public education system seemingly had more interest in punishing you than educating you, why would you pursue public education?

Racism in Minnesota is being one of the top ten states for White high school graduation rates and the bottom ten for Black high school graduation rates. Minnesota public universities have some of the

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6. Elizabeth Shockman, *Calhoun or Bde Maka Ska? Lake Name in Limbo*, MPRNEWS (Apr. 30, 2019), <https://www.mprnews.org/story/2019/04/30/calhoun-or-bde-maka-ska-lake-name-in-limbo> [<https://perma.cc/HPB9-2W7B>].

7. *Id.*

lowest graduation rates for Black students in the country. If you ask me, this can only be attributed to the very same racism that allows cities to be named Coon Rapids.

## II. INTERVIEWS AND SURVEY RESULTS

In this Part, we discuss the experiences of three current students and two alumni of Minnesota Law all of whom identify as Black. These respondents came to us after we sent requests for interviews and survey responses to approximately thirty Black-identifying alumni and approximately twenty Black-identifying current students. We ultimately conducted one interview and received four survey responses. Participants were told that the information they shared would be used in a *Minnesota Law Review* article aimed at demonstrating the barriers and negative experiences facing Black law students in Minnesota and how such experiences affect their education and careers. The survey responses were collected anonymously. While this sample is not necessarily representative of all Black-identifying Minnesota Law alumni, these responses provide important insight into their experiences while in law school and in the Minnesota legal market.

The questions asked both in the survey and in the interview were organized into four sections: (1) experiences before enrolling in law school, (2) experiences while enrolled at Minnesota Law, (3) experiences after graduation, and (4) impressions of the Minnesota legal market. In section one, we collected information on participants' inspiration for applying to law school, their communities' responses to their choices to attend law school, their exposure to lawyers or law students while growing up, support and encouragement from their communities to attend college and law school, and methods for or barriers to preparing to take the LSAT. In section two, we collected information on students' interactions and discussions with classmates, professors, and staff members regarding their sense of community, experiences with class discussions about race, instances of blatant or covert racism, the job search process, and students' overall impression of their time at Minnesota Law. In section three, we collected information on why graduates chose or did not choose to stay in Minnesota post-graduation, and whether they would encourage other students to do the same. In section four, we asked participants whether they believed the state of Minnesota struggles to attract and retain Black attorneys and what it needs to do to increase Black law student enrollment and retention of Black law school graduates. The responses we received demonstrated significant diversity in the



thoughts and experiences of Black individuals before, during, and after their time at Minnesota Law.

A. EXPERIENCES BEFORE ATTENDING THE UNIVERSITY OF MINNESOTA LAW SCHOOL

Our findings indicate that a lack of understanding of the law school application process, lack of exposure to legal professionals, lack of community support, and lack of encouragement to attend college or build resumes are barriers which may contribute to the low number of Black law students in Minnesota. Our research only presents findings from students who ultimately made it to law school, but those discoveries indicate that many of them still encountered these barriers. Therefore, further research is needed to understand why certain Black-identifying students who are interested or might have an interest in pursuing legal education are better positioned to overcome these barriers than others.

Lack of exposure to the legal field in general was also a point of common discussion among the respondents. Out of the five respondents we interviewed or surveyed, only two had considered a career in the legal profession before graduating from high school.<sup>8</sup> And none of the five respondents could remember an instance where someone explained the law school application process to them in high school.<sup>9</sup> One respondent who had considered a legal career before graduating high school reported that they had independently learned about the application process online.<sup>10</sup> Only one out of the five respondents received this information in college from a pre-law guidance counselor.<sup>11</sup> Further, two out of five respondents had lawyers in their family or in their close community while they were growing up, but only one of those two believed that this factor influenced their decision to attend law school.<sup>12</sup> One respondent reported that their only interaction

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8. Experiences of Black Law Students Research Survey (September 2020) [hereinafter Research Survey]; Anonymous Telephone Interview (September 25, 2020) [hereinafter Anonymous Interview].

9. See Research Survey, *supra* note 8; see Anonymous Interview, *supra* note 8. Respondents in the research survey and interview were each asked: "While you were in high school and/or college did anyone explain the law school application process to you? (i.e., what schools are looking for, how to prepare for the LSAT, when to apply.) If yes, could you anonymously explain the guidance and who provided it?"

10. See Research Survey, *supra* note 8.

11. *Id.*

12. *Id.* Respondents were asked: "Did you know or interact with any lawyers or people in law school while you were growing up? (i.e., family members or family friends). If yes, could you anonymously explain how, if at all, these individuals inspired,

with a member of the legal profession was meeting a judge when they were ten years old.<sup>13</sup>

Our findings further indicate that the opinions and attitudes of those in a potential law student's community may affect their decision to pursue a legal education. The two respondents who had considered a career in the legal profession before graduating from high school also reported experiencing bullying, microaggressions, or doubtful comments from classmates, teachers, or family members about their desire to attend law school. One survey respondent wrote, "[i]n middle school, several of my classmates would make comments that I wouldn't be able to be a lawyer or that it didn't seem like something I would be good at."<sup>14</sup> When asked about the response of their communities when they were accepted to law school, the majority of respondents reported positive reception.<sup>15</sup> However, three respondents received comments that could be classified as microaggressions<sup>16</sup> regarding the caliber of the school relative to the respondent's perceived level of intelligence.<sup>17</sup> One respondent wrote that members of their community "congratulated me but then sounded genuinely almost insultingly surprised when they found out I would be attending MN Law," using a tone which "implied they wouldn't have guessed that I could have gotten into that school."<sup>18</sup> Another respondent wrote, "[a]cquaintances generally were shocked that I got into a Top 20 law school."<sup>19</sup> In one of our interviews, the respondent described an instance when she was locked out of her car and sought the help of a stranger to retrieve her keys, but the stranger asked to see her ID when he noticed the Minnesota Law sticker on her car because he didn't believe she attended the school.<sup>20</sup> These types of microaggressions may not be considered blatantly racist, but they demonstrate

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influenced, or assisted you in your journey to law school?"

13. *Id.*

14. *Id.* Respondent was asked: "Had you considered a career in the legal field before graduating from high school? If yes, did you ever experience any bullying, doubtful comments, or microaggressions from a classmate, teacher, family member, or any other person about your desire to attend law school? Would you be willing to anonymously share a description of your experience(s)?"

15. *Id.* Respondents were asked: "Can you describe the reactions from people once they learned you were accepted to law school?"

16. A microaggression is a "comment or action that subtly and often unconsciously or unintentionally expresses a prejudiced attitude toward a member of a marginalized group." *Microaggression*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2003).

17. See Research Survey, *supra* note 8.

18. *Id.*

19. *Id.*

20. See Anonymous Interview, *supra* note 8.

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assumptions and ideas that Black students may face when entering a profession in which they are extremely underrepresented.

So why did these students ultimately apply to and choose to attend law school despite these barriers? Due to the scope of our research, we are unable to assess the reasons why other Black-identifying high school and college students in Minnesota do not pursue legal education. However, one commonality across all five survey respondents was the positive encouragement from those in their communities to attend college.<sup>21</sup> Of those four students, three were specifically encouraged to build their resumes during high school and college.<sup>22</sup> Our findings indicate that for potential students who did not receive the same encouragement to pursue a college education or to seek out resume-building experiences, the barriers discussed above may have been enough to deter them from pursuing law school completely.

#### B. EXPERIENCES WHILE ENROLLED AT THE UNIVERSITY OF MINNESOTA LAW SCHOOL

While there were many common points of discussion regarding barriers faced by Black students prior to applying to law school, the respondents had varying experiences once they began their legal education.<sup>23</sup> Responses varied with regard to the overall sense of community at the school and instances of racism or microaggressions on campus. For example, four out of five respondents indicated they struggled to feel a sense of community while enrolled in the law school.<sup>24</sup> The one respondent who felt they had a strong community at the law school was an alumna who graduated from Minnesota Law in 2013.<sup>25</sup> She discussed several factors which contributed to her

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21. See Research Survey, *supra* note 8. Respondents were asked: "When you were in high school, did anyone encourage you to attend college?"

22. *Id.* Respondents were asked: "While you were in high school and/or college, did anyone encourage you to seek out opportunities to build your resume or explain the importance of building your resume?"

23. It should be noted that some of these experiences may not be representative of all Black student experiences at Minnesota Law due to the low response rate from alumni and the shifts in student and faculty demographics over time.

24. See Research Survey, *supra* note 8. Respondents were asked: "Did you feel a sense of community at the law school? Could you please anonymously explain why or why not?"

25. Between 2011 and 2013, Black student enrollment at the University of Minnesota Law School totaled 27, 27, and 21 students, respectively. Since 2013, however, the total number of Black students enrolled has consistently decreased down to just four students in the 2019–20 academic year. *ABA Required Disclosures*, AMERICAN BAR ASSOCIATION, <http://www.abarequireddisclosures.org/Disclosure509.aspx> [<https://perma.cc/WFM8-YNNL>].

sense of community, including: the administration's openness to addressing the underrepresentation of Black students at the school, the support and guidance Black faculty provided to the Black law students, the diversity within the population of Black students at the school, and the activeness of the Black Law Students Association.<sup>26</sup> One respondent expressed that she was surprised to hear about the current lack of Black faculty at the law school. She explained that a Black faculty member, who has since left the school, served as an adviser and mentor to the Black Law Students Association by creating space for difficult conversations and inviting them to social and community events outside of the school.<sup>27</sup> When asked whether they felt the school administration cared about the Black law student community, three out of the five respondents answered in the negative.<sup>28</sup> One respondent said it seemed as though professors care, but had not formed an opinion with respect to the administration as a whole and another respondent said the school was very open to discussing ways to improve diversity and community on campus.<sup>29</sup>

In stark contrast, the three current students who responded to the survey all expressed that they did not feel a sense of community at the school.<sup>30</sup> One student wrote that the presence of student "cliques" prevented a sense of community.<sup>31</sup> One respondent, who even reported she felt a sense of community while at the school, indicated a similar feeling of being separated from other non-Black students.<sup>32</sup> Specifically, she described one incident which exemplified to her the cultural difference between Black and White law students at the school.<sup>33</sup> One day, several Black students were having a casual conversation in the courtyard about "something unimportant" and a White student approached them and asked if everything was okay because the Black students were being so loud. Then, when the Black students

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26. See Anonymous Interview, *supra* note 8.

27. *Id.*

28. See Research Survey, *supra* note 8. Respondents were asked: "Did you feel that the law school cared about you and your community? Could you please anonymously explain why or why not?"

29. *Id.*

30. See Research Survey, *supra* note 8. Respondents were asked: "Did you feel a sense of community at the law school? Could you please anonymously explain why or why not?"

31. *Id.*

32. See Anonymous Interview, *supra* note 8.

33. *Id.*

looked around the courtyard, they noticed all of the White students watching them.<sup>34</sup>

Our findings indicate that what this respondent and her friends experienced that day was not an isolated incident at Minnesota Law. Three out of four survey respondents indicated they had experienced microaggressions from a classmate, professor, or staff member at the law school, and one out of four respondents had experienced an incident of blatant racism.<sup>35</sup> One respondent gave an example of a microaggression which occurred regularly throughout their time at the law school. Often in their classes, students would “bring up other issues whenever racism is the topic at hand . . . [a]s if the discussion of racism implies that now is the perfect time to discuss solving other issues as well.”<sup>36</sup> Another wrote that they had experienced microaggressions “especially when it came to jobs and grades” but said it was difficult to think of one specific example.<sup>37</sup> One respondent recounted an incident of blatant racism when a fellow student told them that they only received their position at a firm because they were Black. The White student said that “they just hand out positions to diverse students.”<sup>38</sup> When asked whether they had ever been made uncomfortable by a discussion of race in the classroom, one respondent wrote: “There have been several classes where the professor or students would throw around the term ‘the Blacks’ when discussing civil rights cases or other discrimination cases,” and said there were several instances where professors would purposely steer the discussion away from race and would “clearly try to avoid having students participate in [those] conversations.”<sup>39</sup> Additionally, three out of five respondents had, at one time or another, gotten the impression that their contribution to the school’s diversity was one of the reasons they were admitted to the school.<sup>40</sup> One student wrote, “Based on the racial

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34. *Id.*

35. See Research Survey, *supra* note 8. Respondents were asked: “Did you ever experience microaggressions from a classmate, professor, or staff member at the law school? If you are willing, could you please anonymously share a description of your experience?” and “Did you ever experience blatant racism from a classmate, professor, or staff member at the law school? If you are willing, could you please anonymously share a description of your experience?”

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* Respondent was asked: “Were you ever made uncomfortable by a discussion about race in one of your classes? If yes, could you please anonymously explain the experience?”

40. *Id.* Respondents were asked: “Did any faculty, staff, or students ever make you feel as though your contribution to the school’s diversity demographics was the main

demographics of my incoming class and current events, it feels like that was a significant contributing factor.”<sup>41</sup> Another respondent heard comments from their classmates implying they thought diversity was a main factor in the student’s admission.<sup>42</sup> The third respondent inferred this factor from their conversations with admissions staff during the application process.<sup>43</sup>

Despite the prevalence of negative experiences and lack of community at Minnesota Law, only two out of five respondents considered transferring to another law school.<sup>44</sup> Both respondents indicated that the lack of Black students at the school was a significant factor in their consideration of transferring to another school.<sup>45</sup> One respondent wrote, “I came home to Minnesota expecting to find more people with experiences like mine only to find that I am one of a handful of Black students . . . at the law school.”<sup>46</sup> Another wrote, “I was just shocked by the culture at the school,” and indicated they often felt uncomfortable and found it difficult to make friends at the school.<sup>47</sup> One of these respondents wrote that they considered transferring “daily” and at the time the survey was administered had still not decided whether or not they would choose to leave Minnesota Law.<sup>48</sup> The other respondent, however, ultimately made the decision to stay at the school due to promising job prospects and the caliber of the legal education. This response indicates that the culture of Minnesota’s legal market has forced at least one student to compromise their comfort and desire for an inclusive environment in order to secure a job post-graduation.

### C. IMPRESSIONS OF THE MINNESOTA LEGAL MARKET

After collecting data on the individual experiences of University of Minnesota Law students, we wanted to learn more about their impressions of the Minnesota legal market. All respondents answered affirmatively when asked whether they believed Minnesota struggles to

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or only reason you were admitted to the school? If yes, could you please anonymously explain your experience?”

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* Respondents were asked: “Did you ever consider transferring to another law school? If yes, can you anonymously explain why you considered it and why you ultimately chose to stay?”

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

attract and retain Black attorneys.<sup>49</sup> The respondents each posed their own theories for these struggles. One respondent wrote that because “Minnesota is a ‘White’ state in general . . . the pipeline isn’t there to attract Black attorneys to retain them in the first place.”<sup>50</sup> Another posited that the reason firms struggle to retain the attorneys they do attract is because “many of our firms and legal employers lack a critical mass of Black attorneys . . . [so] it’s hard to be the only one.”<sup>51</sup> Another respondent wrote that even though firms in Minnesota openly discuss this issue and their desire to correct it, they are often unsuccessful because “Minnesota is not an appealing destination for out-of-state, well-qualified lawyers.”<sup>52</sup>

All five respondents suggested different programs and initiatives that Minnesota firms and law schools could implement to address the low number of Black law students and attorneys. Three respondents suggested a direct pipeline program targeting Black middle school, high school, and college students in Minnesota.<sup>53</sup> One respondent specifically suggested that Black law students should earn law school credit for “tutor[ing] local Black middle school and high school students,” and noted that this would “create face to face time with soon to be Black lawyers” and “ensure that they are getting the attention they need to learn, apply to college, and study for standardized tests.”<sup>54</sup> Two respondents wrote that the law school needs to increase recruiting efforts outside of Minnesota, focus these efforts on predominantly Black colleges, and increase financial support for Black students.<sup>55</sup> Another respondent suggested that the law school focus more funding on hiring Black faculty.<sup>56</sup>

In sum, our findings demonstrate that Black law students are not a monolith, and thus, Minnesota Law needs to take careful and calculated measures to address the needs of its current and future students. There was significant variance in the experiences, impressions, and overall attitudes of Black students at Minnesota Law. When asked to

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49. *Id.* Respondents were asked: “Do you think Minnesota struggles to attract and retain Black attorneys? Could you anonymously explain why you do or do not hold this opinion?”

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* Respondents were asked: “What do you think the law school or the Minnesota legal field generally need to do in order to increase Black law student enrollment and retention of Black law school graduates?”

54. *Id.*

55. *Id.*

56. See Anonymous Interview, *supra* note 8.

share any additional sentiments, one respondent wrote, “Black students, biracial students, and African students all come from different backgrounds and have extremely different life experiences. So until the school can increase the Black student population we will continue to feel a certain sense of isolation or unfulfillment.”<sup>57</sup> In the first section, we posited that one factor that may distinguish students who pursue law degrees from those who do not may be encouragement to attend college and seek out resume-building opportunities. As all five respondents suggested, in order to close this barrier, law schools should put energy and resources into connecting with Black middle and high school students who may lack this encouragement from members of their communities. By focusing on students before they decide whether or not to attend college, the law school can shape the future generation of prospective law students and drastically expand the pool of applicants. In turn, this will address the barriers and negative experiences we discovered in our research. Increasing the number of Black students at Minnesota Law will begin to correct instances of microaggressions by correcting the stereotypes held by some law students, faculty, and staff. Correcting these microaggressions and instances of blatant racism will prevent the alienation of Black law students and form a more cohesive student body. Continuing to grow the Black law student population will also help diversify the Minnesota legal market by creating a stronger community which will aid in the attraction and retention of Black attorneys and law students. Minnesota Law will need to take direct, purposeful, and sustained action in order to remove educational and social barriers and to foster a more inclusive environment on campus and in the broader Minnesota legal community.

### III. AN EMPIRICAL ANALYSIS OF BLACK STUDENT ENROLLMENT AT THE UNIVERSITY OF MINNESOTA LAW SCHOOL

In the 2019–20 academic year, Black students comprised 0.6 percent of Minnesota Law’s enrolled Juris Doctor (J.D.) student body.<sup>58</sup> Black students at Minnesota Law are disproportionately underrepresented compared to many of the law school’s peers. Minnesota Law has consistently maintained the lowest percentage of enrollment for Black students in the Top 25 ranked law schools since 2017 and in Minnesota since 2014.<sup>59</sup> This Part presents an empirical analysis

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57. See Research Survey, *supra* note 8.

58. ABA Required Disclosures, *supra* note 25.

59. *Id.*



depicting a sobering picture of consistent underrepresentation of Black students and exploring a series of comparisons examining whether the disparities present at Minnesota Law for Black student enrollment are present in peer law schools and educational institutions. At each level of comparison, Black student enrollment at Minnesota Law fails to align with its peers.

#### A. DATA AND METHODOLOGY

In order to examine the nature of disparities in enrollment at Minnesota Law, we analyzed the law school amongst several comparison groups. We considered Minnesota Law amongst its peers in the U.S. News Top 25 Rankings (Top 25),<sup>60</sup> law schools in the state of Minnesota, and American Bar Association (ABA) accredited law schools across the country using annual reports submitted to the ABA by each law school.<sup>61</sup> Enrollment data is annually submitted by law schools to the ABA based on student self-identification of race and ethnicity. Throughout this Part, we compare the percentage of enrollment of a single group of J.D. students within Minnesota Law's J.D. student body to the average enrollment of the same group of students at comparison institutions.<sup>62</sup>

In order to contextualize the law school within the state of Minnesota's educational infrastructure, we analyzed enrollment rates using annual student-level data from the Minnesota Department of Education,<sup>63</sup> high school graduation rates by state on an annual basis using the Common Core of Data from the National Center for Education Statistics (NCES),<sup>64</sup> and suspension rates within Minnesota's public education system.<sup>65</sup> Next, we compared Minnesota Law to the broader institution of the University of Minnesota by analyzing enrollment statistics for the undergraduate and graduate student populations using the Integrated Postsecondary Education

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60. *2021 Best Law Schools*, U.S. NEWS & WORLD REP., <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings>.

61. See *ABA Required Disclosures*, *supra* note 25.

62. For example, we compare the enrollment of Black students at Minnesota Law as a percentage of the law school's student body and compare this percentage to the average percentage of enrollment of Black students at the top 25 highest ranked law schools.

63. *Student*, MINN. DEP'T OF EDUC., <https://public.education.mn.gov/MDEAnalytics/DataTopic.jsp?TOPICID=2> [<https://perma.cc/K2YD-RZ5S>].

64. *Common Core of Data*, NAT'L CTR. FOR EDUC. STATS., <https://nces.ed.gov/ccd/> [<https://perma.cc/ZE5G-XT3S>].

65. *Discipline Data*, MINN. DEP'T OF EDUC., <https://public.education.mn.gov/MDEAnalytics/DataTopic.jsp?TOPICID=133> [<https://perma.cc/8LTL-6CX2>].

Data Systems (IPEDS) from the NCES.<sup>66</sup> Finally, we compared Minnesota Law, the broader University of Minnesota, and the Minnesota public school system to Iowa and Wisconsin using the same groups.<sup>67</sup>

B. A COMPARISON OF BLACK STUDENT ENROLLMENT AT THE UNIVERSITY OF MINNESOTA LAW SCHOOL TO TOP 25 LAW SCHOOLS AND MINNESOTA LAW SCHOOLS

In the 2019–20 academic year, Black students comprised 0.6 percent of Minnesota Law’s student body, totaling four students in a school of 667.<sup>68</sup> Black student enrollment of 0.6 percent in 2019 is the most recent in a cascade of declining enrollment beginning in 2015.<sup>69</sup> Minnesota Law has seen Black student enrollment decrease from 3.59 percent in 2011 to 0.60 percent in 2019, as depicted in Figure 1.<sup>70</sup> While the law school celebrates improvements in overall student diversity and its successful efforts to enhance the racial and ethnic equity of the school,<sup>71</sup> Minnesota Law enrolled fewer Black students than any of its peer schools in the Top 25 in 2014, 2017, 2018, and 2019.<sup>72</sup> Average enrollment for Black students in the Top 25 hovered around six percent from 2011 to 2020.<sup>73</sup> The smallest percentage of Black student enrollment at any law school in the Top 25, excluding Minnesota Law, was 1.61 percent, and only two institutions (Arizona State University and the University of Minnesota) saw Black student

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66. *IPEDS Survey Components*, NAT’L CTR. FOR EDUC. STATS., <https://nces.ed.gov/ipeds/use-the-data/survey-components> [<https://perma.cc/X6XB-K3GX>].

67. For data on enrollment at the University of Iowa and University of Wisconsin law schools, see *ABA Required Disclosures*, *supra* note 25. Data on enrollment in Iowa public schools was gathered from the Iowa Department of Education. See *Education Statistics*, IOWA DEP’T OF EDUC., [https://educateiowa.gov/data-and-reporting/education-statistics#Student\\_Demographic\\_Information](https://educateiowa.gov/data-and-reporting/education-statistics#Student_Demographic_Information) [<https://perma.cc/T7CQ-QK8Q>]. Data on enrollment in Wisconsin public schools was gathered from the Wisconsin Department of Public Instruction. See *WISEdash Data Files by Topic*, WIS. DEP’T OF PUB. INSTRUCTION, [https://dpi.wi.gov/wisedash/download-files/type?field\\_wisedash\\_upload\\_type\\_value=Enrollment](https://dpi.wi.gov/wisedash/download-files/type?field_wisedash_upload_type_value=Enrollment) [<https://perma.cc/AT7T-WHXJ>].

68. See *ABA Required Disclosures*, *supra* note 25.

69. *Id.*

70. *Id.*

71. See generally *Minnesota Law’s Commitment to Social Justice*, UNIV. OF MINN. L. SCH., <https://www.law.umn.edu/admissions/equity-diversity-inclusion/commitment-racial-justice> [<https://perma.cc/5FCL-PF4T>]; Todd Nelson, *Law School Expands Racial Equity and Justice Offerings*, UNIV. OF MINN. L. SCH. (Oct. 9, 2020), <https://www.law.umn.edu/news/2020-10-09-law-school-expands-racial-equity-and-justice-offerings> [<https://perma.cc/3VH5-CRQ5>].

72. See *ABA Required Disclosures*, *supra* note 25.

73. *Id.*

enrollment below two percent during this period. In stark contrast, White students are overrepresented at Minnesota Law and the percentage of White student enrollment has increased since 2014 from 65.33 percent to 72.85 percent in 2020.<sup>74</sup> Minnesota Law also diverges from its peers in the Top 25 where the average enrollment percentage of White students has remained relatively constant at just below 60 percent since 2011.<sup>75</sup> While Minnesota Law has either remained close to the average enrollment percentage as its peers in the Top 25 in many racial and ethnic categories as depicted in Table 1, enrollment trends of Black and White students display significant disparities at Minnesota Law.<sup>76</sup>

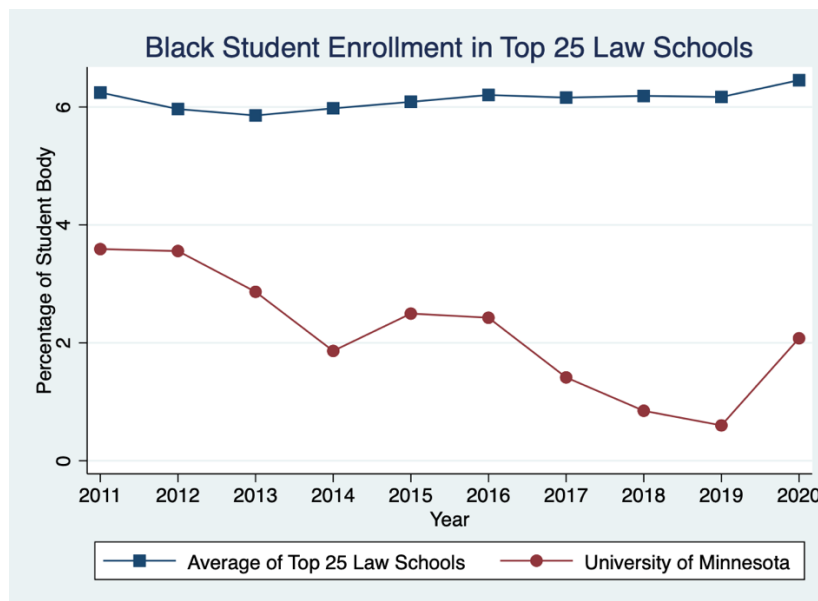


Figure 1.<sup>77</sup>

74. *Id.*

75. *Id.*

76. *Id.*

77. *ABA Required Disclosures, supra* note 25.

**Table 1. Student Enrollment Percentage at the University of Minnesota Law School Compared to the Average Percentage of Top 25 Ranked Schools<sup>78</sup>**

Self-Identified Race or Ethnicity	2012	2013	2014	2015	2016	2017	2018	2019	2020
Black or African-American (Average)	3.56 (5.97)	2.86 (5.86)	1.86 (5.98)	2.50 (6.09)	2.43 (6.20)	1.41 (6.16)	0.85 (6.19)	0.60 (6.17)	2.08 (6.46)
White (Average)	68.91 (58.16)	66.71 (59.24)	65.33 (58.53)	67.08 (58.24)	68.80 (59.79)	70.67 (59.56)	73.22 (59.51)	75.26 (59.76)	72.95 (59.75)
Asian (Average)	9.62 (10.43)	8.73 (10.29)	9.17 (10.38)	8.74 (10.44)	7.45 (10.05)	6.18 (9.56)	5.59 (9.40)	4.95 (9.53)	4.30 (9.71)
Hispanic of any race (Average)	2.90 (8.01)	1.91 (7.90)	2.01 (8.12)	1.56 (8.08)	2.08 (8.60)	3.89 (9.15)	5.25 (9.62)	6.75 (9.83)	8.46 (10.33)
Native Hawaiian or Other Pacific Islander (Average)	0 (0.08)	0 (0.04)	0 (0.11)	0 (0.07)	0 (0.08)	0 (0.09)	0.17 (0.06)	0.15 (0.06)	0.15 (0.06)
American Indian or Alaska Native (Average)	1.05 (0.53)	0.82 (0.52)	0.86 (0.54)	0.78 (0.55)	0.52 (0.51)	0.53 (0.41)	1.12 (0.37)	0.15 (0.35)	0.30 (0.60)
Nonresident (Average)	6.06 (3.82)	9.55 (4.68)	12.03 (5.21)	11.23 (6.25)	9.53 (6.02)	10.25 (6.57)	9.32 (6.50)	7.80 (6.19)	6.68 (5.53)

78. ABA Required Disclosures, *supra* note 25.

Minnesota Law has recently touted its success in reducing some of these disparities during the 2020–21 academic year.<sup>79</sup> The school's administration stated that, "[s]ince 2016, [the law school's] percentage of students of color (American Indian, Asian, Black, and Latino combined) has risen from 13% in 2016 to 24% of this fall's incoming class."<sup>80</sup> The increased diversity of the first-year class is cause for some enthusiasm and relief, with Black student enrollment increasing to 4.27 percent.<sup>81</sup> Yet even with this drastic increase, Minnesota Law still maintains the fourth lowest percentage of first-year Black students in the Top 25.<sup>82</sup> Similarly, Minnesota Law has the second-lowest percentage of Black students and the highest percentage of enrolled White students in its J.D. program amongst the Top 25.<sup>83</sup> While the more diverse representation of the law school's incoming class is certainly one step into the right direction, this single year's divergence from the trend of previous years, as illustrated in Table 2, does not guarantee a long-term solution to the years of decreasing enrollment for Black students.

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79. *Dean Garry Jenkins Responds to the Open Letter from Students*, UNIV. OF MINN. L. SCH. (Aug. 19, 2020), <https://www.law.umn.edu/news/2020-08-19-dean-garry-jenkins-responds-open-letter-students> [<https://perma.cc/6N6B-H8TX>].

80. Based on the recently released 2020–21 ABA disclosures, this number is roughly 25 percent, rather than 24 percent. *See ABA Required Disclosures*, *supra* note 25.

81. *Id.*

82. *Id.*

83. *Id.*

**Table 2. First-Year Student Enrollment & Percentage at the University of Minnesota Law School<sup>84</sup>**

Self-Identified Race or Ethnicity	2012	2013	2014	2015	2016	2017	2018	2019	2020
Black Student Enrollment (Percent of First-Year Class)	4 (1.95)	2 (0.90)	2 (1.04)	5 (2.87)	2 (1.14)	1 (0.51)	2 (0.90)	2 (0.83)	9 (4.27)
Enrollment of Students of Color (Percent of First-Year Class)	42 (20.49)	37 (16.74)	37 (19.17)	27 (15.52)	25 (14.20)	31 (15.66)	35 (15.70)	41 (17.08)	54 (25.59)
First-Year Class Enrollment	205	221	193	174	176	198	223	240	211

Discrepancies in enrollment of Black students at Minnesota Law are not limited to comparisons with our peers in the Top 25 but extend to comparisons with law schools in Minnesota. Between 2011 and 2013, Black students were enrolled in Minnesota Law at rates that mirrored the average Black student enrollment at law schools in Minnesota, as depicted in Figure 3.<sup>85</sup> However, beginning in 2013, Black student enrollment at Minnesota Law declined sharply while average Black student enrollment at other law schools in Minnesota began to rise.<sup>86</sup> Between 2013 and 2018, the average Black enrollment at law schools in Minnesota increased from 2.84 to 4.63 percent.<sup>87</sup> At the same time, Black student enrollment at Minnesota Law decreased from 2.86 to 0.85 percent.<sup>88</sup> While Minnesota Law is the highest ranked law school within Minnesota, the discrepancies between Black student enrollment between law schools in Minnesota are not due to distinctions in admissions standards. As shown in Figure 1, Black student enrollment at Top 25 law schools has remained constant since 2011, demonstrating that Black students can and do gain admission at highly-ranked schools. Black students also remain attracted to

84. *ABA Required Disclosures*, *supra* note 25.

85. From 2011 to 2015, there were four ABA-certified law schools in Minnesota: The University of Minnesota Law School, The University of St. Thomas School of Law, William Mitchell College of Law, and Hamline University School of Law. In 2016, William Mitchell and Hamline University merged to form Mitchell Hamline School of Law. See *ABA Required Disclosures*, *supra* note 25.

86. *Id.*

87. *Id.* This average incorporates the precipitous drop at Minnesota Law. Even with substantial decreases in Black student enrollment at Minnesota Law, average enrollment of Black law students in Minnesota increased.

88. *Id.*

Minnesota law schools as indicated by increased enrollment in Minnesota since 2011. These comparisons illustrate that Black students simply feel unwelcome or uninterested in attending Minnesota Law.

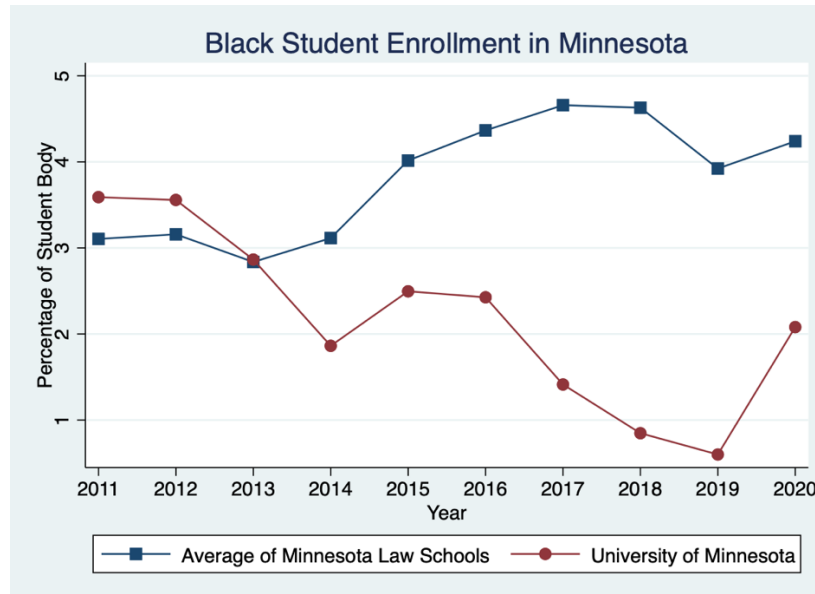


Figure 3.<sup>89</sup>

When we extend our analysis to all ABA-accredited law schools, the discrepancies only expand. From 2011 to 2020, Black students comprised between seven and nine percent of the average law student population across all U.S. law schools.<sup>90</sup> During this period, the University of Minnesota's Black student enrollment declined while the average of Black student enrollment across all U.S. law schools increased.<sup>91</sup> By 2019, the enrollment gap between Black students at Minnesota Law and the average for U.S. law schools reached seven percentage points, doubling from only eight years earlier, when the gap was roughly 3.5 percentage points.<sup>92</sup> In 2019, only four of the 203 ABA-accredited law schools had a smaller percentage of Black student enrollment than the University of Minnesota.<sup>93</sup>

89. *ABA Required Disclosures*, *supra* note 25.

90. *Id.*

91. *Id.*

92. *Id.*

93. Two schools, the University of Puerto Rico and the Pontifical Catholic University of Puerto Rico, each enrolled zero Black students. The University of Wyoming, with

Whether the comparison is specific to Minnesota's peer schools within the Top 25, the state of Minnesota, or to the entire ABA-accredited law school community, Minnesota Law demonstrates a serious failure to attract Black students and create a law school environment where Black students are welcome and valued in the same way as other students.

C. DISPARITIES IN BLACK STUDENT ENROLLMENT WITHIN THE CONTEXT OF EDUCATION AND SEGREGATION IN MINNESOTA

The disparities in Black student enrollment at Minnesota Law are not isolated. They are rooted in an underlying educational framework within the United States and Minnesota that continues to restrict the opportunities available for many Black students. Minnesota's state public school system, including the University of Minnesota, depicts a system of disparity in achievement and success for Black students. In the 2017–18 academic year, Minnesota had the second lowest high school graduation rate in the country for Black students at just 67.40 percent.<sup>94</sup> This graduation rate is more than twenty percentage points lower than Minnesota's White high school students, who graduated at a rate of 88.40 percent.<sup>95</sup> The graduation rate for Black students was ten percentage points lower than the national average of 77 percent, while the graduation rate for White students was equivalent to the national average of 88 percent.<sup>96</sup>

Black students in Minnesota public schools also receive disproportionately high disciplinary actions.<sup>97</sup> Between 2014 and 2018, the enrollment percentage of Black students in Minnesota public K-12 schools was between ten and eleven percent, yet these students experienced between 38 and 40 percent of the disciplinary actions.<sup>98</sup> White students accounted for between 65 and 70 percent of the student

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0.44 percent, and the University of Nebraska, with 0.51 percent, were the two other lowest ranking schools in terms of Black student enrollment. This follows the trend from recent years: in 2018, the University of Minnesota had the seventh smallest percentage of Black student enrollment, and in 2017, it had the fourteenth smallest percentage of percentage. *Id.*

94. *Student, supra* note 63.

95. *Id.*

96. While the graduation rate for Black students in Minnesota has been slowly decreasing from 57.80 percent in 2012 and 62 percent in 2013, these rates continue to lag far behind the rest of the country. *Common Core of Data, supra* note 64.

97. A disciplinary action for purposes of this Article is defined as an "out of school suspension for one day or more, expulsion, or exclusion." *Discipline Data, supra* note 65.

98. *Id.*



population, but made up between 34 and 37 percent of disciplinary actions.<sup>99</sup> Students who are suspended at higher rates are likely to experience substantial reductions in academic achievement, and evidence is ambiguous as to whether suspensions are an effective way to discipline students.<sup>100</sup> This reduction in opportunity for many Black students at the middle school and high school level is reflective of the broader history of racism within Minnesota's educational framework and inhibits more equitable enrollment of Black students at the undergraduate and graduate levels.

These disparities within Minnesota are indicative of larger trends toward increasing inequality, racism and segregation within the Minneapolis-St. Paul community and Minnesota.<sup>101</sup> The culture of racism and segregation continues to pervade life for Black Minnesotans in housing, transportation and policing, amongst other areas. As one example, the Twin Cities and the state of Minnesota now exhibit some of the widest racial disparities in the country:

Recent data show alarming gaps between whites and non-whites in income, unemployment, health, and education. Poverty rates for black Minnesotans are more than four times those for whites while household incomes for blacks are less than half of those for whites; reading proficiency rates for black students are less than half those for whites in most school grades and years; incarceration rates for blacks are 20-25 times greater than for whites; and black unemployment rates are two to three times those for whites. All of these disparities put the region and state near the bottom of national rankings.<sup>102</sup>

Systemic reductions in required levels of affordable housing for suburban areas allowed "intentionally racially segregated schools to

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99. These disparities in discipline have been the subject of action by the Minnesota Department of Human Rights. Nina Moini, *Human Rights Department Analyzes Discipline Disparities at MN Schools*, MPRNEWS (Aug. 3, 2018), <https://www.mprnews.org/story/2018/08/03/discipline-disparities-minnesota-schools-addressed-human-rights-department> [<https://perma.cc/H5Y2-6LSQ>]; see *Discipline Data*, *supra* note 65.

100. Johanna Lacoë & Matthew P. Steinberg, *Do Suspensions Affect Student Outcomes?*, 41 EDUC. EVALUATION & POL'Y ANALYSIS 34 (2019); *The Consequences of Suspension and What Schools Can Do Instead*, EDMENTUM (Apr. 11, 2018), <https://blog.edmentum.com/consequences-suspension-and-what-schools-can-do-instead> [<https://perma.cc/R77D-G8MZ>].

101. Alana Semuels, *Segregation Has Gotten Worse, Not Better, and It's Fueling the Wealth Gap Between Black and White Americans*, TIME (June 19, 2020), <https://time.com/5855900/segregation-wealth-gap/> ("Because of policy decisions at the federal, state, and local levels, Minneapolis, like many places in America, has become more segregated, not less, in the past three decades. As a result, Black Americans have been left behind in the nation's economic growth.").

102. *Id.* at 8 (citing Jonathan M. Rose, *Disparity Analysis: A Review of Disparities Between White Minnesotans and Other Racial Groups*, COUNCIL ON BLACK MINNESOTANS (2013)).

persist indefinitely without penalty” increasing the need for affordable housing in urban areas.<sup>103</sup> At the same time, goals for affordable housing in majority-white suburbs were reduced, which had the effect of “revers[ing] progress towards integration.”<sup>104</sup> These disparities are deep within the state of Minnesota and are reflected not only in the educational and housing infrastructure, but also within state government, where state legislators planned interstate highways to split majority-Black neighborhoods and demanded residents sell their homes for a fraction of their value.<sup>105</sup> The culture of racism, segregation, and inequality has been pervasive throughout Minnesota for centuries and continues to be fervently present within recent decades. As is well-known now, this culture of racism extends to the police killings of Philando Castille, George Floyd, Thurman Blevins, Jamar Clark, Alfred Abuka Sanders, Tycel Nelson, and many others.<sup>106</sup> While Minnesota Law is only one small indication of these effects, the stature of the law school requires attention and action that can be beneficial for its students, community, and the entire state.

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103. INST. ON METRO. OPPORTUNITY, WHY ARE THE TWIN CITIES SO SEGREGATED? (2015), [https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1123&context=imo\\_studies](https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1123&context=imo_studies) [<https://perma.cc/ZV5C-GDN7>].

104. *Id.*

105. Ehsan Alam, *Before It was Cut in Half by I-94, St. Paul's Rondo Was a Thriving African-American Cultural Center*, MINN. POST (June 19, 2017), <https://www.minnpost.com/mnopedia/2017/06/it-was-cut-half-i-94-st-paul-s-rondo-was-thriving-african-american-cultural-center/> [<https://perma.cc/7MEB-8LJ9>]; Emma Nelson, *From Ashes to Asphalt: St. Paul's Systematic Destruction of Black Neighborhoods*, MEDIUM (Mar. 1, 2017), <https://medium.com/@enelson009/from-ashes-to-asphalt-st-pauls-systematic-destruction-of-black-neighborhoods-54ea9c0c25f> [<https://perma.cc/739J-848D>] (“A lush and vibrant neighborhood was effectively sliced in half, displacing nearly 600 families, 300 businesses and forcing thousands of African-Americans to seek alternative housing in a highly segregated city.”).

106. Lianna Matt McLernon, *This Minneapolis Street Is a Growing List of People Killed by Police*, MINN. MONTHLY (June 8, 2020), <https://www.minnesotamonthly.com/lifestyle/people/this-minneapolis-street-is-a-growing-list-of-people-killed-by-police/> [<https://perma.cc/DVC2-EE84>]; Matt Furber, John Eligon & Audra D. S. Burch, *Minneapolis Police, Long Accused of Racism, Face Wrath of Wounded City*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/27/us/minneapolis-police.html> [<https://perma.cc/94EE-7XYE>]; Jeff Hargarten, Jennifer Bjorhus, Mary Jo 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/> [<https://perma.cc/M9UZ/E8PM>].

D. COMPARISON OF THE UNIVERSITY OF MINNESOTA LAW SCHOOL TO THE BROADER UNIVERSITY OF MINNESOTA

While some of the disparities at Minnesota Law can be attributed to the history of segregation and inequality within Minnesota and its educational environment of Minnesota, the law school also displays discrepancies in student enrollment that are not present at the University of Minnesota's undergraduate or graduate levels. The University of Minnesota's Black undergraduate student population steadily increased from 4.06 percent in 2011 to 4.92 percent in 2018.<sup>107</sup> At the same time, the Black graduate student population increased from 2.58 percent in 2011 to 3.16 percent in 2018.<sup>108</sup> In 2011, the law school enrolled Black students as 3.59 percent of its student body, exceeding the average of the graduate schools at the University of Minnesota and closely aligning with the undergraduate student population of 4.06 percent.<sup>109</sup> However, Black student enrollment at the law school sharply diverged from the undergraduate and graduate student population since 2013, as indicated in Figure 5.<sup>110</sup> The lowest percentage of Black student enrollment in either the undergraduate or graduate student population in this time period was 2.46 percent of enrolled graduate students in 2013, far from the law school's 0.6 percent in 2019.<sup>111</sup>

In our comparison of Minnesota Law to the broader public education infrastructure within the state of Minnesota,<sup>112</sup> the only institution experiencing a decrease in the percentage of enrollment of Black students since 2011 is Minnesota Law.<sup>113</sup> In fact, the law school is the only one of these institutions to experience any decrease in the percentage of enrollment of Black students in any individual year since 2013. This comparison illustrates that the disparities present within the law school for Black student enrollment are not present because of a lack of available or talented students.

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107. *IPEDS Survey Components*, *supra* note 66.

108. *Id.*

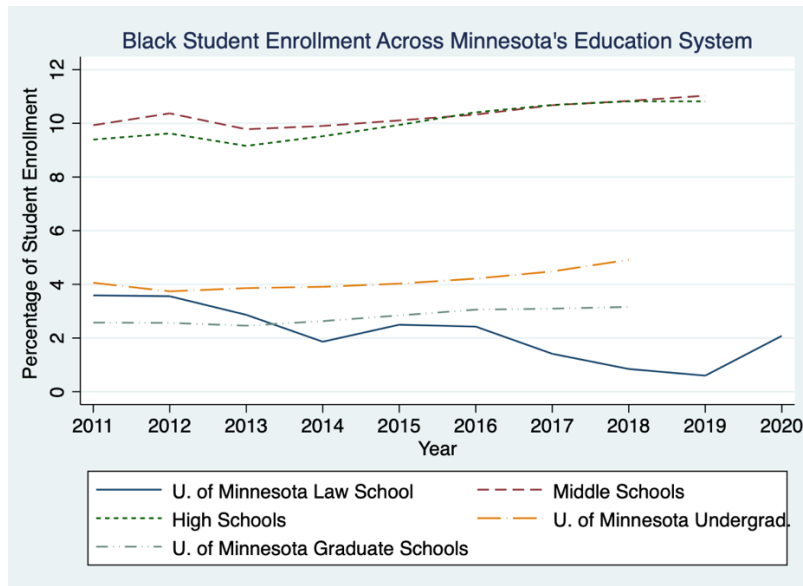
109. *Id.*

110. *Id.*

111. *Id.*

112. For purposes of this Article, this infrastructure includes the University of Minnesota graduate and undergraduate institutions, as well as public middle schools and high schools.

113. See *ABA Required Disclosures*, *supra* Note 25; *Student*, *supra* note 63; *IPEDS Survey Components*, *supra* note 66.

Figure 5.<sup>114</sup>

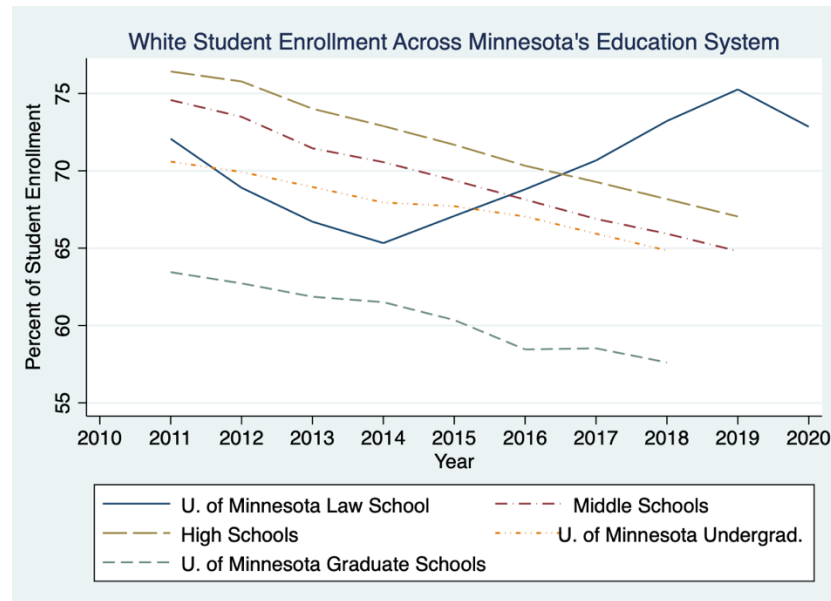
Examination of White student enrollment in Minnesota public schools and the University of Minnesota depicts an even more sobering picture. Each of these five institutional groups, except for the law school, experienced a decrease in its percentage of White student enrollment by more than five percent since 2011, as depicted in Figure 6.<sup>115</sup> The law school mirrored these changes from 2011 to 2014, experiencing a decrease in the enrollment of White students by more than five percent.<sup>116</sup> Since 2014, however, the law school increased its enrollment of White students from 65.33 percent in 2014 to 75.26 percent in 2019.<sup>117</sup> The law school is the only one of these five institutions exhibiting any increase in the percentage of White student enrollment since 2014.

114. *ABA Required Disclosures*, *supra* note 25.

115. *Id. Student*, *supra* note 63; *IPEDS Survey Components*, *supra* note 66.

116. *See ABA Required Disclosures*, *supra* note 25; *Student*, *supra* note 63; *IPEDS Survey Components*, *supra* note 66.

117. *See ABA Required Disclosures*, *supra* note 25.

Figure 6.<sup>118</sup>

#### E. A FINAL COMPARISON: HOW THE UNIVERSITY OF MINNESOTA DEVIATES FROM IOWA AND WISCONSIN

While the University of Minnesota's Law School's Black student enrollment may diverge from the trends of the University of Minnesota and the Minnesota public school system, the law school's peers may be experiencing similar deviations. In considering this explanation, we analyzed whether Wisconsin and Iowa displayed similar trends. Wisconsin and Iowa act as reasonable comparisons because of their geographic similarity, comparable situation as major Big Ten research institutions, and comparable law school ranking.<sup>119</sup> Figure 5 shows that Minnesota Law deviated from the University of Minnesota undergraduate and graduate student bodies, as well as the Minnesota public school system in its enrollment of Black students. Neither law school at the University of Iowa nor the University of Wisconsin displayed similar trends over the same period. The University of Iowa Law School increased the enrollment percentage of Black students

118. *ABA Required Disclosures*, *supra* note 25.

119. The University of Minnesota ranks as #21, the University of Iowa ranks as #27, and the University of Wisconsin ranks as #38 as of the most recent rankings. *2021 Best Law Schools*, *supra* note 60.

from 2.88 percent in 2011 to 4.02 percent in 2020.<sup>120</sup> This result was similar to increases in Black student enrollment at the University of Iowa at the undergraduate and graduate level since 2014.<sup>121</sup> The Iowa K-12 public school system also displayed a steady increase in Black student enrollment from 5.13 percent in 2011 to 6.49 percent in 2019.<sup>122</sup> Black student enrollment at the University of Wisconsin Law School has decreased since 2011, falling from 6.43 percent to 3.73 percent in 2020.<sup>123</sup> While this decrease remains a cause for concern, the University of Wisconsin's Black student enrollment decreased at both the undergraduate and graduate level from 2011 to 2019.<sup>124</sup> These patterns indicate that the decrease is not specifically limited to the law school but is indicative of broader institutional decline in Black student enrollment, which remains a cause for alarm. In addition, the Wisconsin public school system has seen a reduction in the percentage of Black student enrollment from 9.77 percent in 2011 to 8.98 percent in 2019.<sup>125</sup>

At each level of analysis, Minnesota Law is an outlier from its peers. Within recent years, Minnesota Law has failed to cultivate an educational environment that is welcoming and attractive for Black students. As the law school has experienced a precipitous decrease in Black student enrollment, while enrollment for White students increased by over ten percent between 2014 and 2019.<sup>126</sup> This

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120. See *ABA Required Disclosures*, *supra* note 25.

121. See *IPEDS Survey Components*, *supra* note 66.

122. See *Education Statistics*, *supra* note 67.

123. See *ABA Required Disclosures*, *supra* note 25.

124. See *IPEDS Survey Components*, *supra* note 66.

125. *Student and School Data*, WIS. DEP'T OF PUB. INSTRUCTION, <https://dpi.wi.gov/families-students/data> [<https://perma.cc/K2RP-K9JG>].

126. The timing of reductions in enrollment of Black students and increases in enrollment of White students following the 2012 and 2013 academic years is particularly alarming since the disparities in enrollment coincide with increasing pressure to reduce budget shortfalls at the University of Minnesota Law School and subsidies from the University of Minnesota. Josh Verges, *UMN Subsidy for Law School Soars as Applications Suffer a Steep Drop*, PIONEER PRESS (May 10, 2018), <https://www.twincities.com/2018/05/10/umn-subsidy-for-law-school-soars-as-applications-suffer-a-steep-drop/> (last visited Feb. 6, 2021) ("Since 2012-13, the U has given the law school \$39.9 million to cover budget shortfalls. The ongoing annual subsidy has reached \$7.5 million."); Peter Cox, *Law School Reckoning: University of Minnesota Wants More Subsidies to Stay Selective*, MPRNEWS (May 23, 2018), <https://www.mprnews.org/story/2018/05/23/law-school-reckoning-university-of-minnesota-wants-more-money-to-stay-selective>; Elizabeth Olson, *Minnesota Law School, Facing Waning Interest, Cuts Admissions*, N.Y. TIMES (May 12, 2016), <https://www.nytimes.com/2016/05/13/business/dealbook/minnesota-law-school-facing-waning-interest-cuts-admissions.html> [<https://perma.cc/T8UC-7VAM>].

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enrollment trend makes Minnesota Law an outlier when compared to its peer law schools, the broader University of Minnesota, and the public school system within the state of Minnesota. The disparities within the law's school enrollment are not a Midwest problem and they are not a Minnesota problem. They are a Minnesota Law problem. The law school has only exacerbated disparities that are present within the educational framework of Minnesota and has failed to take meaningful action to repair these discrepancies.

#### IV. WHY LAW SCHOOLS AND THE LEGAL PROFESSION MUST ADDRESS DISPARITIES IN BLACK STUDENT ENROLLMENT

The path to becoming an attorney for Black students and other students of color is one littered with barriers in education, transportation, finance, and housing due to systemic racism. These discriminatory and prejudicial barriers necessitate action at each level of our education system. This Part examines the pervasive nature of these injustices and the ways in which they fundamentally hamper the capacity of the legal profession to effectively advocate and represent all members of our society. Parts I, II, and III exposed the realities of the numerous additional obstacles in education and life to become students at Minnesota Law. Yet, these realities are not isolated to these individuals or students in Minnesota. This section examines the detrimental effect of these barriers on representation and advocacy within the legal system profession.

There are well-documented negative effects from a law school experience that fails to incorporate interactions with individuals and ideas built on different life experiences. An education setting that values and incorporates diverse life experiences can lead to “reductions in prejudice, appreciation of other’s perspectives, improved critical thinking, greater connection to the institution, improved self-confidence, greater civic engagement, and enhancement of leadership and professional skills.”<sup>127</sup> These effects are so strong that the United States Supreme Court has recognized that student body diversity in higher education “promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better

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127. Louis M. Rocconi, Aaron N. Taylor, Heather Haeger, John D. Zilvinskis, & Chad R. Christensen, *Beyond the Numbers: An Examination of Diverse Interactions in Law School*, 12 J. OF DIVERSITY IN HIGHER EDUC. 27 (2019); Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean’s Perspective*, 96 IOWA L. REV. 1549, 1556 (2011) (A “racially diverse student body contributes to a better learning environment for students and a higher-quality legal education.”).

prepares them as professionals.”<sup>128</sup> A lack of representation and community for many Black students in law school may inhibit the ability of all students to become better practicing attorneys in the future.<sup>129</sup> A critical component of this gap in meeting students’ potential is the tradition, format, and guise of legal education. Professor Aaron Taylor explored the ways in which our legal education, one “rooted in the centrality of White racial and cultural norms,” creates additional barriers for Black students once they reach law school.<sup>130</sup>

These norms are reflected most notably in the racial and ethnic demographics of most law schools and the “race neutral” manners in which courses are often designed and presented. The further removed a student is from the default norms, the more taxing the law school experience. . . . An example of how this form of incomplete assimilation plays out is the “bifurcated thinking” that Black students and other underrepresented students often have to adopt as an academic survival tactic. On one end, issues of race are typically unspoken or ignored in case analyses and class discussions; in many cases these issues are framed as irrelevant. But on the other end, these students live in a world where they have observed, if not experienced first-hand, the relevance of race in the provision and durability of rights and privileges. In the end, they often have to take the extra mental step of disassociating their life experiences from their efforts to appease their professors.<sup>131</sup>

Taylor’s arguments also address a key component of legal education: the desire to maintain an objective and neutral lens to ensure that one’s individual experiences and perspectives do not impinge upon their legal logic. Professor Taunya Lovell Banks also considers the harms of legal education’s reliance on “objectively reasoned arguments, often devoid of any humanistic concern.”<sup>132</sup> Not only does this focus create an illusion of a truly objective logic, but it often excludes and devalues life experiences, which raises “legal, social, and moral issues that are worthy of discussion and should be addressed by legal scholars because they reflect the law as it operates.”<sup>133</sup> Our understanding of “objective” reasoning is also rooted in White racial and cultural norms and serves to disadvantage students who have not grown

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128. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

129. Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of A Systemic Analysis of Affirmative Action in American Law Schools*, 7 AFR.-AM. L. & POL’Y REP. 1, 15 (2005) (arguing that the isolating environment for many African American students because of significant underrepresentation in law school inhibits these students from performing to their potential).

130. Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. REV. 489, 509 (2019).

131. *Id.* at 509–10.

132. Taunya Lovell Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, 6 BERKELEY WOMEN’S L.J. 46, 48 (1991) (noting that “the nature of traditional legal dialogue within law schools and legal education devalues life experiences.”).

133. *Id.* at 48–49.



up adhering to or living within those norms.<sup>134</sup> A legal education that serves to diminish the importance of life experience and individual perspective both reinforces the legal system's emphasis on White culture and restricts students' future ability to engage with and advocate for clients with varied experiences and perspectives. In addition, educational environments lacking diverse life experiences "impoverishes the imagination of law students and other legal academics."<sup>135</sup>

A legal education that diminishes and devalues varied life experiences serves to reduce the engagement and involvement of many students of color within the legal profession. This creates a cycle where fewer legal professionals are able or willing to incorporate these various experiences within their practice. Black students also receive fewer significant opportunities within law school, such as in law reviews and law journals.<sup>136</sup> Research indicates that law journal membership has been "associated with lower levels of diverse interactions," which may be due to the "insulated nature of journal membership and work."<sup>137</sup> Especially given the weighted role that law reviews and journals serve in publishing articles affecting tenure and professorship decisions, retaining a collection of students that come from diverse racial and ethnic backgrounds is critical to ensure that scholarship does not only fit into norms of White legal scholarship. Professors play a critical role in this cycle, but White professors are still heavily overrepresented in law faculty positions, making up 79 percent of full-time and 84 percent of part-time faculty positions, as of 2020.<sup>138</sup> At Minnesota Law, White professors represented over 90 percent of both full- and part-time faculty in 2020.<sup>139</sup> Enhanced opportunities for Black professors and other professors of color is

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134. See Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549 (2011) ("[A]n African-American man might understandably bring an entirely different set of perspectives, experiences, and knowledge to bear on the classroom discussion of the phenomenon of racial profiling by police in a criminal-law or criminal-procedure course than the average White colleague might be able to offer."); Taylor, *supra* note 130.

135. Banks, *supra* note 132, at 47.

136. Rocconi et al., *supra* note 127.

137. *Id.* at 35. The authors also note that "law schools should audit student journals to assess the amount of bias inherent in the selection process." *Id.*

138. Erika Kubick, *How Diverse are the Law School Faculty in the United States?*, ILL. SUP. CT. COMM'N OF PROFESSIONALISM (Aug. 29, 2016), <https://www.2civility.org/diverse-law-school-faculty-united-states/> [<https://perma.cc/9AQ5-FV24>] (noting that, as of 2013, about 79% of full-time faculty members were White; 82.7% of full-time male faculty members were White; 75.9% of full-time female faculty members were White); see *ABA Required Disclosures*, *supra* note 25.

139. See *ABA Required Disclosures*, *supra* note 25.

critical to improving the current state of legal education by contributing to a more rich and robust legal education experience.<sup>140</sup> Additionally, increased numbers of professors of color throughout the country can show prospective and incoming students that they can achieve to the same levels as their White counterparts and that their experiences and perspectives are also valued by law schools.

The presence of historically underrepresented minorities on law faculties sends an unmistakable message to students of color—and most effectively “teaches” them—that they in fact belong in law school and the legal profession, as well as that they have the ability to be top-flight lawyers, scholars, judges, and policy makers.<sup>141</sup>

As law students transition into attorneys, the legal field continues to reflect similar disparities. Black attorneys and attorneys of color continue to face an uphill battle as they enter the legal market. As of 2019, Black workers comprised 12.5 percent of the workforce and 10.6 percent of the legal workforce.<sup>142</sup> However, in a survey of large law firms, Black attorneys made up only “4.83% of associates and only 1.94% of equity partners.”<sup>143</sup> In 1996, Professors Wilkins and Gulati considered barriers that Black associates face:

Black associates face three significant barriers to getting on the training track. First, they are less likely than whites to find mentors who will give them challenging work and provide them with advice and counseling about how to succeed at the firm. Second, they face higher costs from making mistakes than their white peers. Third, their future employment prospects with other elite firms diminish more rapidly than those of similarly situated associates.<sup>144</sup>

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140. Banks, *supra* note 132, at 56 (“My life stories influence my perspective, a perspective unable to function within a single paradigm because I am too many things at one time. My perspective often transcends race and gender and is sometimes fully or partially conscious of the complexities and intersection of race, gender, and class. It is a multiple perspective not represented in our casebooks or legal literature.”).

141. Johnson, *supra* note 134, at 1558.

142. Meg McEvoy, *Analysis: Black Workers Are Under-Represented in Legal Industry*, BLOOMBERG L. (June 11, 2020), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-black-workers-are-under-represented-in-legal-industry> [<https://perma.cc/C2DN-KKFL>] (In contrast, “White lawyers made up 73.38% of associates and 89.87% of equity partners. Black lawyers are also underrepresented relative to other minorities.”); Tracy Jan, *The Legal Profession Is Diversifying. But Not at the Top*, WASH. POST. (Nov. 27, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/11/27/the-legal-profession-is-diversifying-but-not-at-the-top/> [<https://perma.cc/36Y4-JBKZ>] (discussing that, as of 2017, more than 90 percent of equity partners were White, even though one in four law firm associates was a person of color).

143. See McEvoy, *supra* note 142.

144. David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 568 (1996).

These same barriers continue to be reflected in recent stories. Professor Tsedale Melaku described stories from a few Black women attorneys who explained that they were being asked to make copies for their White colleagues, many of whom were in more junior positions, and that there were expectations that associates of color must “assimilate to firm culture.”<sup>145</sup> Black attorneys are constantly required to restrict part of their identities to become more like their White counterparts in these firms because the “dominant value of the legal profession is a commitment to colorblindness in lawyers’ conduct so that professional socialization ‘bleaches out’ racial differences among lawyers.”<sup>146</sup> In addition, another attorney stated that the culture of racism and microaggressions within law firms continues to be pervasive because “people tend to gravitate to people who are similar to them, and I know I’m different than a lot of the people at the firm.”<sup>147</sup> Commitment to engage and mentor Black attorneys can also act as a detriment to future success. Time spent on social commitments (diversity committees, outreach programs, tokenism, etc.) is perceived as less valuable within the firm and takes away from other opportunities for meaningful mentorship and networking.<sup>148</sup> The nature of these harms are complex and systemic; the “fact that [B]lacks have had little success breaking into the upper echelons of the elite bar is emblematic of a deeper and more intractable set of problems facing those interested in workplace integration.”<sup>149</sup> In addition, it is increasingly difficult for Black women and women of color who simultaneously experience racism and sexism within the legal system and workplace.<sup>150</sup> The “very processes by which BigLaw extracts value from its lawyers’ gender and racial identities tend to undermine the success of women and minority lawyers at the firm.”<sup>151</sup> Wald illustrates this challenge with the example that by “overburdening a Latina associate with service on the diversity and hiring committees, by expecting her to

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145. Tsedale M. Melaku, *Why Women and People of Color in Law Still Hear “You Don’t Look Like a Lawyer”*, HARV. BUS. REV. (Aug. 7, 2019), <https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer> [<https://perma.cc/7F4W-P9PL>].

146. Carla D. Pratt, *Way to Represent: The Role of Black Lawyers in Contemporary American Democracy*, 77 FORDHAM L. REV. 1409, 1412 (2009).

147. See Melaku, *supra* note 145.

148. Eli Wald, *Biglaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509, 2511 (2015) (discussing that minority associates are pressured to attend more events and their absence is more noted because they are expected to be the face of diversity at all firm events).

149. See Wilkins & Gulati, *supra* note 144.

150. See Melaku, *supra* note 145.

151. See Wald, *supra* note 148.

actively participate in firm events, and even by publicly displaying her image on its website, the firm distracts her and undermines her performance contrasted with her White male counterparts.”<sup>152</sup> It is critical that individuals throughout the legal profession continue to question the norms of the workplace and ask “[w]hy attrition rates among women and people of color remain high, and their advancement rates so low? Why Black female associates are hired in greater numbers than Black male associates but are promoted to partner far, far less often?”<sup>153</sup> These questions highlight just one aspect of racism and sexism that Black attorneys face in the legal profession, but these experiences are by no means limited to the environment of large law firms.<sup>154</sup>

Diverse voices are also necessary to interpret and inform our understanding of the laws to ensure that all of those who seek refuge, mercy, and justice receive equitable treatment. This can only be done when we allow varied life experience to “contribute to our interpretation and understanding of legal doctrine.”<sup>155</sup> The “exclusion of African Americans from judicial decision-making, like the wholesale exclusion of men or women from judging, removes critical analytical resources from judicial decision-making.”<sup>156</sup>

At every step of the path for a Black student or a student of color to become an attorney, our legal system and education structure has erected barriers to ensure that these students work twice as hard to make it half as far. As this Article depicts, these barriers may be pronounced here in Minnesota, but they extend throughout the country

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152. “Fundamentally then, the core root of minority underrepresentation in positions of power and influence at BigLaw appears to boil down to this: while White male associates essentially get to exchange their labor for relatively low economic capital in the present (a salary) and a shot at cultural, social, and high economic capital in the future, female and minority associates exchange their labor as well as identity capital for relatively low economic capital in the present.” *Id.* at 2539.

153. *Id.*

154. See Wilkins & Gulati, *supra* note 144, at 610 (“America’s long history of discrimination against [B]lacks exercises a similar hold on the problems we discuss . . . this history is partly responsible for the fact that high wages, pyramiding, and tracking are likely to have an especially adverse effect on the career opportunities of [B]lack lawyers. Slavery set this nation on a path in which it was necessary to portray [B]lacks as mentally, emotionally, and spiritually incapable of self-determination. Almost a generation after the last de jure remnants of this vicious system were put to rest, the stereotypes and predispositions that can be traced back to this ignoble past continue to shape race relations in this country.”).

155. *Id.*

156. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 414 (2000).

and are deeply rooted within our legal framework. The expansive scope of these barriers requires action and response from the entire legal system that reckons with the gravity of the problem.

#### V. RECOMMENDATIONS FOR CHANGE AT THE UNIVERSITY OF MINNESOTA LAW SCHOOL

“If there is any occupation in which one would expect to see meaningful equality of opportunity and results, given the profession’s lofty ideals and pronouncements, it should be the legal profession, but the reality is quite the contrary.”<sup>157</sup> Regardless of whether change comes at an industry or organizational level, institutions like Minnesota Law must act in a manner that considers the massive harms of these barriers. Racism within the law has depleted legal institutions of attorneys who can make groundbreaking change and innovate our field in ways that we have failed. This Part proposes a series of actions that Minnesota Law should take to remedy some of the harms caused by these disparities and enhance the educational environment to contend with the realities of racism within the law.

##### A. CREATE A RACIAL JUSTICE CLINIC THAT TAKES PART IN IMPACT LITIGATION AND COMMUNITY MENTORING WITH PRIORITY ENROLLMENT FOR BLACK STUDENTS

The clinical program at Minnesota Law encompasses 25 clinics which provide “free legal services, education, and outreach to those in our community in a wide variety of areas, addressing both individual legal needs and systemic issues, all while training students for practice.”<sup>158</sup> As “[s]tudent interest truly drives the success of [the law school’s] clinical programs,”<sup>159</sup> the law school should add a clinic specifically devoted to issues of racial justice in the Twin Cities and Minnesota. This clinic should take part in impact litigation, direct legal services, and community engagement on issues that disproportionately affect Black individuals and other individuals of color within our communities. There have been recent instances in Minnesota where major lawsuits have been brought to remedy discrimination and segregation against Black individuals and individuals of color.<sup>160</sup> This clinic can

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157. Alex M. Johnson Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist’s Perspective*, 95 MICH. L. REV. 1005, 1006 (1997).

158. Dean Garry Jenkins *Responds to the Open Letter from Students*, *supra* note 79.

159. *Id.*

160. *Civil Rights Lawsuit Alleges Roseville Elementary School Teacher Assaulted, Segregated Black Students*, WCCO CBS MINN. (Sept. 28, 2020), <https://minnesota.cbslocal.com/2020/09/28/civil-rights-lawsuit-alleges-roseville-elementary-school>

contribute to the fight to reduce the history of racism and segregation throughout Minnesota.<sup>161</sup> A racial justice clinic can provide opportunity for Black students and students of color to develop robust litigation experience in an environment where they may be able to help others who have faced similar barriers of racism. While this clinic should not be exclusively limited to Black students and students of color at Minnesota Law, it should allow priority enrollment for these students.

This clinic should also serve to engage younger students within the Twin Cities in the form of a pipeline program. While students at Minnesota Law currently take part in the Minnesota Justice Foundation's Street Law<sup>162</sup> program for law students to teach middle school and high school students about the law, the racial justice clinic should also learn from programs like the one at the University of Denver's Sturm College of Law (SCOL).<sup>163</sup> Using its partnerships, law students at SCOL created a pipeline program with the Denver Urban Debate League (DUDL).<sup>164</sup> SCOL provided a physical space for DUDL and its executive director in SCOL's offices, as well as spaces for DUDL students to "practice and compete in the moot court facilities and use the resources of the law library."<sup>165</sup> In addition, law students, staff and faculty are judges, coaches and volunteers with DUDL.<sup>166</sup> Professor Catherine Smith emphasized that SCOL has a "broad interest in breaking down barriers that impede the success of marginalized individuals and groups in our communities and in society."<sup>167</sup> Similar to SCOL's pipeline program with DUDL, Minnesota Law should commit to

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-teacher-assaulted-segregated-black-students/ (last visited Feb. 6, 2021); Erin Golden, *Twin Cities School Segregation Case Proceeds After Ruling on Charter Schools*, STAR TRIB. (June 12, 2019), <https://www.startribune.com/school-segregation-case-proceeds-after-ruling-on-charter-schools/511209602/?refresh=true> [<https://perma.cc/QK06-89KQ>].

161. See *supra* Part III.C; Elizabeth Shockman, *Minnesota District Uses Student Voice to Combat Racism*, MPRNEWS (Sept. 13, 2019), <https://www.mprnews.org/story/2019/09/13/district-uses-student-voice-to-combat-racism> [<https://perma.cc/7SBY-TT95>].

162. "Law student volunteers teach fundamental legal rights, responsibilities, and resources to low-income, at-risk juveniles at various sites throughout Minnesota. During the academic year, many volunteers serve at local alternative learning centers, charter schools, or other educational/after-school programs." *Street Law*, MINN. JUST. FOUND., <https://www.mnjustice.org/street-law/> [<https://perma.cc/C9VQ-5AG5>].

163. Catherine E. Smith, *Seven Principles: Increasing Access to Law School Among Students of Color*, 96 IOWA L. REV. 1677 (2011).

164. *Id.* at 1690.

165. *Id.*

166. *Id.*

167. *Id.* at 1688.

engage with local communities, whether through debate leagues or similar programs.

As discussed in Part III.D., discrepancies in Black student enrollment in comparison to middle schools and high schools in Minnesota identify a critical opportunity for outreach and engagement. As Minnesota Law considers how to increase Black student enrollment, it should look within Minnesota and the Twin Cities. Deep and meaningful connections with Black students near the law school's community can be a great opportunity to increase interest in the law school, but also drive curiosity and attention in the collection of undergraduate and graduate opportunities throughout the University of Minnesota. A new clinic at Minnesota Law focused on racial justice can position the law school as a leader and innovator in advancing racial equality within the state of Minnesota and across the country. Not only would this clinic be a signal that the residents of Minnesota will gain an additional hand in the fight to remove the effects of systemic racism within our communities, but it will also provide momentum for other graduate schools and undergraduate departments within the University of Minnesota to partner with local organizations in similar ways. Partnership from the University of Minnesota with consistent and thoughtful investment in our local communities is critical to remove barriers to educational access and representation within Minnesota.

B. ADAPT THE CURRENT 1L FOUNDATIONS CURRICULUM TO TEACH AND INCORPORATE CRITICAL RACE THEORY INTO THE CASES THAT STUDENTS LEARN ABOUT IN THEIR 1L COURSES

Minnesota Law must find a way to adapt its curriculum to consistently incorporate critical race theory.<sup>168</sup> The ideal way to include critical race theory within the curriculum would be to provide regular or required courses on critical race theory and those that emphasize the lens of critical race theory within its pedagogy. While the law school has been unsuccessful in hiring faculty to teach in this area and is currently under a mandatory hiring freeze, the law school should

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168. "The critical race theory (CRT) movement is a collection of activists and scholars interested in studying and transforming the relationship among race, racism, and power. The movement considers many of the same issues that conventional civil rights and ethnic studies discourses take up, but places them in a broader perspective that includes economics, history, context, group- and self-interest, and even feelings and the unconscious. Unlike traditional civil rights, which embraces incrementalism and step-by-step progress, critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law." RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY*, NEW YORK UNIVERSITY PRESS 2-3 (2001).

begin by supplementing or adapting the current 1L Foundations curriculum<sup>169</sup> to include short lectures on foundational topics within critical race theory. Minnesota Law should first engage professors and faculty within the University of Minnesota who have studied and taught critical race theory. Enhanced connection with local professors and scholars can provide opportunity for enriched engagement between Minnesota Law and members of our local community.

These lectures should be followed by group discussions within students' main section or legal writing sections and facilitated by professors and upper-level students regarding how critical race theory interacts with the cases they have recently discussed in their classes. It would be critical that Minnesota Law invite scholars who have spent a considerable amount of time studying critical race theory, whether in legal practice or other academic areas, to provide an enriching base of knowledge for 1L students. For Minnesota Law to cultivate an environment that is welcoming and attractive for Black students, it is imperative that the curriculum educate the entire student body on the ways in which racism acts as a foundational concept of our legal system and the methods of reform.

C. EMPLOY AND AWARD TENURE TO A MORE DIVERSE COLLECTION OF PROFESSORS AND ENDOW PROFESSORSHIPS IN THE AREAS OF CRITICAL RACE THEORY, RACISM, AND THE LAW

As of the 2019–20 academic year, Minnesota Law reported that nine percent of its full-time faculty members self-identified as a “minority” and nine percent of non-full-time faculty members self-identified as a “minority.”<sup>170</sup> While the Dean of the law school has stated that the school has “doubled [its] adjunct faculty of color” since his arrival in 2016, this doubling represents increasing the group from just five professors out of 136 total adjunct faculty in 2016.<sup>171</sup> At the same time, however, the percentage of full-time faculty of color has decreased, dropping from thirteen percent in the 2016–17 academic year to nine percent in the 2019–20 academic year.<sup>172</sup> While doubling adjunct faculty of color is an important step forward, full-time faculty

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169. 1L Foundations is a weekly required lecture series for 1L students. Previous sessions have included lectures on maintaining personal health and well-being as attorneys and students, academic success in the first semester of law school, speeches from the founder of the non-profit organization “We Are All Criminals,” and Financial Planning Courses.

170. See *ABA Required Disclosures*, *supra* note 25.

171. Dean Garry Jenkins *Responds to the Open Letter from Students*, *supra* note 79; *ABA Required Disclosures*, *supra* note 25.

172. See *ABA Required Disclosures*, *supra* note 25.



play a unique and essential role in the law school environment. While the Dean has stated that “recruiting a race and the law scholar to join our community remains one of our top priorities,” recent hiring indicates an inability to meet this goal.<sup>173</sup> Future opportunities to meet this goal may also be difficult because the law school is “currently under a mandatory hiring freeze due to the pandemic.”<sup>174</sup>

It is imperative that the law school commit to hiring candidates that have diverse racial and ethnic backgrounds. One way to do so is to partner with the Twin Cities legal community to endow professorships with a specific focus on critical race theory, racism, and the law. These professorships would ensure that Minnesota Law is not required to rely exclusively on its own funds to create these positions. In addition, it provides an opportunity to successfully meet the law school’s goal to recruit a race and the law scholar. Hiring new faculty members, especially full-time faculty members, who come from diverse racial and ethnic backgrounds or have engaged in meaningful scholarship on topics of race and the law can help to create a more attractive and welcoming environment for Black students. Minnesota Law must commit to bring in numerous professors from diverse racial and ethnic backgrounds to ensure they can thrive and grow as a part of the law school’s community.

D. ENSURE THAT BLACK STUDENTS HAVE A STRONG COMMUNITY WITHIN THEIR 1L SECTIONS.

Since 2011, the number of incoming Black law students at Minnesota Law has not exceeded nine students.<sup>175</sup> As is typical, first-year students are divided into sections and spend much of their academic experience with the same collection of students. In many cases, the small number of Black students are separated into different sections. This exacerbates the isolation that many Black students already feel in this environment. To remedy this, Minnesota Law should ensure that Black students, for as long as their enrollment continues to be disproportionately small, can choose to be within a section with the other Black students within their class. For example, if there are six Black students within the first-year class, all six of these students should have the option be placed in one section. While arguably this could inhibit the learning experience of students in other sections by

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173. *Minnesota Law Welcomes Three to Faculty*, UNIV. OF MINN. L. SCH. (Aug. 20, 2019), <https://www.law.umn.edu/news/2019-08-20-minnesota-law-welcomes-three-faculty> [<https://perma.cc/R3WD-DU4N>].

174. *Dean Garry Jenkins Responds to the Open Letter from Students*, *supra* note 79.

175. See *ABA Required Disclosures*, *supra* note 25.

reducing the diversity of experiences in their classrooms, fostering a sense of community and belonging for the small number of Black students within the University of Minnesota's Law School should be the priority. In addition, an easy way for the law school to balance these two interests is simply to enroll more Black students and make the school more attractive for Black students in the future.

E. DEVELOP AND EXPAND CURRENT CONNECTIONS WITH UNDERGRADUATE BLACK STUDENTS AND STUDENTS OF COLOR AT THE UNIVERSITY OF MINNESOTA IN THE FORM OF A PIPELINE PROGRAM

Minnesota Law should recommit itself to outreach to undergraduate students at the University of Minnesota to provide opportunities to learn about the law school, volunteer within the legal community, and prepare for the Law School Admissions Test (LSAT). The law school should expand upon current programs, such as the Minnesota Pre-Law Scholars (MPLS)<sup>176</sup> or programs from other law schools,<sup>177</sup> and directly partner with student organizations for Black students and students of color at University of Minnesota campuses. The law school should engage these students to ensure they have opportunities to become engaged in classes at the law school and within the broader Twin Cities legal community. In addition, the law school should partner with these organizations to help their students prepare for the LSAT. The law school could also encourage these students, who have shown interest in engaging with the local legal community and are well prepared for the LSAT, with incentives to apply to the law school.

F. THE ADMISSIONS DEPARTMENT AND DEAN'S OFFICE SHOULD IDENTIFY SPECIFIC STEPS THAT THE LAW SCHOOL IS TAKING TO ENHANCE RECRUITMENT AND MATRICULATION OF BLACK STUDENTS AND ENHANCE DATA COLLECTION PRACTICES

To ensure that Minnesota Law continues to be held accountable and take proactive steps to expand opportunity and enrollment for Black students, the law school should commit to providing more

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176. The MPLS program "offers a select number of students a free LSAT prep class each summer" and provides the opportunity to "learn about law school admissions preparation." *Minnesota Pre-Law Scholars Program*, UNIV. OF MINN. L. SCH., <https://www.law.umn.edu/admissions/minnesota-pre-law-scholars-mpls-program> [<https://perma.cc/R696-YA6K>].

177. *Summer Pre-Law Programs*, B.U., <https://www.bu.edu/prelaw/preparing-for-law-school/summer-pre-law-programs/> [<https://perma.cc/63X3-GJEB>]; *UHLC Pre-Law Pipeline Program*, UNIV. OF HOUS. L. CTR., <https://www.law.uh.edu/pipeline/about.asp> [<https://perma.cc/JB9N-MVDS>].

transparent data regarding student applications, admissions, and matriculation. In addition, the law school's administration and admissions department should identify specific actions to increase enrollment for Black students and how it is adapting its curriculum and educational environment to be more inviting and attractive for Black students. The admissions department should also publish data regarding disaggregated application and admissions rates of all applicants, as opposed to only releasing enrollment data.

The Dean's Office recently authored two statements<sup>178</sup> promoting initiatives by Minnesota Law to address issues of racism and the law. These statements describe admission efforts to expand enrollment of Black students and students of color, new courses related to racial justice added to the curriculum for the Fall 2020 semester, and support for student engagement in the practice of law and racial justice through public interest work and clinical programs.<sup>179</sup> Although encouraging, these statements do not provide assurance that the fervent nature of these new initiatives will continue beyond the Fall 2020 semester or the near future. While it is stressed that these new offerings are not a "temporary response," it took a nine-minute video of a police officer pinning his knee into the neck of George Floyd and killing Floyd for Minnesota Law to partner with professors to develop new courses on racial justice, include singular or optional discussions on racial justice and police within traditional classes, and conduct a "racial justice scan" within the clinical program.<sup>180</sup> Commitment to racial justice at Minnesota Law requires time, effort, and resources devoted to anti-racist legal education when there is not widespread outcry at the local and national levels against police violence and racism within our legal system.

### CONCLUSION

The ultimate fault is that too many higher education institutions and the public resources to support them exist for the elite upper classes while too few exist for the masses. But in the end the total society pays double. Because we fail to fully overcome the burden of historic exclusionary and discriminatory

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178. See Dean Garry Jenkins Responds to the Open Letter from Students, *supra* note 79; Nelson, *supra* note 71.

179. See Dean Garry Jenkins Responds to the Open Letter from Students, *supra* note 79; Nelson, *supra* note 71.

180. See Dean Garry Jenkins Responds to the Open Letter from Students, *supra* note 79; Nelson, *supra* note 71.

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racial practices in the education system, we fail to fully use and develop our most valuable national resource, our human resource.<sup>181</sup>

The law is accorded a great deal of power,<sup>182</sup> but actions to reform the current state of the legal system and legal education must truly contend with the nature of the harm. Individual seminars to increase awareness of racism or implicit bias or press releases that report solidarity with Black attorneys and attorneys of color without simultaneous action to meaningfully increase support and opportunity throughout the legal system are insufficient to reckon with the gravity of these issues.

This Article has depicted stories of some of our law school's most courageous students and the nefarious barriers of racism they have repeatedly faced throughout their lives and educational path on the way to Minnesota Law. Their stories must be a further reminder of the despicable ways in which racism constantly inhibits the lives of many Black individuals here in Minnesota and throughout the country. For too long, Minnesota Law has failed to create an educational environment that is attractive, supportive, and desirable for Black students. We hope that this Article serves as a catalyst for additional work at Minnesota Law, as well as in numerous other sections of legal education and the legal profession.

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181. Marvel Lang, *Barriers to Blacks' Educational Achievement in Higher Education: A Statistical and Conceptual Review*, 22 J. OF BLACK STUD. 510, 520-21 (1992).

182. Johnson Jr., *supra* note 157, at 1022 ("The persuasive power of law as a tool to change or eliminate certain harmful or nonproductive behavior must, in part, be attributable to the respect and acquiescence afforded to the law and lawyers by those subject to it.").

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## Article

# Entrenched Racial Hierarchy: Educational Inequality from the Cradle to the LSAT

Kevin Woodson<sup>†</sup>

### INTRODUCTION

For my contribution to this special issue of the *Minnesota Law Review*, I will attempt to situate the problem of black underrepresentation at America's law schools<sup>1</sup> within the broader context of racial hierarchy in American society. The former has generated an extensive body of legal scholarship and commentary,<sup>2</sup> centering primarily on

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<sup>†</sup> I would like to thank Bret Asbury for his helpful comments on previous drafts of this article. I would also like to thank Chris Chavarría for his excellent research assistance. Copyright © 2021 by Kevin Woodson.

1. See AMERICAN BAR ASSOCIATION, ABA PROFILE OF THE LEGAL PROFESSION 33 (2020) (black Americans make up only five percent of the profession even though they are over thirteen percent of the overall U.S. population). See Law School Enrollment by Race & Ethnicity (2019), ENJURIS, <https://www.enjuris.com/students/law-school-race-2019.html> [<https://perma.cc/BZH5-MNWW>] (black students were 7.57% of incoming law students in 2019); *id.* ("Black enrollment in law school dropped for the fourth consecutive year" and nearly half of all black law school applicants are not admitted to a single institution); Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FLA. INT'L. U. L. REV. 489 (2019) (nearly half of all black law school applicants did not gain admission into a single program). Further, black students who enroll in law school are less likely than other students to persist until graduation. Kyle Thomas & Tiffane Cochran, *ABA Data Reveals Minority Students are Disproportionately Represented in Attrition Figures*, ACCESSLEX (Sept. 18, 2018), <https://www.accesslex.org/xblog/aba-data-reveals-minority-students-are-disproportionately-represented-in-attrition-figures> [<https://perma.cc/5PNS-C4MT>] (black students are only nine percent of all 1Ls but account for 15.5 percent of all 1L non-transfer attrition).

2. See, e.g., Vernellia R. Randall, *The LSAT, U.S. News & World Report, and Minority Admissions: The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHNS L. REV. 107 (2006); Diane Curtis, *The LSAT and the Reproduction of Hierarchy*, 41 W. NEW ENG. L. REV. 307 (2019); Paula Lustbader, *Painting Beyond the Numbers: The Art of Providing Inclusive Law School Admission to Ensure Full Representation in the Profession*, 40 CAP. U. L. REV. 71 (2012); Anthony Peirson Xavier Bothwell, *The Law School Admission Test Scandal: Problems of Bias and Conflicts of Interest*, 27 T. MARSHALL L. REV. 1 (2001); Preston C. Green, III, *Can Title VI Prevent Law Schools from Adopting Admissions Practices that Discriminate Against*

the racial impact of law schools' admissions criteria and procedures, particularly the substantial weight placed upon the Law School Admissions Test ("LSAT").<sup>3</sup> This focus is understandable: given the substantial racial disparities in LSAT performance<sup>4</sup> and the test's relatively limited value in predicting academic and professional

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*African-Americans?*, 24 S. U. L. REV. 237 (1997); Alex M. Johnson, Jr., *Knots in the Pipeline for Prospective Lawyers of Color: The LSAT Is Not the Problem and Affirmative Action Is Not the Answer*, 24 STAN. L. & POL'Y REV. 379 (2013); William C. Kidder, Comment, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CALIF. L. REV. 1055 (2001).

3. See, e.g., Randall, *supra* note 2, at 107 ("If a Black or Mexican applicant is denied admission to law school, there is an excellent possibility that he or she may have been discriminated against based on race . . . . It is institutional racism"); Curtis, *supra* note 2, at 310 (contending that "the reliance on the LSAT diminishes diversity, reinforces pernicious and anti-democratic hierarchies, and exacerbates financial inequities in the legal profession and among legal professionals"); Lustbader, *supra* note 2, at 94 (2012) ("law schools continue to over-rely on LSAT scores. In doing so, they significantly reduce enrollment of the underrepresented."); Bothwell, *supra* note 2, at 1 (arguing that the LSAT is "inherently and unfairly biased against racial minorities"). Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 J. CONST. L. 1235, 1241-44 (2011); Green, *supra* note 2 (discussing possible disparate impact challenge against use of LSAT in admissions).

Multiple Supreme Court justices also have criticized the racial impact of the LSAT. See *DeFunis v. Odegaard*, 416 U.S. 312, 319-44 (1974) (Douglas, dissenting) (suggesting that schools may need to "abolish" the LSAT to avoid racial unfairness); *Grutter v. Bollinger*, 539 U.S. 306, 369-70 (2003) (Thomas, dissenting) (observing that "no modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admission Test (LSAT). Nevertheless, schools continue to use the test").

4. The average LSAT score for black test takers is 142, a score in the bottom quintile of all test-takers. Scott Jaschik, *Do Law Schools Limit Black Enrollment with LSAT?*, INSIDE HIGHER EDUC. (April 15, 2019), <https://www.insidehighered.com/admissions/article/2019/04/15/study-argues-law-schools-limit-black-enrollment-through-lsat> [https://perma.cc/ZT6B-J7S6]. By comparison, the average test score for white and Asian test takers is 153. *Id.* This average score falls below the 25th percentile LSAT scores at virtually every law school in the country, and falls within the range that some observers have concluded puts students at "extreme risk" of bar failure. *Law School Enrollment*, L. SCH. TRANSPARENCY DATA DASHBOARD, <https://data.lawschooltransparency.com/enrollment/admissions-standards> [https://perma.cc/8C3X-KNN8]. See also Kidder, *supra* note 2, at 1073 (finding significant racial disparities in LSAT scores among white students and students of color with similar grades at equivalent undergraduate institutions).

outcomes,<sup>5</sup> it makes sense that efforts to increase black representation in law school would start here.<sup>6</sup>

But in focusing primarily on the inequities of law school admissions, the existing discourse to some extent has unduly isolated the issue of black law school underrepresentation from the broader context of American racial inequality. The law school admissions process is but the final stage in a long chain of events that determines whether an individual becomes a law student. The vast majority of black students effectively are prevented from attending law school by conditions that they encounter before they even apply.

Accordingly, in this article I offer a broader account of the underrepresentation of black law students, one that focuses on the conditions of entrenched racial hierarchy that impede black Americans' educational trajectories and limit their mobility into high-status

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5. See, e.g., Richard O. Lempert, David L. Chambers & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Law School*, 2 L. & SOC. INQ. 395 (2000) (finding that LSAT scores do not predict success or satisfaction post-law school); Bothwell, *supra* note 2, at 4; Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 L. & SOC. INQ. 620 (2011) (finding that the LSAT does not predict professional competence); William Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Under-theorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975 (2003-2004) (concluding that the LSAT's predictive value lies largely in its ability to measure performance on timed tests). See also Roy Freedle, *The LSAT, U.S. News & World Report, and Minority Admissions: How and Why Standardized Tests Systematically Underestimate African-Americans' True Verbal Ability and What to do About it: Towards the Promotion of Two New Theories with Practical Applications*, 80 ST. JOHN'S L. REV. 183 (2006) (proposing the adoption of a new test that might more meaningfully assess the abilities of minority applicants).

6. Without endorsing the test, it is worth noting that a number of researchers and commentators have countered many of criticisms of the LSAT by emphasizing that the test remains the most reliable predictor of student performance and pushing back against claims that the test is discriminatory. LISA C. ANTHONY, SUSAN P. DALESSANDRO, & TAMMY J. TRIERWEILER, LAW SCHOOL ADMISSION COUNCIL LSAT TECHNICAL REPORT, PREDICTIVE VALIDITY OF THE LSAT: A NATIONAL SUMMARY OF THE 2013 AND 2014 LSAT CORRELATION STUDIES 14 (2016) (LSAT scores have a much stronger correlation with first-year law school grades than undergraduate grade point averages); Katherine Auston, Catherine Martin Christopher, & Darby Dickerson, *Will I Pass the Bar Exam? Predicting Student Success Using LSAT Scores and Law School Performance*, 45 HOFSTRA L. REV. 753, 757 (2017) (concluding that "the LSAT is still a strong predictor of academic success and bar passage, as well as career success."); Gail L. Heriot & Christopher T. Wonnell, *Standardized Tests Under the Magnifying Glass: A Defense of the LSAT Against Recent Changes of Bias*, 7 TEX. REV. L. & POL. 467 (2003) (reporting on studies finding that the LSAT actually overestimates the future performance of black students in law school); Robert Steinbuch, *A Different Take On Why Law Schools Are Not Admitting More Black Students*, NAT. JUR. (Jan. 24, 2018), <http://www.nationaljurist.com/national-jurist-magazine/different-take-why-law-schools-are-not-admitting-more-black-students> [<https://perma.cc/3CK6-JWP6>].

occupations, including the practice of law. This entrenched hierarchy has three core, distinct, though related, components that each contribute to the underrepresentation of black law students: stark racial socioeconomic disparities, the pernicious racial stigma that subjects black Americans to various anti-black prejudices and stereotypes, and enduring patterns of racial segregation. Collectively, these conditions subject many black children to an onslaught of deprivations, disadvantages, and discrimination that work to divert them away from professional careers from the very outset of their educational careers. By the time law schools review students' applications, entrenched racial hierarchy has produced staggering educational disparities that all but ensure that black Americans will be underrepresented among law students.<sup>7</sup>

The resultant struggle to secure sufficient numbers of academically well-prepared black law students who are likely to thrive will persist indefinitely in the absence of more far-reaching, holistic interventions.

This article will proceed in three parts. Part I introduces the three core components of racial hierarchy in America, each of which deprives black people of equal opportunities and treatment. Part II explains how these conditions diminish the potential pipeline of black attorneys by generating educational disparities at every stage of students' academic careers, from early childhood through college. Building upon this analysis, Part III identifies some approaches through which a variety of institutions, including law schools, might better enable more black Americans to enter the legal profession.

### I. ENTRENCHED RACIAL HIERARCHY

America's structures and processes of racial hierarchy powerfully limit the life chances of black Americans and thereby perpetuate

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7. Further, given the overrepresentation of black students from immigrant families and among black students at of higher education, the existing statistics, as bad as they are, likely understate the impact of racial hierarchy on the educational trajectories of multi-generation, single-race black students. See generally Kevin Brown, *LSAC Data Reveals that Black/White Multiracials Outscore All Blacks on LSAT by Wide Margins*, 39 NYU REV. L. & SOC. CHANGE 381, 383–84 (2014) (describing evidence of the overrepresentation of biracial students among black students at highly-selective colleges); Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, N.Y. TIMES (June 24, 2004), <https://www.nytimes.com/2004/06/24/us/top-colleges-take-more-blacks-but-which-ones.html> [<https://perma.cc/CPG5-5PDE>] (reporting that according to Harvard professor Henry Louis Gates, as much as two-thirds of the school's black undergraduate population were biracial or from immigrant families).



racial inequality. This Part will introduce the three primary elements of this hierarchy—socioeconomic inequality, stigma, and segregation—that ultimately contribute to the underrepresentation of black law students.<sup>8</sup>

#### A. SOCIOECONOMIC DISPARITIES

Racial socioeconomic disparities originated from the institution of slavery and the legal regime erected to manage and preserve it. Laws and social practices that forbid or hindered black Americans

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8. The impact of racial hierarchy is not limited to the legal profession. It produces similar racial deficits in virtually all high-status occupational fields. *See, e.g., Women, Minorities, and Persons with Disabilities in Science and Engineering*, NAT'L SCI. FOUND., <https://www.nsf.gov/statistics/2017/nsf17310/digest/occupation/blacks.cfm> [<https://perma.cc/B2Q7-S937>] (engineering and science fields); AAMC, DIVERSITY IN MEDICINE: FACTS AND FIGURES 2019, Figure 18, <https://www.aamc.org/data-reports/workforce/interactive-data/figure-18-percentage-all-active-physicians-race/ethnicity-2018> [<https://perma.cc/YC8E-7KVU>] (medicine); *The Dentist Workforce—Key Facts*, AM. DENTAL ASS'N HEALTH POL'Y INST., [https://www.ada.org/~media/ADA/Science%20and%20Research/HPI/Files/HPIgraphic\\_0716\\_1.pdf?la=en](https://www.ada.org/~media/ADA/Science%20and%20Research/HPI/Files/HPIgraphic_0716_1.pdf?la=en) [<https://perma.cc/7DEA-7B6E>] (black Americans were only 3.8% of all dentists in 2015); Amanda Iacone, *Fifty Years, Little Progress for Black Accountants*, BLOOMBERG TAX (July 8, 2019), <https://news.bloombergtax.com/financial-accounting/fifty-years-little-progress-for-black-accountants> [<https://perma.cc/F6JH-C9N9>] (“Out of 650,000 CPAs in the U.S., an estimated 5,000 are black”); U.S. EQUAL EMP. OPPORTUNITY COMM'N, DIVERSITY IN THE FINANCE INDUSTRY tbl.2 (2006), <https://www.eeoc.gov/special-report/diversity-finance-industry> [<https://perma.cc/ZJ2Z-QXRF>] (professional and management-level positions in finance); Sam Dean & Johana Bhuiyan, *Why are Black and Latino People Still Kept out of the Tech Industry*, L.A. TIMES (June 24, 2020), <https://www.latimes.com/business/technology/story/2020-06-24/tech-started-publicly-taking-lack-of-diversity-seriously-in-2014-why-has-so-little-changed-for-black-workers> (last visited Feb. 27, 2021) (black Americans are less than 1% of venture capitalists); Sinduja Rangarajan, *Here's the Clearest Picture of Silicon Valley's Diversity Yet: It's Bad. But Some Companies are Doing Less Bad*, REVEAL N. (June 25, 2018), <https://revealnews.org/article/heres-the-clearest-picture-of-silicon-valleys-diversity-yet> [<https://perma.cc/XB5W-LECU>] (finding “grave” racial disparities in a study of 177 of the largest Silicon Valley tech companies); Leslie Davis & Richard Fry, *College Faculty Have Become More Racially and Ethnically Diverse, but Remain Far Less so Than Students*, PEW RES. CTR. (July 31, 2019), <https://www.pewresearch.org/fact-tank/2019/07/31/us-college-faculty-student-diversity> [<https://perma.cc/9CGK-W6EN>] (only six percent of all professors are black). *See also* Denise Lu, Jon Huang, Ashwin Seshagiri, Haeyoun Park & Troy Griggs, *Faces of Power: 80% are White, Even as U.S. Becomes More Diverse*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/interactive/2020/09/09/us/powerful-people-race-us.html> [<https://perma.cc/6K8F-GZ57>] (similar disparities exist in the upper-echelon positions of influence and power in business and government).

from acquiring land,<sup>9</sup> attaining education,<sup>10</sup> and securing employment in desirable occupations gave rise to conditions of extreme socioeconomic inequality. The financial, educational, and occupational inequities imposed by these early injustices were perpetuated by government-sanctioned discrimination and segregation well into the twentieth century.

The black-white income gap is perhaps the most commonly used measure of this socioeconomic inequality. Thanks in part to the disproportionate concentration of black workers in lower-status jobs,<sup>11</sup> the median black household earns barely 60% as much as the median white household.<sup>12</sup> Black households are highly overrepresented in the bottom quintile of the U.S. income distribution,<sup>13</sup> and the black poverty rate remains more than twice that of white Americans.<sup>14</sup> Even

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9. See Roy W. Copeland, *In the Beginning: Origins of African American Real Property Ownership in the United States*, 44 J. BLACK STUD. 646, 647–48 (2013) (noting legal restrictions that prevented enslaved and free black Americans from owning land).

10. See Christopher M. Span, *Learning in Spite of Opposition: African Americans and their History of Educational Exclusion in Antebellum America*, 131 COUNTERPOINTS 26 (2005) (discussing compulsory illiteracy laws in the antebellum South).

11. See *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STATS., <https://www.bls.gov/cps/cpsaat11.htm> [<https://perma.cc/2AEN-4AU8>] (black Americans are highly underrepresented in high-status jobs and overrepresented in service-sector employment). See also *supra* note 8.

12. See Valerie Wilson, *Racial Disparities in Income and Poverty Remain Largely Unchanged Amid Strong Income Growth in 2019*, ECON. POL. INST. (Sept. 16, 2020); Valerie Wilson & William M. Rodgers III, *Black-White Wage Gaps Expand with Rising Wage Inequality*, ECON. POL. INST. (Sept. 20, 2016). See also Deirdre Bloome, *Racial Inequality Trends and the Intergenerational Persistence of Income and Family Structure*, 79 AM. SOC. REV. 1196 (2014) (finding this gap has held relatively steady and closed very little over the past half century).

13. Scott Winship, Richard V. Reeves & Katherine Guyot, *The Inheritance of Black Poverty: It's All About the Men*, Brookings (March 22, 2018), <https://www.brookings.edu/research/the-inheritance-of-black-poverty-its-all-about-the-men> [<https://perma.cc/2AKG-57RY>] (more than forty percent of black children grow up in households in the bottom fifth of the income distribution, a rate more than three times higher than that of white children).

14. John Creamer, *Inequalities Persist Despite Decline in Poverty for All Major Race and Hispanic Origin Groups*, U.S. CENSUS BUREAU, <https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html> [<https://perma.cc/SMZ9-TD6U>]; Black children are more than three times more likely to live in poverty than white children, and in some states, including Minnesota, they are more than five times as likely. *Status and Trends in the Education of Racial and Ethnic Groups: Indicator 4 Snapshot: Children Living in Poverty for Racial/Ethnic Subgroups (Feb. 2019)*, NAT'L CTR. FOR EDUC. STATS., [https://nces.ed.gov/programs/raceindicators/indicator\\_rads.asp](https://nces.ed.gov/programs/raceindicators/indicator_rads.asp) [<https://perma.cc/6J8F-9KEQ>] (34 percent of black children lived in poverty in 2016, compared to 11 percent of white children); David Murphy, Jonathan Belford, Susan Baldwin & Samuel Beckwith, *In 33 States, Hispanic or Black Children are More than Twice as Likely to be in Poverty Than*

these dismal numbers understate the economic gulf separating black and white families. Poor black families remain in poverty for much longer than poor white families, and they are far more likely to be part of an intergenerational cycle of family poverty.<sup>15</sup> Because of residential segregation, they are also far more likely than poor whites to live in concentrated poverty.<sup>16</sup> Although black Americans achieved significant progress toward closing this gap during the middle of the twentieth century,<sup>17</sup> income disparities have increased substantially since 1970, eroding this convergence almost entirely.<sup>18</sup>

As large as these income-based disparities are, they are dwarfed in magnitude by another, even more important indicator of racial socioeconomic inequality,<sup>19</sup> the black-white wealth gap. Whereas measures of income only capture the amount of money that households or individuals earn during a specified time period, wealth encompasses their total stock of accrued assets.<sup>20</sup> Wealth provides a fuller picture of a family's economic well-being.<sup>21</sup> Far more so than

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*Their White Peers*, CHILD TRENDS (2018), <https://www.childtrends.org/blog/in-33-states-hispanic-or-black-children-are-more-than-twice-as-likely-to-be-in-poverty-than-their-white-peers> [https://perma.cc/24LT-RZW8].

15. See Raj Chetty, Nathaniel Hendren, Maggie R. Jones & Sonya R. Porter, *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, 135 Q. J. ECON. 711 (2020).

16. See Lincoln Quillian, *Segregation and Poverty Concentration: The Role of Three Segregations*, 77 AM. SOC. REV. 354,355 (2012) ("About one in three poor white families live in poor neighborhoods and send their children to high-poverty schools, compared to two in three poor black and Hispanic families"). See also Sean F. Reardon, Lindsay Fox & Joseph Townsend, *Neighborhood Income Composition by Household Race and Income, 1990-2009*, 660 ANNALS AM. ACAD. POL. & SOC. SCI. 78, 94 (2015) (black families with incomes of roughly \$55,000-\$60,000 lived in neighborhoods that were socioeconomically similar to those of white families with incomes of roughly \$12,000).

17. See Patrick Bayer & Kerwin Kofi Charles, *Divergent Paths: Structural Change, Economic Rank, and the Evolution of Black-White Earning Differences, 1940-2014* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22797, 2017), <https://www.nber.org/papers/w22797> [https://perma.cc/L9CY-PK5L] (finding that the black-white income gap "narrow[ed] consistently from 1940 to 1970").

18. See *id.* at 2-3 ("the median black man's earnings would have placed him at the 24<sup>th</sup> percentile of the white earnings distribution in 1940. Years after the end of the Great Recession, his position had scarcely budged, rising to only the 27<sup>th</sup> percentile.").

19. See MELVIN OLIVER & THOMAS N. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 3 (2d ed. 2006) (positing that the wealth gap "reveals dynamics of racial inequality otherwise concealed by income, occupational attainment, or education").

20. *Id.* at 2.

21. See THOMAS M. SHAPIRO, *TOXIC INEQUALITY: HOW AMERICA'S WEALTH GAP DESTROYS MOBILITY, DEEPENS THE RACIAL DIVIDE, AND THREATENS OUR FUTURE* 14 (2017) (describing wealth as "a fundamental pillar of economic security").

income, wealth determines the amount and quality of the resources and opportunities that families are able to provide their children, and thereby powerfully contributes to the intergenerational transmission of privilege and inequality.<sup>22</sup> The wealth gap reflects a number of historic and ongoing racial dynamics, including income disparities, discriminatory housing policies,<sup>23</sup> and unequal access to credit.<sup>24</sup>

The median wealth of black families in 2019 (\$24,100) was a scant 13 percent of the median white family wealth (\$188,200).<sup>25</sup> Black families hold less wealth than white families at every income level,<sup>26</sup> and over a third of all black families have negative wealth or no wealth at all.<sup>27</sup> Passed down from generation to generation on account of racial differences in inheritances and access to *in vivo* gifts and financial support,<sup>28</sup> wealth disparities continue to grow because of contemporary differences in income, home ownership, and marriage rates.<sup>29</sup> The full magnitude of this wealth gap is perhaps most evident when relatively well-off black families are compared to white families who would otherwise appear to be less privileged. On

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22. *Id.* at 32 (“the reality for most families is that income supplies the necessities of life, while wealth represents a kind of ‘surplus’ resource available for improving life chances, providing further opportunities, securing prestige, passing status along to one’s family, and influencing the political process.”); DALTON CONLEY, *BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA* 58 (2010 ed.) (“two families with the same household income might have vastly different resources at their disposal to provide advantages to their children.”).

23. See KENNETH JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985); Louis Lee Woods II, *The Federal Home Loan Bank Board, Redlining, and the National Proliferation of Racial Lending Discrimination, 1921-1950*, 38 J. URB. HIST. 1036 (2012). See also *infra* notes 42–44 and accompanying text.

24. See MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* 1 (2017).

25. Neil Bhutta, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RESRV. SYS. (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm> [<https://perma.cc/TLV3-PJE6>]. See also Heather Long & Andrew Van Dam, *The Black-White Economic Divide Is as Wide as It Was in 1968*, WASH. POST (June 4, 2020), <https://www.washingtonpost.com/business/2020/06/04/economic-divide-black-households> [<https://perma.cc/LZV9-FVTB>] (the wealth gap has not closed over the past half-century).

26. See CONLEY, *supra* note 22, at 26.

27. See BARADARAN, *supra* note 24.

28. Bhutta, *supra* note 25.

29. Alexandra Killewald, *Falling Behind: The Role of Inter- and Intragenerational Processes in Widening Racial and Ethnic Wealth Gaps Through Early and Middle Adulthood*, 97 SOC. FORCES 705 (2018) (more than half of present wealth inequality stems from racial differences in the intergenerational transmission of wealth).

average, black families with employed heads of household have less wealth than white families whose heads of household are jobless.<sup>30</sup> Black households whose heads have university degrees have less wealth than white households whose heads never completed *high school*.<sup>31</sup> Black families with graduate or professional degrees typically are worth hundreds of thousands of dollars less than their comparably-educated white counterparts.<sup>32</sup> Due to the interplay of these discrepancies and persisting patterns of residential segregation, even middle-class, relatively high-income black households tend to live in far more disadvantaged neighborhoods than comparable white families.<sup>33</sup>

#### B. STIGMA

Another foundational component of racial hierarchy is the racial stigma that categorically marks black Americans as inferior and dangerous in the eyes of their fellow citizens.<sup>34</sup> In America, the institution of slavery first gave rise to pervasive black racial stigma, as white Americans developed mythologies of innate racial differences to excuse the enslavement and oppression of black people.<sup>35</sup> The rise of scientific and social scientific racism at the tail end of the nineteenth

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30. WILLIAM A. DARITY JR. & A. KIRSTEN MULLEN, FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY 33 (2020).

31. *Id.* See also Patricia Cohen, *Racial Wealth Gap Persists Despite Degree, Study Says*, N.Y. TIMES (Aug. 16, 2015), <https://www.nytimes.com/2015/08/17/business/racial-wealth-gap-persists-despite-degree-study-says.html> [<https://perma.cc/PEP5-8VPS>] (“From 1992 to 2013, the median net worth of blacks who finished college dropped nearly 56 percent (adjusted for inflation). By comparison, the median net worth of whites with college degrees rose about 86 percent over the same period”).

32. Janelle Jones, *The Racial Wealth Gap: How African-Americans Have Been Shortchanged out of the Materials to Build Wealth*, ECON. POL. INST. (Feb. 13, 2017), <https://www.epi.org/blog/the-racial-wealth-gap-how-african-americans-have-been-shortchanged-out-of-the-materials-to-build-wealth> [<https://perma.cc/MM7M-L5EY>].

33. Patrick Sharkey, *Spatial Segmentation and the Black Middle Class*, 119 AM. J. SOC. 903 (2014).

34. See GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 87 (2002) (describing racial stigma as the refusal to accord black Americans “the presumption of equal humanity”). See also Arjan E.R. Bos, John B. Pryor, Glenn D. Reeder & Sarah E. Stutterheim, *Stigma: Advances in Theory and Research*, 35 BASIC & APPLIED SOC. PSYCHOL. 1 (2013) (describing stigma as “widespread social disapproval”); ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 9 (1963) (describing stigma as “the situation of the individual who is disqualified from full social acceptance”).

35. See Matthew Wills, *How Antebellum Christians Justified Slavery*, JSTOR DAILY (June 27, 2018), <https://daily.jstor.org/how-antebellum-christians-justified-slavery> [<https://perma.cc/88GP-G43L>].

century further reinforced black stigma by introducing new “proof” of black otherness and inferiority under the veneer of supposedly objective empirical analyses.<sup>36</sup> An extensive body of social science research has demonstrated the continued force of racial stigma and prevalence of anti-black racial biases (albeit increasingly in subtle and covert forms).<sup>37</sup> On account of this stigma, black Americans suffer discriminatory, life-altering mistreatment in employment,<sup>38</sup> the criminal justice system,<sup>39</sup> and in their commercial and financial dealings.<sup>40</sup> This anti-black racial stigma also extends to black neighborhoods and institutions, which are often inaccurately perceived to be far more dangerous and of lower quality than comparable non-black ones.<sup>41</sup>

### C. SEGREGATION

The profound racial segregation that persists between black and white Americans is another defining characteristic of racial hierarchy in America. This segregation is the legacy of concerted and sustained efforts to deny black Americans access to white residential and educational spaces. It became a prominent feature of American life in northern metropolitan areas around the turn of the twentieth century, as cities and their white citizens attempted to confine black residents to racially designated neighborhoods through a variety of invidious means, ranging from racist laws and contractual restrictions to

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36. See KHALID GIBRAL MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 36–54 (2010) (discussing the impact of Frederick L. Hoffman and similar-minded researchers in promoting the thesis that blacks were innately inferior and criminally inclined).

37. See JENNIFER EBERHARDT, *BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO* (2019); ANTHONY GREENWALD & MAHZARIN BANAJI, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013).

38. See DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007).

39. See Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System is Racist. Here's the Proof*, WASH. POST (June 10, 2020), [https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/?utm\\_term=.051189c87977](https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/?utm_term=.051189c87977) [https://perma.cc/P59R-M2EQ] (discussing more than 120 studies that have found evidence of racial bias in the criminal justice system).

40. See Devah Pager & Hana Shephard, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181 (2008).

41. See Robert J. Sampson & Stephen W. Raudenbush, *Neighborhood Stigma and the Perception of Disorder*, 24 FOCUS 7, 10 (2005) (demonstrating that perceptions of neighborhoods disorder are heavily influenced by neighborhoods' racial compositions).

campaigns of violence and terrorism.<sup>42</sup> When black Americans successfully breached neighborhoods and schools that were previously all-white, their arrival often led to white flight and, ultimately, resegregation.<sup>43</sup>

More recently, residential segregation has been sustained through unlawful racial steering,<sup>44</sup> exclusionary zoning,<sup>45</sup> the strategic placement of schools and public housing in racially defined neighborhoods,<sup>46</sup> and the consistent refusal of white families to move to black neighborhoods.<sup>47</sup> More than a half century after the Supreme Court struck down separate but equal in public education<sup>48</sup> and the 1968 Fair Housing Act proscribed housing discrimination,<sup>49</sup> many of America's neighborhoods remain highly segregated.<sup>50</sup> This residential segregation invariably fuels patterns of school segregation,<sup>51</sup> which are further exacerbated by the refusal of many white parents to send their children to predominantly-minority schools.<sup>52</sup> As a result, nearly

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42. See JEANNINE BELL, *HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING* (2013); JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* (2006).

43. See generally David Card, Alexandre Mas & Jesse Rothstein, *Tipping and the Dynamics of Segregation*, 123 Q.J. ECON. 177 (2008); TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* xvi (revised ed. 1993).

44. See Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOC. 167 (2003).

45. See Kimberly Quick, *Exclusionary Zoning Continues Racial Segregation's Ugly Work*, CENTURY FOUND. (Aug. 4, 2017), <https://tcf.org/content/commentary/exclusionary-zoning-continues-racial-segregations-ugly-work/?agreed=1> (last visited Feb. 27, 2021).

46. See RICHARD ROTHSTEIN, *COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

47. Lincoln Quillan, *Why Is Black-White Residential Segregation So Persistent? Evidence on Three Theories from Migration Data*, 31 SOC. SCI. RES. 197 (2002); Ann Owens, *Racial Residential Segregation of School-Age Children and Adults: The Role of Schooling as a Segregating Force*, 3 RSF: RUSSELL SAGE FOUND. J. SOC. SCI. 63 (2017).

48. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

49. 42 U.S.C. § 3601 (2012).

50. William H. Frey, *Black-White Segregation Edges Downward Since 2000, Census Shows*, BROOKINGS (Dec. 17, 2018), <https://www.brookings.edu/blog/the-avenue/2018/12/17/black-white-segregation-edges-downward-since-2000-census-shows/> [<https://perma.cc/22SP-V5TE>] (most metropolitan areas remain highly segregated by neighborhood, with dissimilarity indexes of above 50).

51. See Erica Frankenberg, *The Role of Residential Segregation in Contemporary School Segregation*, 45 EDUC. & URB. SOC. 548 (2013).

52. See ERIC TORRES & RICHARD WEISSBOURD, *DO PARENTS REALLY WANT SCHOOL INTEGRATION* 3 (2020); Chase M. Billingham & Matthew O. Hunt, *School Racial Composition and Parental Choice: New Evidence on the Preferences of White Parents in the United States*, 89 SOC. EDUC. 99, 112 (2016) (finding that white parents became

seven out of ten black students now attend schools in which most students are racial minorities.<sup>53</sup>

Segregation, socioeconomic inequality, and stigma operate in tandem, and their effects on racial inequality constitute a mutually reinforcing feedback cycle of deprivation and mistreatment. For example, segregation is both a function of the wealth gap, which leads to black families being priced out of many white neighborhoods, and a contributing factor, as the values of the homes that black Americans ultimately purchase in more heavily black and less affluent neighborhoods appreciate at lower rates than comparable homes in white neighborhoods.<sup>54</sup> Segregation also contributes to socioeconomic inequality through the phenomenon of spatial mismatch, in which many employers are located in areas remote from, and difficult to access by, people living in black neighborhoods.<sup>55</sup> The disparities and social problems brought about by segregation, concentrated poverty, and wealth disparities further stigmatize black people and black spaces as inferior, leading to discrimination that in turn reinforces socioeconomic inequality. The tendency to blame black people for the outcomes brought about by racial hierarchy also leads to greater support for racially repressive and regressive public policies<sup>56</sup> and apathy and resentment concerning the plight of the black poor.<sup>57</sup> These

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significantly less likely to enroll their children in a hypothetical school as the proportion of black students there increases).

53. Emma Garcia, *Schools are Still Segregated, and Black Children are Paying a Price*, ECON. POL. INST. (Feb. 12, 2020), <https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price> [<https://perma.cc/9K7Z-DUNK>].

54. See generally Katrin B. Anacker, *Still Paying the Race Tax? Analyzing Property Values in Homogeneous and Mixed-Race Suburbs*, 32 J. URB. AFFAIRS 55 (2010) (finding that homes in predominantly black neighborhoods are appraised for less than comparable homes in white neighborhoods); Junia Howell & Elizabeth Korver-Glenn, *The Increasing Effect of Neighborhood Racial Composition on Housing Values, 1980–2015*, SOC. PROBLEMS 1, 19 (2020) (in the years between 1980 and 2015, homes in white neighborhoods appreciated \$194,000 more than comparable homes in minority neighborhoods).

55. See Michael A. Stoll, *Job Sprawl, Spatial Mismatch, and Black Employment Disadvantage*, 25 J. POL. ANAL. & MGMT. 827 (2006) (finding evidence that job sprawl reduced black workers' employment outcomes); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987) (describing the impact of deindustrialization and job loss on predominantly-black urban communities).

56. See ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2017) (arguing that perceptions of black pathology helped fuel the rise of mass incarceration).

57. See MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* (1999) (finding that Americans supported the



conditions of racial hierarchy all jointly contribute to educational inequality, as the following Part will explain.<sup>58</sup>

## II. THE LONG PIPELINE PROBLEM

The underrepresentation of black students in American law schools is the product of a series of disparities that occur throughout the educational careers of black Americans. The inequities of entrenched racial hierarchy disadvantage black Americans through the childhood and early adulthood years in which students attain the academic preparation and credentials necessary for entrance to law school. In fact, this process begins before they even reach kindergarten and produces cumulative disadvantages that increase at every step along the way from elementary school to secondary school to college.

### A. CHILDHOOD DISPARITIES

The impact of racial hierarchy on the educational trajectories of black children is evident by the time they first go to school. Socioeconomic inequality leads to racial disparities in developmental parenting practices<sup>59</sup> and exposure to adverse childhood experiences (“ACEs”),<sup>60</sup> both of which strongly influence children’s school readiness and future educational outcomes.<sup>61</sup> Further, most black 3- and 4-

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retrenchment of AFDC because they perceived that the program primarily helped undeserving black beneficiaries).

58. These educational disparities are multifaceted and stem from a diverse, complex array of causes. There is no way to determine the precise degree to which the conditions associated with racial hierarchy are responsible for these problems, but the social science research suggests that they play critical roles.

59. See Jeanne Brooks-Gunn & Lisa B. Markman, *The Contribution of Parenting to Ethnic and Racial Gaps in School Readiness*, 15 *FUT. CHILD.* 139, 157 (2005) (finding that black and Hispanic mothers were less likely to use certain parenting behaviors that are associated with greater school readiness and finding that these differences may account for 25 to 50 percent of the school readiness gap).

60. See Vanessa Sacks & David Murphey, *The Prevalence of Adverse Childhood Experiences, Nationally, by State, and by Race or Ethnicity*, *CHILD TRENDS* (Feb. 12, 2018), <https://www.childtrends.org/publications/prevalence-adverse-childhood-experiences-nationally-state-race-ethnicity> [https://perma.cc/ZQ3K-VRDB] (33% of black children have multiple ACEs, compared to only 19% of white children).

61. See Nadine Forget-Dubois, Ginette Dionne, Jean-Pascal Lemelin, Daniel Pérusse, Richard E. Tremblay & Michael Boivin, *Early Child Language Mediates the Relation Between Home Environment and School Readiness*, 80 *CHILD DEV.* 736, 736 (2009) (finding that certain parenting tactics and qualities increased school readiness); Annie Bernier, Stephanie M. Carlson & Natasha Whipple, *From External Regulation to Self-Regulation: Early Parenting Precursors of Young Children’s Executive Functioning*, 81 *CHILD DEV.* 326, 334 (2010); Dylan B. Jackson, Alexander Testa & Michael G. Vaughn,

year-olds do not attend preschool,<sup>62</sup> and those who do disproportionately receive low-quality care.<sup>63</sup> Thus, black children arrive at kindergarten already an extraordinary seven to twelve months behind their white counterparts in math and reading on average,<sup>64</sup> and also substantially trailing them in other measures of school readiness.<sup>65</sup>

These early disparities beget later ones.<sup>66</sup> As a group, black students never overcome this initial deficit. The black-white achievement gap persists through elementary and secondary school. It is a near-universal feature of American education: it exists in every state<sup>67</sup> and

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*Adverse Childhood Experiences and School Readiness Among Preschool-Aged Children*, J. PEDIATRICS (Nov. 23, 2020), [https://www.jpeds.com/article/S0022-3476\(20\)31435-9/fulltext](https://www.jpeds.com/article/S0022-3476(20)31435-9/fulltext) [<https://perma.cc/3V39-S9N9>].

62. See Farah Z. Ahmad & Katie Hamm, *The School-Readiness Gap and Preschool Benefits for Children of Color*, CTR. AM. PROGRESS (Nov. 12, 2013), <https://www.americanprogress.org/issues/early-childhood/reports/2013/11/12/79252/the-school-readiness-gap-and-preschool-benefits-for-children-of-color> [<https://perma.cc/9QNP-7FXW>] (“recent data from 2011 show that more than half of African American children and 63 percent of Hispanic children ages 3 to 4 do not attend preschool.”).

63. See Rachel Valentino, *Will Public Pre-K Really Close Achievement Gaps? Gaps in Prekindergarten Quality Between Students and Across States*, 55 AM. EDUC. RES. J. 79 (2018) (finding that that the public prekindergarten programs that served poor black children were much lower in quality than those that served more affluent whites); Diane M. Early, Iheoma U. Iruka, Sharon Ritchie & Oscar A. Barbarin, *How Do Pre-Kindergarteners Spend Their Time? Gender, Ethnicity, and Income as Predictors of Experiences in Pre-Kindergarten Classrooms*, 25 EARLY CHILD. RES. Q. 177 (2010) (schools with greater percentages of minority children spend less time engaged in stimulating developmental activities).

64. Allison Friedman-Krauss, W. Steven Barnett & Milagro Nores, *How Much Can High-Quality Universal Pre-K Reduce Achievement Gaps?*, CTR. AM. PROGRESS (April 5, 2016), <https://www.americanprogress.org/issues/early-childhood/reports/2016/04/05/132750/how-much-can-high-quality-universal-pre-k-reduce-achievement-gaps> [<https://perma.cc/5845-PLE6>].

65. See Emma Garcia & Elaine Weiss, *Early Education Gaps by Social Class and Race Start U.S. Children Out on Unequal Footing*, ECON. POL. INST. (June 17, 2015), <https://www.epi.org/publication/early-education-gaps-by-social-class-and-race-start-u-s-children-out-on-unequal-footing-a-summary-of-the-major-findings-in-inequalities-at-the-starting-gate> [<https://perma.cc/4XY5-LVGU>]. Racial disparities in mass incarceration also contribute to these disparities to some extent, as the experience of having an incarcerated parent has been associated with lower school readiness scores. Anna R. Haskins, *Unintended Consequences: Effects of Paternal Incarceration on Child School Readiness and Later Special Education Placement*, 1 SOC. SCI. 141 (2014) (boys whose fathers have been incarcerated have lower school-readiness scores and are more likely to be placed in special education classes).

66. See Kevin Woodson, *Why Kindergarten Is Too Late: The Need for Early Childhood Remedies in School Finance Litigation*, 70 ARK. L. REV. 87, 99–105 (2017).

67. See *Racial and Ethnic Achievement Gaps*, STANFORD CTR. FOR EDUC. POL’Y ANALYSIS, <https://cepa.stanford.edu/educational-opportunity-monitoring-project/achievement-gaps/race> [<https://perma.cc/Q9JN-CX9R>]. See also Sean F. Reardon &

within virtually all school districts that educate black students.<sup>68</sup> If the past few decades are any indicator,<sup>69</sup> there is little reason to expect that this gap will close in the foreseeable future.

These disparities are not mere byproducts of cultural pathologies or self-sabotage on the part of black children succumbing to peer pressure.<sup>70</sup> Instead, they are the natural and foreseeable results of the conditions of racial hierarchy set forth in Part I. Socioeconomic inequality, for example, contributes to this achievement gap substantially, and in

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Joseph P. Robinson, *Patterns and Trends in Racial/Ethnic and Socioeconomic Academic Achievement Gaps*, in HANDBOOK OF RSCH. IN EDUC. FIN. AND POL'Y 14 (2014) ("Across all 50 states, white-black . . . gaps remain quite large.").

68. Sean F. Reardon, Joseph P. Robinson-Cimpian & Ericka S. Weathers, *The Geography of Racial/Ethnic Test Score Gaps*, 124 AM. J. SOC. 1164, 1204 (2019) (studying several thousand districts and finding "but a handful in which the achievement gap is near zero."). *Id.* ("there is no school district in the United States that serves a moderately large number of black or Hispanic students in which achievement is even moderately high and achievement gaps are near zero.").

69. Racial disparities in critical measures of academic achievement have diminished very little in the past three decades. For example, white fourth-, eighth-, and twelfth-graders outscored black students on the National Assessment of Educational Progress ("NAEP") reading and math tests in 2019 by similar margins as they did in 1992. *National Student Group Scores and Score Gaps, NAEP Report Card: Reading*, NATION'S REP. CARD, <https://www.nationsreportcard.gov/reading/nation/groups/?grade=4> [<https://perma.cc/TGC4-RBYU>]; *National Student Group Scores and Score Gaps, NAEP Report Card: Mathematics*, NATION'S REP. CARD, <http://cepa.stanford.edu/educational-opportunity-monitoring-project/achievement-gaps/race/#first> [<https://perma.cc/AXX5-YBZW>]; *National Student Group Scores and Score Gaps, NAEP Report Card: Reading*, NATION'S REP. CARD, <https://www.nationsreportcard.gov/reading/nation/groups/?grade=8> [<https://perma.cc/BK3U-YZ52>]; *National Student Group Scores and Score Gaps, NAEP Report Card: Mathematics*, NATION'S REP. CARD, <https://www.nationsreportcard.gov/mathematics/nation/groups/?grade=8> [<https://perma.cc/7FSY-CDBD>]; *National Student Group Scores and Score Gaps, NAEP Report Card: Reading*, NATION'S REP. CARD, <https://www.nationsreportcard.gov/reading/nation/groups/?grade=12> [<https://perma.cc/NL76-K5QR>]; *National Student Group Scores and Score Gaps, NAEP Report Card: Mathematics*, NATION'S REP. CARD, <https://www.nationsreportcard.gov/mathematics/nation/groups/?grade=12> [<https://perma.cc/B9F8-M5G2>].

70. The "acting white" trope, which posits that culturally-maladapted black children eschew academic achievement, has been roundly rebuked in recent social science research. *See, e.g.*, PRUDENCE L. CARTER, *KEEPIN' IT REAL: SCHOOL SUCCESS BEYOND BLACK AND WHITE* (2005) (finding that minority students used the "acting white" criticism in reference to social and cultural behavior that were not necessarily related to academic achievement); KAROLYN TYSON, *INTEGRATION INTERRUPTED: TRACKING, BLACK STUDENTS, AND ACTING WHITE AFTER BROWN* (2011) (arguing that academic-related concerns about "acting white" only arise with respect to high-achieving black students who have been isolated by racial tracking).

a variety of ways.<sup>71</sup> The strong and growing correlation between socioeconomic status and educational achievement<sup>72</sup> and the deleterious effects of living in poverty,<sup>73</sup> especially long-term exposure to poverty,<sup>74</sup> undermine black educational achievement. Racial hierarchy depresses black educational outcomes by relegating black students to inferior schools. Black students attend schools with higher concentrations of inexperienced and uncertified teachers<sup>75</sup> and fewer school counselors.<sup>76</sup> Their schools offer calculus, physics, chemistry, and Algebra II less frequently than schools with low minority enrollments.<sup>77</sup> Most black students in large metropolitan areas attend high-poverty schools,<sup>78</sup> and this exposure to school poverty is a powerful mechanism of educational inequality.<sup>79</sup>

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71. See Jesse Rothstein & Nathan Wozny, *Permanent Income and the Black-White Test Score Gap*, J. HUM. RES. 509, 537 (finding that “family financial circumstances can explain 40 to 75 percent of the raw [black-white test score] gap at age 10 or 11.”).

72. See Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN’S LIFE CHANCES* (2011) (explaining that “the achievement gap between children from high- and low-income families is roughly 30 to 40 percent larger among children born in 2001 than among those born twenty-five years earlier.”).

73. See Robert Sampson, Patrick Sharkey & Stephen W. Raudenbush, *Durable Effects of Concentrated Disadvantage on Verbal Abilities among African American Children*, 105 PROCEEDINGS NAT. ACAD. SCI. 845–52 (2008) (finding that living in severely disadvantaged neighborhoods reduced later verbal ability by the equivalent of an entire year or more of school).

74. See Caroline Ratcliffe, *Child Poverty and Adult Success*, URB. INST. 4 (Sept. 9, 2015), <https://www.urban.org/research/publication/child-poverty-and-adult-success> [<https://perma.cc/BA6N-PRRX>] (children who spend at least half of their childhoods in poverty are 13 percent less likely to complete high school and 43 percent less likely to complete a four-year college degree than other children who experienced poverty).

75. U.S. DEP’T OF EDUC. OFF. OF CIV. RTS., 2013-2014 CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK 9 (2016), <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf> [<https://perma.cc/6T3K-72UE>] [hereinafter A FIRST LOOK].

76. *Id.*

77. *Id.* at 6.

78. See Janie Boschma & Ronald Brownstein, *The Concentration of Poverty in American Schools*, ATLANTIC (Feb. 29, 2016), <https://www.theatlantic.com/education/archive/2016/02/concentration-poverty-american-schools/471414> [<https://perma.cc/4US3-XVBM>] (in the vast majority of large U.S. cities, most black students attend high-poverty schools).

79. Reardon et al., *supra* note 16, at 95. See Janie Boschma & Ronald Brownstein, *The Concentration of Poverty in American Schools*, ATLANTIC (Feb. 29, 2016), <https://www.theatlantic.com/education/archive/2016/02/concentration-poverty-american-schools/471414> [<https://perma.cc/2T8A-UF3K>] (quoting Sean Reardon as explaining that “The difference in the rate at which black, Hispanic, and white students go to school with poor classmates is the best predictor of the racial-achievement gap.”).

Racial stigma impairs black students' educational careers by subjecting them to discrimination at the hands of teachers and other school personnel. Black students are subject to excessive surveillance and disparate levels of discipline, including suspensions,<sup>80</sup> expulsions,<sup>81</sup> referrals to law enforcement,<sup>82</sup> and arrests.<sup>83</sup> These inequities begin as early as preschool<sup>84</sup> and persist throughout students' educational careers. Black students also experience discrimination in the classroom, for example when they are "tracked" into less rigorous courses that less adequately prepare them for college admissions exams and the academic rigors of college.<sup>85</sup> Some evidence suggests that teachers may give black students worse grades and devote less effort to improving their performance because of racial biases.<sup>86</sup> Racial stigma may also harm black students in even more subtle ways. Many social psychologists have posited that black students' awareness of racial stigma may lead them to underperform on important exams on

80. U.S. GOV'T ACCOUNTABILITY OFF., K-12 EDUCATION: DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES 13 (March 2018) ("Although there were approximately 17.4 million more White students than Black students attending K-12 public schools in 2013-14, nearly 176,000 more Black students than White students were suspended from school that school year.").

81. A FIRST LOOK, *supra* note 75, at 4 (black students are nearly twice as likely as white children to be expelled from school).

82. *Id.* (black students are more than twice as likely as white students to be referred to law enforcement).

83. Moriah Balingit, *Racial Disparities in School Discipline are Growing*, *Federal Data Show*, WASH. POST (Apr. 24, 2018), [https://www.washingtonpost.com/local/education/racial-disparities-in-school-discipline-are-growing-federal-data-shows/2018/04/24/67b5d2b8-47e4-11e8-827e-190efaf1f1ee\\_story.html](https://www.washingtonpost.com/local/education/racial-disparities-in-school-discipline-are-growing-federal-data-shows/2018/04/24/67b5d2b8-47e4-11e8-827e-190efaf1f1ee_story.html) [<https://perma.cc/G4M4-27F5>] ("Black students accounted for 15 percent of the student body in the 2015-2016 school year but 31 percent of arrests").

84. A FIRST LOOK, *supra* note 75, at 3 (black preschoolers are 3.6 times as likely as white children to receive one or more suspensions, and make up 47% of suspended preschoolers despite constituting only 19% of all preschoolers); Walter S. Gilliam, Angela N. Maupin, Chin R. Reyes, Maria Accavitta & Frederick Shic, *Research Study Brief, Do Early Educators' Implicit Biases Regarding Sex and Race Relate to Behavior Expectations and Recommendations of Preschool Expulsions and Suspensions?*, YALE CHILD STUDY CTR. (Sept. 28, 2016) (describing experimental evidence suggesting that implicit racial biases may lead preschool teachers more likely to expect challenging behavior from black boys).

85. See generally Whitney Pirtle, *The Other Segregation*, ATLANTIC (April 23, 2019), <https://www.theatlantic.com/education/archive/2019/04/gifted-and-talented-programs-separate-students-race/587614> [<https://perma.cc/W2MM-FSZQ>] (discussing racialized patterns of tracking within schools).

86. See generally Harriet R. Tenenbaum & Martin D. Ruck, *Are Teachers' Expectations Different for Racial Minority than for European American Students? A Meta-Analysis*, 99 J. EDUC. PSYCHOL. 253 (2007) (finding that teachers scored certain assignments lower when they believed that they had been completed by black students).

account of stereotype threat, a phenomenon in which anxieties about confirming negative stereotypes situationally hinder their cognitive abilities.<sup>87</sup>

Conditions of racial hierarchy also inhibit the educational performance of black children from higher-income households.<sup>88</sup> Thanks to the wealth gap, even fairly well-to-do black families may lack the financial resources necessary to provide their children the same opportunities and support that their privileged white peers enjoy,<sup>89</sup> including private tutors, test preparation services, and college admissions coaches. Further, black students who attend low-poverty, predominantly-white schools potentially face various forms of discrimination, including the disparate enforcement of school rules.<sup>90</sup>

These achievement gaps culminate in black school dropout rates that are twice those of white students.<sup>91</sup> In some predominantly black

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87. See Toni Schmader, Michael Johns & Chad Forbes, *An Integrated Process Model of Stereotype Threat Effects on Performance*, 115 PSYCHOL. REV. 336 (2008).

88. See also Reardon et al., *supra* note 68, at 1205–07 (finding that educational disparities are largest among students from high-SES households).

89. See Jones, *supra* note 32 (noting that “Even the typical black family with a graduate or professional degree had more than \$200,000 less wealth than a comparable white family.”).

90. See AMANDA E. LEWIS & JOHN B. DIAMOND, *DESPITE THE BEST INTENTIONS: HOW RACIAL INEQUALITY THRIVES IN GOOD SCHOOLS* 45–83 (2015) (black students were more likely to be punished than white students who committed the same rule infractions).

91. *Secondary School Completion: Public High School 4-Year Graduation Rate*, AM. COUNCIL ON EDUC., <https://www.equityinhighered.org/indicators/secondary-school-completion/public-high-school-4-year-graduate-rate> [https://perma.cc/RPQ9-6WF2]. Although the percentage of black Americans who have completed high school has converged upon the national average, this statistic is misleading, as it includes students who have dropped out of school and attained General Equivalency Degrees (“GEDs”). *Secondary School Completion*, AM. COUNCIL ON EDUC., <https://www.equityinhighered.org/indicators/secondary-school-completion/high-school-completion-rate-by-gender> [https://perma.cc/TN74-CY86]; James J. Heckman & Paul A. LaFontaine, *The American High School Graduation Rate: Trends and Levels*, 92 REV. ECON. STAT. 244 (2010). Black students are highly overrepresented among GED-holders, who as a group are far less likely than high school graduates to attend or complete college. See *id.* See generally *THE MYTH OF ACHIEVEMENT TESTS: THE GED AND THE ROLE OF CHARACTER IN AMERICAN LIFE* (James J. Heckman et al. eds., 2014). Many other students earn enough credits to graduate high school through online credit recovery programs, in some instances with minimal little work or demonstrations of proficiency. See Stephen Smiley, *Fast. Isolating. Superficial.*, SLATE (May 23, 2017), <https://slate.com/news-and-politics/2017/05/what-class-is-like-for-high-schoolers-taking-their-courses-online.html> [https://perma.cc/254G-YM9P]; Molly Bloom, *Atlanta Schools: How Online Credit Recovery Students Actually Perform*, ATL. J-CONST. (Oct. 14, 2016), <https://www.ajc.com/news/local-education/atlanta-schools-how-online-credit-recovery-students-actually-perform/e3XdYJHSRuuNOTxRMDJNdN> [https://perma.cc/82XA-RH27] (reporting that although 90 percent of Georgia students passed

cities, fewer than half of all students who begin high school graduate within four years.<sup>92</sup> As few students who drop out of high school ultimately complete college, let alone attend professional school, this disparity effectively eliminates a significant number of black students from the law school pipeline.<sup>93</sup> Those black students who persist in high school through graduation are less likely to have amassed the types of academic records that might make them candidates for admission at selective colleges and universities—the schools that typically serve as pathways to law school. As a group, black high school graduates have GPAs that are substantially below the national average,<sup>94</sup> a troubling indicator given the well-documented correlation between high school GPAs and academic performance in college.<sup>95</sup> They also take fewer Advanced Placement courses and are less likely to be enrolled in gifted and talented programs.<sup>96</sup> Although standardized

their online credit recovery courses, only 10 percent passed the corresponding state proficiency tests).

92. See Sam Dillon, *Large Urban-Suburban Gap Seen in Graduation Rates*, N.Y. TIMES (Apr. 22, 2009), <https://www.nytimes.com/2009/04/22/education/22dropout.html> [<https://perma.cc/V7YD-TVMM>] (referring to low graduation rates in Cleveland and Baltimore).

93. At least some students who drop out of high school and later earn GED credentials go on to attend law school. See In *'Bastards of the Reagan Era' A Poet Says His Generation Was 'Just Lost,'* NPR (Dec. 8, 2015), <https://www.npr.org/2015/12/08/458901392/in-bastards-of-the-reagan-era-a-poet-says-his-generation-was-just-lost> [<https://perma.cc/CJE2-XZ2R>] (describing the life and educational career of Reginald Dwayne Betts); Debra Cassens Weiss, *Onetime High School Dropout and Single Mom Celebrates Her Law School Graduation in Viral Photo*, ABA J. (Apr. 11, 2018), [https://www.abajournal.com/news/article/onetime\\_high\\_school\\_dropout\\_and\\_single\\_mom\\_celebrates\\_her\\_law\\_school](https://www.abajournal.com/news/article/onetime_high_school_dropout_and_single_mom_celebrates_her_law_school) [<https://perma.cc/7NP2-Q49T>]; Jey Born, *A High School Dropout Finds Support on Road from Prison to Law School*, NPR (Oct. 23, 2020), [https://www.npr.org/2020/10/23/926632001/a-high-school-dropout-finds-support-on-road-from-prison-to-law-school?utm\\_medium=RSS&utm\\_campaign=morningedition](https://www.npr.org/2020/10/23/926632001/a-high-school-dropout-finds-support-on-road-from-prison-to-law-school?utm_medium=RSS&utm_campaign=morningedition) [<https://perma.cc/YR7Q-FB6G>]. This group likely represents an extremely small percentage of the overall law student population.

94. *Race/Ethnicity: Grade Point Average*, NATION'S REP. CARD, [https://www.nationsreportcard.gov/hsts\\_2009/race\\_gpa.aspx?tab\\_id=tab2&subtab\\_id=Tab\\_1](https://www.nationsreportcard.gov/hsts_2009/race_gpa.aspx?tab_id=tab2&subtab_id=Tab_1) [<https://perma.cc/PF4K-J8N7>] (the average GPAs of black high school graduates were 2.47 in core academic courses and 2.82 in other academic courses, compared to 2.88 and 3.22 for white students).

95. See Elaine M. Allensworth & Kallie Clark, *High School GPAs and Act Scores as Predictors of College Completion: Examining Assumptions About Consistency Across High Schools*, 49 EDUC. RES. (2020); MICHELLE HODARA & KARYN LEWIS, HOW WELL DOES HIGH SCHOOL GRADE POINT AVERAGE PREDICT COLLEGE PERFORMANCE BY STUDENT URBANITY AND TIMING OF COLLEGE ENTRY? (2017), [https://ies.ed.gov/ncee/edlabs/regions/northwest/pdf/REL\\_2017250.pdf](https://ies.ed.gov/ncee/edlabs/regions/northwest/pdf/REL_2017250.pdf) [<https://perma.cc/8NMZ-Y6Q4>].

96. A FIRST LOOK, *supra* note 75, at 7 (black students account for only 28 percent of the students enrolled in such programs despite constituting 42 percent of the student bodies in schools with such programs).

tests are highly imperfect predictors of future academic performance, the very low scores of black students, which have been linked in part to racial segregation,<sup>97</sup> reveal the academic deficit that many would need to overcome to succeed in college. Black students score an average of 927 on the Standardized Achievement Test (“SAT”),<sup>98</sup> compared to the average white score of 1104,<sup>99</sup> and only 32 percent of black test-takers scored above 1100,<sup>100</sup> compared to 72 percent of white test-takers.<sup>101</sup> A quarter of all black test-takers scored below 800,<sup>102</sup> compared to 5 percent of white test-takers.<sup>103</sup> Only 20 percent of black test-takers met College Board’s benchmarks of presumptive college readiness on both the math and Evidence-Based Reading and Writing sections of the test,<sup>104</sup> compared to a majority of white test-takers.<sup>105</sup>

Black students also fare very poorly on the ACT test, the other major college entrance exam. The average black ACT score of 16.9 (compared to 22.2 for white test-takers)<sup>106</sup> falls below the ACT College Readiness Benchmark, the minimum scores associated with a 50 percent chance of earning a B grade or better in related college courses.<sup>107</sup> These disparities not only make black students less competitive applicants at selective colleges and universities but suggest that they will have greater difficulties transitioning to college if they ever enroll.<sup>108</sup> One study found that college enrollees with ACT scores and GPAs in the same range as the mean black test-takers and high school

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97. See David Card & Jesse Rothstein, *Racial Segregation and the Black-White Test Score Gap*, 91 J. PUB. ECON. 2158 (2007).

98. 2020 SAT SUITE ANNUAL REPORT TOTAL GROUP, COLLEGEBOARD 3 (2020), <https://reports.collegeboard.org/pdf/2020-total-group-sat-suite-assessments-annual-report.pdf> [<https://perma.cc/2X3J-RRJS>].

99. *Id.*

100. *Id.* at 5.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 3.

105. *Id.*

106. *Fast Facts: ACT Scores*, NAT’L CTR. FOR EDUC. STATS., <https://nces.ed.gov/fastfacts/display.asp?id=897> [<https://perma.cc/BSS5-6LTL>].

107. *ACT Scores for Higher Education Professionals*, ACT, <https://www.act.org/content/act/en/products-and-services/the-act-postsecondary-professionals/scores.html> [<https://perma.cc/U736-AJSG>].

108. See Emily J. Shaw, *An SAT Validity Primer*, COLL. BD. RES. (Jan. 2015), <https://files.eric.ed.gov/fulltext/ED558085.pdf> [<https://perma.cc/3AXR-5GK6>] (describing studies finding strong correlations between SAT scores and first-year and cumulative college grade point averages).



graduates (16–17 and 2.75–2.99, respectively) have only a 39 percent graduation rate.<sup>109</sup>

Thus, the educational deficits and inequalities brought about by conditions of racial hierarchy remove a very high percentage of black students from the law school pipeline before they even enter adulthood. The disparities evident in academic performance, standardized test scores, and high school graduation rates all drastically limit the supply of potential black attorneys who survive the next critical stage of the law school pipeline: college.

#### B. COLLEGE AS A DEAD END

The social dynamics that lead to many black students not attending college also undermine the performance and outcomes of those who do.<sup>110</sup> Black college attendance has fallen greatly in recent years,<sup>111</sup> and only a minority of those who do enroll in college emerge with the credentials and preparation necessary to pursue careers as attorneys. Black college students are only half as likely as their white peers to graduate within four years,<sup>112</sup> and most do not even graduate within six years.<sup>113</sup> In total, these disparities lead to a deficit of

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109. Allensworth & Clark, *supra* note 95, at tbl. 2.

110. See generally Jason M. Fletcher & Marta Tienda, *Race and Ethnic Differences in College Achievement: Does High School Attended Matter?*, 627 ANN. AM. ACAD. POL. SCI. 144 (2010) (finding that inequalities in the high schools black and white students had attended explained much of the disparities in their college grades).

111. *African American Students in Higher Education*, PNPI (June 12, 2020), <https://pnpi.org/african-american-students> [<https://perma.cc/9TK4-N8AF>] (explaining that black undergraduate enrollment fell 21% between 2010 and 2018).

112. *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STATS. Tbl. 326.10, [https://nces.ed.gov/programs/digest/d14/tables/dt14\\_326.10.asp](https://nces.ed.gov/programs/digest/d14/tables/dt14_326.10.asp) [<https://perma.cc/6333-9WAB>] (Black students are actually less likely to receive a bachelor's degree within six years than white students are in four). *Id.* Black students take a year longer than white students on average to complete their degrees. See Ariana De La Fuente & Marissa Navarro, *Black and Latinx Students Are Getting Less Bang for Their Bachelor's Degrees*, CTR. AM. PROGRESS (Jan. 23, 2020), <https://www.americanprogress.org/issues/education-postsecondary/news/2020/01/23/479692/black-latinx-students-getting-less-bang-bachelors-degrees> [<https://perma.cc/BHU6-L7HH>].

113. *Status and Trends in the Education of Racial and Ethnic Groups*, NAT'L CTR. FOR EDUC. STATS. (Feb. 2019), [https://nces.ed.gov/programs/raceindicators/indicator\\_red.asp](https://nces.ed.gov/programs/raceindicators/indicator_red.asp) [<https://perma.cc/K6N8-PK3V>] (only 40 percent of black students graduate from their initial institutions within six years). See also *Undergraduate Completion Rates at Public Four-Year Institutions*, AM. COUNCIL ON EDUC., <https://www.equityinhighered.org/indicators/undergraduate-persistence-and-completion/undergraduate-completion-at-public-four-year-institutions> [<https://perma.cc/4VUN-YQCF>] (six years after first enrolling at public four-year institutions, black students are more likely to be unenrolled without having received a degree than to have graduated); Doug Shapiro et al., *Completing College - National by Race and Ethnicity - 2017*, NSC

upwards of 100,000 black college graduates per year.<sup>114</sup> As a result, less than 30% of all black adults from ages 25–29 hold bachelor's degrees (compared to 45% of whites in this age group),<sup>115</sup> a basic prerequisite for admission to law school.

College dropouts are not the only students eliminated from the law school pipeline. A large percentage of black students who graduate from college do so with grades that render them unlikely candidates for admission to law school. 2009 data from the U.S. Department of Education revealed that 45 percent of all black college graduates finished with cumulative grade point averages of less than 3.0,<sup>116</sup> a cutoff point that falls below the median incoming GPAs at even the least selective law schools in the country, and below the 25<sup>th</sup> percentile at many. Fewer than one in five black college graduates finished with a GPA of 3.5 or higher,<sup>117</sup> less than half the percentage of white graduates.<sup>118</sup> These numbers indicate that the LSAT is not the only, or perhaps even the most significant, barrier that prevents black students from attending law school.

Moreover, black college students are also less likely to attend the selective and well-resourced institutions that best prepare students for the academic rigors of law school.<sup>119</sup> The percentage of black

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RES. CTR. (April 2017), <https://nscresearchcenter.org/signaturereport12-supplement-2> [<https://perma.cc/7MEF-9TGQ>] (44.6% of black students who enrolled in four-year public institutions had not graduated and were no longer enrolled after six years).

114. See Libassi, *The Neglected College Race Gap: Racial Disparities Among College Completers*, CTR. AM. PROGRESS (May 23, 2018), <https://www.americanprogress.org/issues/education-postsecondary/reports/2018/05/23/451186/neglected-college-race-gap-racial-disparities-among-college-completers> [<https://perma.cc/R3UB-46B9>] (finding that racial disparities in college graduation resulted in an estimated 435,000 fewer black graduates between 2013 and 2015 alone).

115. See *African American Students in Higher Education*, POSTSECONDARY NAT'L POL'Y INST., <https://pnpi.org/african-american-students> [<https://perma.cc/C7UF-XLM2>].

116. *Profile of 2007-08 First-Time Bachelor's Degree Recipients in 2009*, U.S. DEPT. OF EDUC. tbl.2.3 (Oct. 2012), <https://nces.ed.gov/pubs2013/2013150.pdf> [<https://perma.cc/9Z6C-Y726>]. By comparison, only 25 percent of white students graduated with GPAs below 3.0. *Id.* Black students also were nearly three times as likely as Whites to graduate with a GPA of less than 2.5. Some 14.5 percent of Black graduates and 5.5 percent of White graduates had a GPA of less than 2.5. *Id.*

117. *Id.*

118. *Id.* See also Jason M. Fletcher & Marta Tienda, *Race and Ethnic Differences in College Achievement: Does High School Attended Matter?*, 627 ANN. AM. ACAD. POL. SCI. 144 (2010) (reporting a black-white GPA gap of .39 for sixth-semester University of Texas students).

119. More selective institutions generally devote far more resources toward educating and providing support services to students. See ANTHONY P. CARNEVALE, PETER SCHMIDT & JEFF STROHL, *THE MERIT MYTH: HOW OUR COLLEGES FAVOR THE RICH AND DIVIDE AMERICA* 115–37 (2020).

students attending the nation's most selective schools has declined in recent years,<sup>120</sup> while the numbers attending less selective and less well-resourced schools rose substantially.<sup>121</sup> Black students now account for only 6 percent of students at the nation's top-tier research institutions,<sup>122</sup> and they are highly underrepresented at the flagship public universities of many states.<sup>123</sup> As of 2016, 14 percent of black college students pursuing bachelor's degrees attended for-profit colleges,<sup>124</sup> by far the largest percentage of any major racial group.<sup>125</sup> Because of racial differences in the quality of the institutions of higher learning that students attend, states ultimately spend billions more on educating white students.<sup>126</sup> This racial sorting of black college students into less well-resourced and academically rigorous institutions further limits their law school prospects.

Financial considerations may also push many black college graduates away from law school. Black students leave college owing \$7,400 more than their white counterparts,<sup>127</sup> and that gap explodes

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120. Andrew McGill, *The Missing Black Students at Elite American Universities*, ATLANTIC (Nov. 23, 2015), <https://www.theatlantic.com/politics/archive/2015/11/black-college-student-body/417189> [<https://perma.cc/26K9-UHWG>].

121. *Id.* Black college students attending selective non-profit 4-year institutions are twice as likely as white students to be enrolled in minimally selective institutions *Undergraduate Enrollment in Selective Public and Private Nonprofit 4-Year Institutions, by Race and Ethnicity: 2015-16*, AM. COUNCIL ON EDUC., <https://www.equityinhighered.org/indicators/enrollment-in-undergraduate-education/enrollment-in-selective-institutions> [<https://perma.cc/6ZKP-EDHJ>] (12.9 percent compared to 6.3 percent). They are somewhat more likely to be enrolled in schools with open admissions. *Id.* (17.1 percent compared to 14.2 percent).

122. McGill, *supra* note 120.

123. Meredith Kolodner, *Many State Flagship Universities Leave Black and Latino Students Behind*, HECHINGER REP. (Jan. 29, 2018), <https://hechingerreport.org/many-state-flagship-universities-leave-black-latino-students-behind> [<https://perma.cc/63YX-5HQY>].

124. *Enrollment in Undergraduate Education*, AM. COUNCIL ON EDUC., <https://www.equityinhighered.org/indicators/enrollment-in-undergraduate-education/bachelors-degree-seeking-students> [<https://perma.cc/5L27-9QDY>].

125. *Id.*

126. Sarah Garcia, *Gaps in College Spending Shortchange Students of Color*, CTR. AM. PROGRESS (April 5, 2018), <https://www.americanprogress.org/issues/education-postsecondary/reports/2018/04/05/448761/gaps-college-spending-shortchange-students-color> [<https://perma.cc/VO6F-3XXZ>].

127. See Judith Scott-Clayton & Jing LI, *Black-White Disparity in Student Loan Debt More than Triples After Graduation*, BROOKINGS (Oct. 20, 2016), <https://www.brookings.edu/research/black-white-disparity-in-student-loan-debt-more-than-triples-after-graduation> [<https://perma.cc/5Q9N-6KQF>]; Ben Miller, *The Continued Student Loan Crisis for Black Borrowers*, CTR. AM. PROGRESS (Dec. 2, 2019), <https://files.eric.ed.gov/fulltext/ED602791.pdf> [<https://perma.cc/9ZHU-VLBJ>].

in size to \$25,000 a few years after they have graduated.<sup>128</sup> Black college graduates earn lower salaries upon graduating<sup>129</sup> and are less likely to receive family support in paying back their loans than white graduates.<sup>130</sup> These disparities, a direct result of racial socioeconomic inequality, likely deter a significant number of black college graduates from applying to law school.

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This overview of the challenges and disparities that greatly diminish the law school prospects of the vast majority of black students is intended to encourage readers to think about the law school underrepresentation problem more expansively. By the time students are old enough to apply for admission to law school, profound educational deficits and disparities arising from the confluence of socioeconomic inequality, racial stigma, and racial segregation have effectively removed the vast majority of black Americans from the law school pipeline. This set of problems defies simple solutions. Resolving them will require far more than mere tinkering with law school admissions criteria. In the following part, I will briefly propose some policy and programming efforts that law schools and other interested parties might undertake to address this problem more holistically.

### III. THE PATH FORWARD

The enduring underrepresentation of black students in American law schools has proven resistant to quick fixes and easy solutions. Representing the culmination of lifelong educational disparities rooted in centuries of racial hierarchy, it calls for broad, wide-ranging policy solutions that address those underlying conditions. Without substantial interventions, law schools could well struggle in perpetuity to enroll more representative numbers of black students. A truly comprehensive solution to this problem would require ambitious policy reforms at every level of government to help ameliorate racial hierarchy and reduce its impact on the educational prospects of black

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128. *Id.*

129. See Editorial Board, *Even College Doesn't Bridge the Racial Income Gap*, N.Y. TIMES (Sept. 20, 2017), <https://www.nytimes.com/2017/09/20/opinion/college-racial-income-gap.html> [<https://perma.cc/SYN2-5HUQ>] (reporting that “black college graduates earned about 21 percent less per hour on average than white college graduates”).

130. Andrew Howard Nichols & Marshall Anthony Jr., *Graduation Rates Don't Tell the Full Story: Racial Gaps in College Success are Larger than We Think*, EDUC. TRUST (Mar. 5, 2020), <https://edtrust.org/resource/graduation-rates-dont-tell-the-full-story-racial-gaps-in-college-success-are-larger-than-we-think> [<https://perma.cc/YEK7-8XUJ>].

children. There are any number of policy measures that might help address the effects of racial socioeconomic inequality, such as targeted employment and training initiatives that would provide black families access to higher-paying jobs, student loan forgiveness measures, and programs to bolster black homeownership. A more expansive Moving to Opportunity-style housing policy program might offer housing vouchers and mobility counseling to help more disadvantaged black families move to more affluent and less segregated neighborhoods.<sup>131</sup> Other policy solutions could address the conditions of black schooling directly. They might entail, for example, programs that provide black children and their families greater access to high-quality early childhood education and parenting assistance programs,<sup>132</sup> and reform efforts to provide more black children access to high-quality primary and secondary schools.<sup>133</sup> Additional measures might seek to rein in the excessively punitive policies and practices at the heart of the school-to-prison pipeline and to prevent racial discrimination in pupil placement and college counseling. These policy reforms would not lead to immediate increases in the number of black law students, but by attacking the root causes of their underrepresentation, they would help bring about greater diversity in the profession in the long-term.

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131. See Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016).

132. Woodson, *supra* note 66; Allison Friedman-Krauss, W. Steven Barnett & Milagros Nores, *How Much Can High-Quality Universal Pre-K Reduce Achievement Gaps?*, CTR. AM. PROGRESS (April 5, 2016), <https://www.americanprogress.org/issues/early-childhood/reports/2016/04/05/132750/how-much-can-high-quality-universal-pre-k-reduce-achievement-gaps> [<https://perma.cc/YZ76-49V8>] (“it is estimated that high-quality UPK would reduce the achievement gap at kindergarten entry in math 45 percent for African American children”).

133. Of course, experts and researchers remain sharply divided about the relative merits of the leading approaches to education reform. Some researchers and education reform advocates have emphasized the potential value of high-performing charter schools. See, e.g., Sarah Cohodes, *Charter Schools and the Achievement Gap*, FUT. CHILD. 1 (2018); Bret D. Asbury & Kevin Woodson, *On the Need for Public Boarding Schools*, 47 GA. L. REV. 113 (2012). Others have argued for prioritizing greater funding for existing public schools. See, e.g., C. Kirabo Jackson, *Does School Spending Matter? The New Literature on an Old Question*, in CONFRONTING INEQUALITY: HOW POLICIES AND PRACTICES SHAPE CHILDREN’S OPPORTUNITIES 165–86 (L. Tach et al. eds., 2020). Still others have emphasized the importance of providing disadvantaged children access to more high-quality teachers. See, e.g., Steven G. Rivkin, Eric A. Hanushek & John F. Kain, *Teachers, Schools, and Academic Achievement*, 73 ECON. 417 (2005); Raj Chetty, John N. Friedman & Jonah E. Rockoff, *Measuring the Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood*, 104 AM. ECON. REV. 2633 (2014).

But while there are many policies that might help alleviate racial hierarchy, the political will necessary to bring those policies to fruition is in short supply. The American public's well-documented resistance to policies that redistribute resources to racial minorities<sup>134</sup> renders the wholesale adoption of many of these policies highly unlikely.<sup>135</sup> Because these ambitious reforms will likely remain unattainable for the foreseeable future (and if they are implemented eventually, would still take many additional years to bear fruit), the primary responsibility for resolving this problem will fall upon law schools. These are the institutions best situated to achieve immediate, tangible progress, and the breadth and depth of the pipeline problem does not absolve them of their moral obligations to pursue this goal. Therefore, it is particularly important to consider measures law schools might feasibly undertake to help increase the representation of black law students.

Law schools committed to diversifying the profession have a number of options. First, they should reevaluate and revise their admissions criteria to minimize the impact of the inequities brought about by racial hierarchy.<sup>136</sup> Individual schools should each examine their admissions data to ensure that they are not placing unnecessary weight on applicants' LSAT scores for the sake of prestige or on the basis of misguided notions about the extent of their predictive value. And by sharing their data and working collectively, law schools might be able to develop an even more precise and fine-grained understanding of the predictive value of LSAT scores for black applicants.

Law schools should also create new pipeline programs, or expand existing ones, to cultivate a broader pool of potentially viable black applicants. Such initiatives ideally would include academic support, career advice, help preparing for standardized tests, assistance with application materials, and financial aid support, but they can vary considerably in their breadth of focus. The most narrowly-tailored programs would entail efforts on the part of law schools to increase their

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134. See Gilens, *supra* note 57.

135. In the absence of government action, wealthy non-governmental entities such as philanthropic foundations and universities may still be able to leverage their resources to help alleviate the conditions of racial hierarchy. For an exemplary recent example, see Michelle Caffrey, *University of Pennsylvania Pledges \$100M to Philadelphia Public Schools*, PHIL. BUS. J. (Nov. 17, 2020), <https://www.bizjournals.com/philadelphia/news/2020/11/17/university-of-pennsylvania.html> [<https://perma.cc/F3EC-8V9X>] (describing the University of Pennsylvania's pledge of \$100 million to improve the quality of education available at Philadelphia public schools).

136. Numerous scholars have proposed that law schools place less emphasis on applicants' LSAT scores. See *supra* note 3 and accompanying text.

own minority student populations in relatively short order. This approach is perhaps best exemplified by CUNY Law School's Pipeline to Justice program, which admits a select group of applicants who have been denied admission to the law school into a special preparatory program and then reconsiders them for admission upon completion.<sup>137</sup> Another type of targeted pipeline initiative involves forming partnerships with HBCU undergraduate institutions. One model for this approach is the "3+3" dual-degree program that Drexel University's Thomas R. Kline School of Law and Spelman College formed in December 2020,<sup>138</sup> in which students begin taking classes at Drexel after finishing their third year of coursework at Spelman.<sup>139</sup>

Other less-targeted pipeline efforts might focus on expanding the pool of black law school applicants more broadly, with less emphasis on funneling students into their own programs. One prominent example of this approach is the University of Houston Law Center's Pre-Law Pipeline Program, which offers several programs including an eight-week summer program that provides university undergraduates and alums from underrepresented backgrounds preparation for the LSAT, the law school admissions process, and law school coursework.<sup>140</sup> A number of other schools also have implemented such programs, including the University of California at Davis School of Law,<sup>141</sup> St. John's

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137. See *Pipeline to Justice*, CUNY SCH. OF L., <https://www.law.cuny.edu/academics/pipeline> [<https://perma.cc/3WCG-5QJ3>] (program provides participants intensive preparation for the LSAT exam and the academic rigors of law school coursework).

138. *Kline Law Forms 3+3 Program with Historically Black Spelman College*, DREXEL UNIV. THOMAS KLINE SCH. OF L. (Dec. 11, 2020), <https://drexel.edu/law/about/news/articles/overview/2020/December/drexel-kline-selman-3-plus-3> [<https://perma.cc/U92T-XAK6>].

139. *Id.* The credits that students earn during their first year at Drexel also count toward their bachelor's degree requirements at Spelman.

140. *UH Law Center Provides Introduction to Law School with Two New Pre-Law Programs*, PR NEWSWIRE (May 14, 2020), <https://www.prnewswire.com/news-releases/uh-law-center-provides-introduction-to-law-school-with-two-new-pre-law-programs-301059622.html> [<https://perma.cc/HLB8-5XKY>].

141. *King Hall Outreach Program (KHOP)*, U.C. DAVIS SCH. OF L., <https://law.ucdavis.edu/outreach/khop.html> [<https://perma.cc/PJ86-VC33>] (King Hall Outreach Program provides mentoring, advising, and weekend programming to undergraduate students from underrepresented communities).

University School of Law,<sup>142</sup> UCLA School of Law,<sup>143</sup> and the University of Baltimore.<sup>144</sup> Other schools hold similar programs that, while not specifically targeted to minority students, still may help increase the pool of well-prepared black applicants.<sup>145</sup>

These pipeline programs are valuable tools for increasing the representation of black law students, and far more schools should adopt such initiatives. But broader and even more ambitious outreach efforts that would begin working with black students during their critical childhood years would hold even greater potential for expanding the pool of qualified black law school applicants over time. A small number of law schools already have implemented such programs. The University of Baltimore's Charles Hamilton Houston Scholars Program, for example, offers attorney mentors, mini-internships, and weekly workshops on academic skills to participating college freshman and sophomores.<sup>146</sup> The Georgetown University Law Center's Early Outreach Initiative sends Georgetown staff to visit select groups of high school seniors at dozens of high schools across the country,

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142. See ST JOHN'S UNIVERSITY SCHOOL OF LAW, RON BROWN PREP PROGRAM, <https://www.stjohns.edu/sites/default/files/2019-12/2020%20RHB%20Brochure.pdf> [<https://perma.cc/P365-3Z39>] (Ronald H. Brown Law School Prep Program for College Students offers several LSAT Boot Camp programs and law school prep programs for college seniors and graduates from disadvantaged or underrepresented backgrounds).

143. *Outreach*, UCLA SCH. OF L. ACAD. OUTREACH RES. CTR., <https://www.law.ucla.edu/life-ucla-law/diversity-inclusion/outreach> [<https://perma.cc/3ERH-PCFF>] (UCLA Law School Fellows Program seeks to "increase the pipeline of diverse students interested in the law" through workshops and seminars, and supports them with mentoring and academic advising).

144. See Yvonne Wenger, *University of Baltimore Recruits Top Talent from Historically Black Colleges*, WASH. POST (Oct. 21, 2017), [https://www.washingtonpost.com/local/education/university-of-baltimore-recruits-top-talent-from-historically-black-colleges/2017/10/21/5ceff974-b394-11e7-9e58-e6288544af98\\_story.html?noredirect=on&utm\\_term=.7d2d5a00c938](https://www.washingtonpost.com/local/education/university-of-baltimore-recruits-top-talent-from-historically-black-colleges/2017/10/21/5ceff974-b394-11e7-9e58-e6288544af98_story.html?noredirect=on&utm_term=.7d2d5a00c938) [<https://perma.cc/R59K-MY8C>]; *The Fannie Angelos Program for Academic Excellence*, UNIV. OF BALT., <http://law.ubalt.edu/admissions/diversity/fannieangelosprogram/index.cfm> [<https://perma.cc/8YR3-LFQ7>] (Fannie Angelos Program for Academic Excellence provides LSAT preparation, mentoring, and other forms of support, including full scholarships for those who are later admitted to the law school, to select students from the state's HBCUs).

145. See Donald J. Weidner Summer for Undergraduates, COLL. OF L. FLA. STATE UNIV., <https://law.fsu.edu/academics/summer-for-undergraduates> [<https://perma.cc/A4BS-ZKEP>]; *Pre-Law Undergraduate Scholars (PLUS) Program*, CHICAGO-KENT COLL. OF L., <https://www.kentlaw.iit.edu/academics/pre-law-undergraduate-scholars-program> [<https://perma.cc/Q39Y-RAA2>].

146. *Charles Hamilton Houston Scholars Program, About the Program*, UNIV. OF BALT., <http://law.ubalt.edu/admissions/diversity/chhsp/index.cfm> [<https://perma.cc/G4WE-FTDB>].



providing mentorship support and advising aimed at preparing them for college and for their postgraduate educational and professional careers.<sup>147</sup> Several bar associations and non-profit organizations also have developed similarly long-term pipeline programs.<sup>148</sup> An obvious downside to these more expansive programs is that they offer far less in the way of direct returns for the individual law schools that run them. The students who participate in them may very well end up attending law school elsewhere, or not applying to law school at all. The broad dispersion of these programs' benefits potentially poses a collective action problem that may deter some schools from investing the resources necessary to fund such programs. Law schools might avoid this problem by agreeing collectively to support such programs, either by developing their own programs or by pooling their resources with other institutions.

Finally, law schools and law professors can help address the underlying conditions of racial hierarchy by supporting or engaging in research, policy advocacy, social activism,<sup>149</sup> and efforts to promote doctrinal reforms.<sup>150</sup>

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147. *Early Outreach Initiative*, GEO. L., <https://www.law.georgetown.edu/admissions-aid/early-outreach-initiative> [<https://perma.cc/P8Y4-ULTG>]. See generally Marisa Manzi & Nina Totenberg, *'Already Behind': Diversifying the Legal Profession Starts Before the LSAT*, NPR (Dec. 22, 2020), <https://www.npr.org/2020/12/22/944434661/already-behind-diversifying-the-legal-profession-starts-before-the-lsat> [<https://perma.cc/28EP-UZAR>] (describing the Georgetown Early Outreach Initiative).

148. See, e.g., *Student Pipeline Programs*, NYC BAR, <https://www.nycbar.org/serving-the-community/diversity-and-inclusion/student-pipeline-programs> [<https://perma.cc/B3QF-LN48>] (describing several pipeline support programs that the New York City Bar Association offers to high school and college students); *About Us*, LEGAL OUTREACH, [https://legaloutreach.org/?page\\_id=2](https://legaloutreach.org/?page_id=2) [<https://perma.cc/V2A7-CFW5>] (New York City organization, Legal Outreach, Inc., works with students starting in the eighth grade to interest them in, and prepare them for, legal careers); NJ LEEP, <http://njleep.org> (NJ Law and Education Empowerment Program ("LEEP") provides similar support to middle- and high-school students from New Jersey).

149. See generally James E. Moliterno, *The Lawyer as Catalyst of Social Change*, 77 *FORDHAM L. REV.* 1559, 1568 (2009) (noting some of the many competencies that position attorneys to help achieve social change, including "[l]eadership qualities, forensic ability, talent for reasoning, [and] knowledge of the legal system").

150. For example, in recent years, a number of prominent education law scholars have made the case for more robust education-related rights under federal and state constitutions and statutes. See James E. Ryan, *A Constitutional Right to Preschool?*, 94 *CALIF. L. REV.* 49 (2006); Derek W. Black, *The Fundamental Right to Education*, 94 *NOTRE DAME L. REV.* 1059 (2019); See generally *A FEDERAL RIGHT TO EDUCATION: QUESTIONS FOR OUR DEMOCRACY* (Kimberly Jenkins Robinson ed., 2019). The recent decision of the Sixth Circuit Court of Appeals in *Gary B v. Whitmer* suggests that at least some members of the federal judiciary may be open to such rights claims, given sufficiently compelling legal argumentation and evidence.

## CONCLUSION

Continued black underrepresentation at America's law schools has produced a substantial body of scholarship and commentary. This Article contributes to this literature by situating this problem against the backdrop of racial hierarchy that impedes the educational trajectories of black Americans. Conceptualizing black underrepresentation through this broader lens underscores the need to approach the law school diversity problem expansively and holistically. Only bold, persistent efforts on the part of a broad set of stakeholders, including policymakers and members of the bar, will achieve the type of lasting and transformative progress that advocates have sought for so long.

**CORRECTION OF MONUMENTAL JUDICIAL  
MALPRACTICE: THE CASE FOR CLEARING  
SECESSIONIST AND SLAVEHOLDING SYMBOLS  
OF “JUSTICE” FROM THE COURTHOUSE**

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In disconnecting the “political bands” that linked “the thirteen United States of America” to Great Britain,<sup>1</sup> the founders of our nation said that “all men are created equal . . . [and] are endowed . . . with . . . unalienable Rights . . . [to] Life, Liberty and the pursuit of Happiness.”<sup>2</sup> What the founders intended was something entirely different.

Noble as those words and principles may have been—for the first time, the people of a nation announced to the world their intent to form a government of their choosing—they did not apply to everyone. Left unbroken were the shackles binding the captured, enslaved souls who toiled on plantations, in pine barrens, and at wharves. The purported unalienable rights to life, liberty, happiness, self-determination, and their attendant freedom came with a caveat: they did not apply to slaves.

That exception, of course, was enshrined in the Constitution of the United States of America. Reflected in the document that purported to “establish Justice” and “secure the Blessings of Liberty” for the “People of the United States,”<sup>3</sup> the Constitution made the point that an enslaved individual counted as only three-fifths of a person.<sup>4</sup> Chiseled into the bedrock of our democracy was an acceptance of the enslavement of human beings in what ironically had been declared to be a land of innate liberty and unyielding equality.

So was born a country of freedom for some, justice for fewer than all, and an original sin that this now mature nation struggles with even today. The protests that swept the nation in 2020 reflect as much. How to best respond to some of the systemic issues highlighted by the objections of “today” might require a brisk but careful response to be carried out not

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<sup>1</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

<sup>2</sup> *Id.* para. 2.

<sup>3</sup> U.S. CONST. pmbl. (alteration in original).

<sup>4</sup> *Id.* art. I, § 2.

immediately or reflexively, but “tomorrow.” Certain symbolic, yet significant, measures can be taken immediately.

Democracy, at least at some level, is freedom from arbitrary actions, be they of government or of citizens. That freedom is protected by justice, which guarantees fair treatment and proper administration of laws.<sup>5</sup>

However, how we personify justice in this country sometimes suggests that yesterday’s view—that the extent of liberty and justice that one is entitled to depends on the shade of that person’s skin—still prevails today. Throughout this country, allegories of justice are told through the conspicuous heraldry of Confederate figures and of slaveholders at courthouse steps and on courthouse walls. Slavery and the institution that supported it are the worst forms of racism, and racism is incompatible with justice. It should take no time to conclude that there is no justification for using those figures as representatives in our halls of justice. Along those lines, it also should take no time for American courts experienced in the practice of adopting “bright line rules” to implement this practice in the narrow circumstance of courthouse iconography. Although it is appropriate and, in fact, important to remember positive contributions and achievements in American society, our modern illustration of justice should be free from the taint of slavery and the Confederacy. So, if a figure of yesterday “preached equality, but . . . didn’t practice it,”<sup>6</sup> insofar as they bought, owned, leased, loaned, or traded another human being, or if the figure fought for the Confederacy in support for that practice, then they should not be used to symbolize justice at the modern courts of today.

This article touches upon those points. Parts I and II of this article, respectively, consider our nation’s original sin and its reluctant reconciliation with its history of slavery and its consequences. Parts III through V of this article, in turn, briefly note the national and international shift in the understanding and acceptance of symbols of inequality before suggesting a responsible, reasoned review of our illustrations of justice. In Part VI, this article announces its bright-line rule for modern metaphors of justice: those who engaged in the practice of slavery, and those of yesterday who supported the renegade faction in this country who took up arms in support of that practice, cannot symbolize justice today. Finally, in Part VII, this article notes the relevant demand of justice in this area, namely, that courts replace antiquated articulations of a justice that applied only to some with inclusive representations that best symbolize our national covenant of equal justice, at all times and for all.

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<sup>5</sup> See *Justice*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>6</sup> Shamar Walters & Maia Davis, *Image of Thomas Jefferson Alongside Black Descendant Holds ‘a Mirror’ to America*, NBC NEWS (July 4, 2020), <https://www.nbcnews.com/news/us-news/image-thomas-jefferson-alongside-black-great-grandson-holds-mirror-american1232913> [<https://perma.cc/V499-2VAT>].

## I. THE ORIGINAL (SECULAR) SIN

This country's original sin traces back to the 1619 arrival of the White Lion privateer ship in Point Comfort, Virginia.<sup>7</sup> The ship delivered approximately twenty kidnapped humans into slavery,<sup>8</sup> and it brought what those who witnessed it saw as an inhuman "curse [of] nations" to American shores.<sup>9</sup>

In the years that followed, humans born rich with the skin of significant melanin pigments, but poor in luck, were bought, sold, leased, and traded. Those unfortunate people were exploited and abused, be it through barbarous physical treatment, mandatory unenlightenment, or "merely" degradation with the insupportable insult that they were not of the human family.<sup>10</sup>

Underlying those mistreatments was the fallacy of natural inequality. Science was—unsuccessfully—used in an attempt to establish a difference between people of color and others that was more than skin deep.<sup>11</sup> Perversions of religion were used to teach that "God," as the "*sole proprietor* . . . of the WHOLE human family," somehow "made the Africans for nothing else but to dig [the] mines and work [the] farms" of White people.<sup>12</sup>

Rhetoric, too, was a yoke of bondage. One of our country's greatest characters, known more for his perhaps still unequaled political philosophy and less for his personal beliefs, at one time arguably was the nation's most effective proponent of the baseless speculation used to rationalize the brutal practice of enslaving other human beings. "[B]lacks," Thomas Jefferson conjectured, were "*inferior* to [] whites in [] endowments both of body and mind[.]"<sup>13</sup> The man whose words birthed our nation and gave us the lofty democratic ideals to which we have aspired for hundreds of years also wrote of what he deemed a comprehensive inferiority in Blacks that obstructed their emancipation and required the prevention of intermixture with other races for the protection of what then was an overwhelmingly White American experiment with democracy.

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<sup>7</sup> *The 1619 Project*, N.Y. TIMES MAG., <http://nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html?smtyp=cur&smid=tw-nytmag> [https://perma.cc/C8U6-9W5X].

<sup>8</sup> *Id.*

<sup>9</sup> PETER P. HINKS, *DAVID WALKER'S APPEAL TO THE COLOURED CITIZENS OF THE WORLD* 4–5 (Peter P. Hinks ed., Penn State Univ. Press 2000).

<sup>10</sup> *Id.* at 12, 25.

<sup>11</sup> Linda Villarosa, *Myths About Physical Racial Differences Were Used to Justify Slavery—and are Still Believed by Doctors Today*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/racial-differences-doctors.html> [https://perma.cc/X9QJ-TKC2].

<sup>12</sup> HINKS, *supra* note 9, at 7.

<sup>13</sup> *Id.* at 29.

Those indictments of myth—those expressions of racism—were used to legitimize the enslavement of Black labor that helped build a country that refused to treat those with dark skin as equals. Those falsities also fueled a racial antipathy that was woven into the fabric of American law. Contrary to the principles of universal liberty and equality expressed in the Declaration of Independence, the Federal Constitution accepted and condoned the most invidious form of racism and characterized an enslaved human being as only three-fifths of a person.<sup>14</sup> Afterward, to maintain “a more perfect Union,” and to promote “domestic Tranquility” and “secure the Blessings of Liberty,”<sup>15</sup> this country regularly compromised its promise of universal liberty and equality with concessions to the intentionally mischaracterized “Peculiar Institution.”<sup>16</sup> The Fugitive Slave Act of the 1790s denied even freed slaves constitutional protections such as the right to a jury trial.<sup>17</sup> The 1820 Missouri Compromise allowed Missouri to be admitted to the union as a slave state,<sup>18</sup> with a provision in its constitution that explicitly precluded “free negroes and mullatoes from coming to and settling in th[e] State.”<sup>19</sup>

Later, the House of Representatives gagged abolitionist petitions in the 1830s and 1840s,<sup>20</sup> and it regularly retracted the coverage of liberty in exchange for the tractability of slaveholding interests in the 1850s.<sup>21</sup> Slaves, we repeatedly said, were not to be accounted for in our pursuit of greatness as a nation. Only in the 1860s did America vanquish slavery and begin to consider the repentance of its original sin.<sup>22</sup>

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<sup>14</sup> See U.S. CONST. art. I, § 2.

<sup>15</sup> U.S. CONST. pmbl.

<sup>16</sup> John C. Calhoun, *Southern Address*, CHARLESTON COURIER (Feb. 1, 1849), reprinted in <http://www.civilwarcauses.org/address.htm> [<https://perma.cc/S57S-8XTN>].

<sup>17</sup> *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875*, LIBRARY OF CONGRESS, <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=003/llac003.db&recNum=702> & <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=003/llac003.db&recNum=703> [<https://perma.cc/AC7S-E7DB>] & <https://perma.cc/9GJ6-XRA9>].

<sup>18</sup> See *Dred Scott v. Sanford*, 60 U.S. 393, 519 (1857) (Catron, J., concurring), superseded by constitutional amendment, U.S. CONST. amend. XIV; see also *Ngiraingas v. Sanchez*, 495 U.S. 182, 195 n.2 (1990) (Brennan, J., dissenting).

<sup>19</sup> MO. CONST. of 1820, art. III, § 26.

<sup>20</sup> See Lynn D. Waddle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853, 930-31 (1999).

<sup>21</sup> See Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

<sup>22</sup> See U.S. CONST. amend. XIII.

## II. RELUCTANT RECONCILIATION

Slavery was the worst form of the worst of prejudices. Although slavery was abolished, its underlying bigotry has persisted.<sup>23</sup> “Black Codes” unsubtly limited civil rights and freedoms for African-Americans in post-Civil War society.<sup>24</sup> Jim Crow laws codified racial segregation,<sup>25</sup> and universal Black suffrage was an unfulfilled promise for decades even after the passage of the Thirteenth, Fifteenth, Nineteenth, and Twenty-Fourth Amendments.<sup>26</sup>

Even today, our country struggles to reckon with its original sin and, in many respects, still proceeds haltingly toward the perfection of our union.<sup>27</sup> The protests that followed the killing of George Floyd in Minneapolis, Minnesota, which surely arose from frustrations that transcend that horrible incident,<sup>28</sup> starkly remind us that racial iniquity lurks and lingers among us.

The republic was compromised at its inception, perhaps naturally, since its founders were inexperienced in the delicate business of nation-building. No matter, there remains work—much of it, in fact, and much of it difficult—to be done to reach the ideals of equality and justice to which we aspire.

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<sup>23</sup> This turn of phrase is borrowed from Jeff Bezos’s observation that “[s]lavery ended a long time ago, but racism didn’t.” Annie Palmer, *Read the Memo Jeff Bezos Sent to Amazon Employees About Juneteenth*, CNBC (June 17, 2020, 9:13 AM), <https://www.cnbc.com/2020/06/17/read-the-memo-jeff-bezos-sent-to-amazon-employees-about-juneteenth.html> [https://perma.cc/4PUA-7M6G].

<sup>24</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441–42 (1968).

<sup>25</sup> *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 393–94 (1978) (Marshall, J., concurring).

<sup>26</sup> The Thirteenth Amendment of the United States Constitution, ratified in 1865, abolished slavery. U.S. CONST. amend. XIII. Five years later, the requisite number of states ratified the Fifteenth Amendment, guaranteeing that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” *Id.* amend. XV, § 1. The Fifteenth Amendment did not address women’s right to vote. *See id.* Only in 1920, with the ratification of the Nineteenth Amendment, did this country guarantee that “[t]he right of citizens of the United States to vote [would] not be denied or abridged . . . on account of sex.” *Id.* amend. XIX. Likewise, it was not until 1964 that citizens of any color or sex could vote in any federal election without being “denied or abridged by the United States or any State by reason of failure to pay poll tax or any other tax.” *Id.* amend. XXIV.

<sup>27</sup> *Statement by the President on the Observance of Juneteenth*, WHITE HOUSE: PRESIDENT BARACK OBAMA (June 19, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/06/19/statement-president-observance-juneteenth> [https://perma.cc/GBS7-D5BY].

<sup>28</sup> *In Their Words: Protesting for George Floyd*, NBC NEWS (June 3, 2020), <https://www.nbcnews.com/news/nbcblk/their-words-why-black-men-women-are-protesting-george-floyd-n1223486> [https://perma.cc/A89C-TJJB].

### III. A SYMBOLIC SHIFT

How those aspirations are to be met is a question that this country has grappled with for centuries. It undoubtedly cannot be answered by one person, it cannot be answered simply, and it surely cannot be answered here.

When that question is ultimately answered, it will have been addressed through significant, sustained, and sincere action. Some of the action will be inspired. Some will be planned. Some will be begrudging. Some parts will be effective, and other parts will not. Most of it will be long overdue.

Some of that action also will be symbolic. In Great Britain, protesters deposited a statue of a seventeenth-century slave trader in the abyss of the River Avon.<sup>29</sup> The NASCAR auto racing series banned the Confederate flag from its premises.<sup>30</sup> Mississippi has removed the Confederate battle emblem from its state flag.<sup>31</sup> Statues and other commemorations of Confederate figures have recently and rapidly been removed from public places,<sup>32</sup> including the United States Capitol,<sup>33</sup> and for good reason. The Confederacy was founded, in part, based on the idea “that the African race” was “rightfully held and regarded as an inferior and dependent race,” and could be “beneficial or tolerable” in the Confederacy “in that condition only.”<sup>34</sup> Today, at their core, monuments to the

<sup>29</sup> Max Foster, Nada Bashir, Rob Picheta, & Susannah Cullinane, *UK Protesters Topple Statue of Slave Trader Edward Colston in Bristol*, CNN (June 8, 2020, 11:39 AM), <https://www.cnn.com/2020/06/07/europe/edward-colston-statue-bristol/index.html> [https://perma.cc/DK5F-LUPQ].

<sup>30</sup> Steve Almasy, *NASCAR Bans Confederate Flags at All Races, Events*, CNN (June 10, 2020, 11:29 PM), <https://www.cnn.com/2020/06/10/us/nascar-bans-confederate-flag-spt-trnd/index.html> [https://perma.cc/85RZ-9282].

<sup>31</sup> Paul LeBlanc, *Mississippi State Legislature Passes Bill to Remove Confederate Symbol from State Flag in Historic Vote*, CNN (June 29, 2020, 3:08 PM), <https://www.cnn.com/2020/06/28/politics/mississippi-flag-confederate-emblem/index.html> [https://perma.cc/FUD7-64PM].

<sup>32</sup> Alisha Ebrahimji, Artemis Moshtaghian, & Lauren M. Johnson, *Confederate Statues Are Coming Down Following George Floyd's Death. Here's What We Know*, CNN (July 1, 2020, 3:45 PM), <https://www.cnn.com/2020/06/09/us/confederate-statues-removed-george-floyd-trnd/index.html> [https://perma.cc/S57S-8HYS].

<sup>33</sup> Emily Cochrane, *Pelosi Orders Removal of Four Confederate Portraits from the House*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/us/politics/pelosi-confederate-portraits-house.html> [https://perma.cc/M9NV-LJAP]. In banishing four portraits of previous Speakers of the House from the United States Capital, current Speaker Nancy Pelosi observed that “the halls of Congress are the very heart of our democracy,” and that “[t]here is no room in the hallowed halls of Congress or in any place of honor for memorializing men who embody the violent bigotry and grotesque racism of the Confederacy.” *Id.*

<sup>34</sup> *Confederate States of America - A Declaration of the Causes Which Impel the State of*



Confederacy and to Confederate figures emphasize white supremacy over Black people.<sup>35</sup>

#### IV. THE CHANGING FACES OF JUSTICE

Those, and other similar individual actions, share a common purpose of illustrating an intent to eradicate injustice throughout society.<sup>36</sup> A question naturally following that broader change in narrative is whether the justice system—where this country upholds rights and protects from wrongs—should reexamine its own depictions of justice, fairness, and equality under the law. It should, but in a judicious manner.

The judiciary, by nature, is a cautious branch of government, and any hurried, wholesale reinvention of courthouse art and allegory would be inconsistent with the deliberative nature of that branch of government. A rational first step, though, would be to ensure that our judiciary does not use symbols of the Confederacy or symbols of slaveholders to illustrate justice today.<sup>37</sup>

Taking that rational, cautious step of reimagining how stories of justice are told requires recognizing that some of those who come before the judiciary for judgment do so for reasons attributable to bias.<sup>38</sup> The original sin of slavery traces to segregation, and traceable from segregation

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*Texas to Secede from the Federal Union*, AVALON PROJECT, [https://avalon.law.yale.edu/19th\\_century/csa\\_texsec.asp](https://avalon.law.yale.edu/19th_century/csa_texsec.asp) [https://perma.cc/U36Q-JW3M]; see *Confederate States of America - Georgia Secession*, AVALON PROJECT, [https://avalon.law.yale.edu/19th\\_century/csa\\_geosec.asp](https://avalon.law.yale.edu/19th_century/csa_geosec.asp) [https://perma.cc/45TK-97F2]; *Confederate States of America - Mississippi Secession*, AVALON PROJECT, [https://avalon.law.yale.edu/19th\\_century/csa\\_missec.asp](https://avalon.law.yale.edu/19th_century/csa_missec.asp) [https://perma.cc/FT6L-GND4]. Confederate Vice President Alexander H. Stephens expressed the same thought in slightly different words in his “Cornerstone Speech,” declaring that the Confederacy’s “foundation[] [was] laid” and “its corner-stone rest[ed] upon the great truth, that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition.” Alexander H. Stephens, Cornerstone Speech, *in* THE CIVIL WAR AND RECONSTRUCTION: A DOCUMENTARY READER 1, 59, 61 (Stanley Harrold ed., 2008), (Mar. 21, 1861).

<sup>35</sup> *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy> [https://perma.cc/J7M7-THLH] [hereinafter S. POVERTY L. CTR., *Public Symbols*]. White supremacist groups have staged hundreds of rallies to protest the removal of Confederate statues in the South. *Id.*

<sup>36</sup> *Id.* Removing Confederate symbols is “about acknowledging the injustices of the past as we address those of today.” *Id.*

<sup>37</sup> *Id.* In the South, “[c]ourthouses, capitols and public squares are adorned with resplendent statues of [Confederate] heroes . . .” *Id.*

<sup>38</sup> *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENT’G PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [https://perma.cc/J4YW-CNLC]. Racial disparity permeates our justice system. Black Americans are more likely than White Americans to be arrested, convicted, and serve lengthy prison sentences. *Id.*

are significant economic problems that linger today.<sup>39</sup> Data shows that unemployment disparity follows racial lines; Black unemployment nearly doubles White unemployment, and White household median income is substantially higher than Black households.<sup>40</sup> Affordable housing and low-income housing tax credits have been concentrated in high-poverty segregated neighborhoods.<sup>41</sup> Persistent housing segregation, in turn, restricts access to good jobs.<sup>42</sup>

The absence of upward economic mobility that flows from these economic conditions contributes to an increase in crime,<sup>43</sup> and it arguably gives rise to disproportionate policing.<sup>44</sup> Disproportionate policing, of course, is a gentle way of referring to such things as inordinate stop and frisks of African-Americans,<sup>45</sup> predictive law enforcement that unfairly leads to heavier policing of communities of color,<sup>46</sup> and the stopping of Black motorists at higher rates than White drivers.<sup>47</sup> Also included in heavier policing are, among other things, higher arrest rates for low-level crimes like

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<sup>39</sup> Alana Semuels, *Segregation Has Gotten Worse, Not Better, and It's Fueling the Wealth Gap Between Black and White Americans*, TIME (June 19, 2020, 8:53 AM), <https://time.com/5855900/segregation-wealth-gap/> [<https://perma.cc/7B9Z-P2W9>] (“The numbers reflect the long-term consequences of segregation, which has contributed to denying Black Americans the jobs, salaries and other opportunities that are key to upward mobility.”).

<sup>40</sup> *Id.* In January of 2020, unemployment among Black Americans was 6.0% versus 3.1% for White Americans. *Id.* As of 2017, the median income for Black households was \$40,258 versus \$68,145 for White households. *Id.*

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

<sup>42</sup> *Id.*

<sup>43</sup> See *Evidence Matters*, U.S. DEP'T. OF HOUSING AND URB. DEV. 1, 3 (2016) <https://www.huduser.gov/portal/sites/default/files/pdf/EM-Newsletter-summer-2016.pdf> [<https://perma.cc/J4UM-9XXE>].

<sup>44</sup> See *id.* at 4.

<sup>45</sup> See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 668, 672 (S.D.N.Y. 2013) (acknowledging the “targeting [of] racially defined groups for stops” and noting that such practice “perpetuates the stubborn racial disparities in our criminal justice system”); *cf. Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that a police officer may stop and frisk a person when the officer “observes unusual conduct which leads him [or her] reasonably to conclude in light of his [or her] experience that criminal activity may be afoot and that persons with whom he [or she] is dealing may be armed and presently dangerous . . .”).

<sup>46</sup> *Los Angeles Discontinues a Predictive-Policing Program*, SENT'G PROJECT (May 11, 2020), <https://www.sentencingproject.org/news/race-justice-news-los-angeles-discontinues-predictive-policing-program/> [<https://perma.cc/P5NA-HJYB>].

<sup>47</sup> See *Findings*, STAN. OPEN POLICING PROJECT, <https://openpolicing.stanford.edu/findings> [<https://perma.cc/MUJ6-ZJKE>] (finding, among other things, “that police require less suspicion to search Black and Hispanic drivers than White drivers. This double standard is evidence of discrimination.”).

marijuana possession,<sup>48</sup> and a fatality rate for police encounters involving African-Americans that paradoxically is too high,<sup>49</sup> while it is also too low.<sup>50</sup>

None of these points are novel, and none of these issues can be adequately or properly addressed overnight. In fact, the root causes of these problems are beyond the reach of the judiciary and should not be addressed in that arena. However, this is not to say that the judiciary should not be sensitive to these concerns. There is also the attendant optical problem that figures who practiced gross inequality by holding slaves and laying down their lives in support of a cause premised upon a belief of natural inequality are used to symbolize justice today.

Justice, of course, is many things, including the public expression of love,<sup>51</sup> and that love is communicated through the fair and equal application of the law to all. Yet, at the door to many courts—our temples of justice—are statues of slaveholders and those who fought for the Confederacy, and therefore to preserve slavery, in the Civil War.<sup>52</sup> A monument, too, is many things. It is the preservation of an image or an idea.<sup>53</sup> It reflects an instinct to perceive part of ourselves in others. It is the idolatry of a select part of the past.<sup>54</sup>

And on the steps of a courthouse, it can convey a message that the promise of fair and equal treatment under the law might come with an asterisk.<sup>55</sup> When courts use symbols of those who engaged in slavery, and risked life and limb to support that institution, as illustrations of modern justice, they (intentionally or otherwise) risk mimicking segregationists who erected Confederate monuments in town squares across the South. Those

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<sup>48</sup> *Marijuana Arrests by the Numbers*, ACLU, <https://www.aclu.org/gallery/marijuana-arrests-numbers> [<https://perma.cc/6JFC-Z2SZ>] (“Despite roughly equal usage rates, Blacks are 3.73 times more likely than Whites to be arrested for marijuana.”).

<sup>49</sup> Aubrey Clayton, *The Statistical Paradox of Police Killings*, BOS. GLOBE (June 11, 2020, 1:00 PM), <https://www.bostonglobe.com/2020/06/11/opinion/statistical-paradox-police-killings/> [<https://perma.cc/T42Y-D5Z3>] (“A black person in America is roughly three times more likely than a white person to be killed by police.”).

<sup>50</sup> *Id.* Black people have many more interactions with police in non-deadly situations than White people. The higher number of non-lethal police encounters synthetically inflates the number of such encounters and skews the fatality rate for Black police encounters. *See id.*

<sup>51</sup> Harvard University, *Askwith Forum: Cornel West - Spiritual Blackout, Imperial Meltdown, Prophetic Fightback*, YOUTUBE (Oct. 4, 2017), <https://www.youtube.com/watch?v=zuxqhsrCGeg> [<https://perma.cc/RJ26-MQV5>].

<sup>52</sup> Beth D. Jacob, *Confederate Monuments That Remain*, A.B.A. (May 16, 2019), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/black-to-the-future/confederate-monuments/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future/confederate-monuments/) [<https://perma.cc/7ZKZ-LAST>].

<sup>53</sup> *See id.* (quoting *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 470 (2009)) (“A monument, by definition, is a structure that is designed as a means of expression.”).

<sup>54</sup> *Sumnum*, 55 U.S. 460, at 468. When a government arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure. *Id.* at 470.

<sup>55</sup> *See generally* Jacob, *supra* note 52.

monuments were intended to instill fear in the Black population, emphasize white supremacy, normalize racial inferiority, and communicate that those whose accidents of conception resulted in a darker skin tone might not be treated fairly inside the courthouse they are about to enter.<sup>56</sup> Justice, it might seem, may not be blind after all.<sup>57</sup>

## V. RESPONSIBLE REIMAGINATION

Surely, there are those who will argue that to hurriedly remove statues, rename streets and buildings, and otherwise attempt to rewrite history would be a mistake borne of the passion of the moment.<sup>58</sup> They have a point.

Generally, it should be a community responsibility to determine whether to remove a monument of a historical figure or strip the name of that figure from a building or a road. The past cannot and should not be erased, but the present may purposefully determine who it wishes to honor and in what way. It may well be that a community chooses to honor only parts of the legacy of an imperfect figure or that certain contributions of that flawed figure are acknowledged in the context of the presentation of the full historical picture of that character.<sup>59</sup>

There may be others who say that the next perfect person we honor will be the first and that it is unfair to judge figures of the past through the lens of the present. They, too, may be right. Perceptions change with time, and even recent history has plenty of figures who walked a jagged line in the pursuit of equality.<sup>60</sup> For those reasons, it is eminently reasonable to conclude that the reexamination of statues, monuments, and other idolatry should be done in the context of the period in which the person lived and in the context of their entire legacy.

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<sup>56</sup> *See id.*

<sup>57</sup> *Id.*

<sup>58</sup> *See* Senator Tom Cotton, *Senator Tom Cotton Against the 1619 Riots*, AM. MIND (June 22, 2020), <https://americanmind.org/essays/senator-tom-cotton-against-the-1619-riots/> [https://perma.cc/TAL6-H8TM].

<sup>59</sup> The debate with respect to the legacy of President Millard Fillmore is instructive here. *See* Stephen T. Watson, *A Reckoning: Reconsidering Millard Fillmore's Legacy*, BUFF. NEWS (July 19, 2020), [https://buffalonews.com/news/local/a-reckoning-reconsidering-millard-fillmores-legacy/article\\_0050e600-c832-11ea-883a-13b1bc0f917a.html](https://buffalonews.com/news/local/a-reckoning-reconsidering-millard-fillmores-legacy/article_0050e600-c832-11ea-883a-13b1bc0f917a.html) [https://perma.cc/K6AR-736W].

President Fillmore's record includes the signing of the Fugitive Slave Act. *Id.* But as a citizen, Fillmore made significant and lasting contributions to his local community, including founding what today have become an important regional hospital and a premier public research-intensive university. *Id.*

<sup>60</sup> *See, e.g.,* Katy Steinmetz, *See Obama's 20-Year Evolution on LGBT Rights*, TIME (Apr. 10, 2015), <https://time.com/3816952/obama-gay-lesbian-transgender-lgbt-rights/> [https://perma.cc/2GD3-EV2U].

Still, more may say that the heat of the moment should not melt memories of those who took great risk to forge the democracy of today. They also have a point. Several of this country's "founding fathers"—George Washington, John Hancock, Thomas Jefferson, and John Jay among them—owned slaves.<sup>61</sup> Perhaps that sin was mortal; that debate is one for a different place and a different time. But the fact remains that those figures exposed themselves to perils that yielded the fortune and prosperity of today.

Indeed, the flamboyance of John Hancock was an early mark of American boldness and bravery.<sup>62</sup> The character and political selflessness of George Washington helped create the indomitable American spirit that has persevered through war, depression, and plague.<sup>63</sup> John Jay's work abroad helped to end the Revolutionary War and secure American independence.<sup>64</sup> Thomas Jefferson's words, though produced by an imperfect person and initially subject to selective application, are of a logic pristine and pure that has withstood the test of centuries of time.<sup>65</sup> Those actions cannot be erased and should not be forgotten, and it is absolutely appropriate to celebrate those accomplishments in modern America. Greatness has a price and those who paid it—no matter how imperfect their legacies—should be remembered in appropriate ways.

## VI. MODERN METAPHORS OF JUSTICE

That balanced approach can even extend to the courthouse. Our justice system was undoubtedly built with contributions from some with a troubled legacy on the question of race, and it is perfectly reasonable to acknowledge those contributions in places where justice is administered.<sup>66</sup> However, acknowledging contributions from such a figure and upholding that figure as a modern *symbol of justice* are entirely different matters.

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<sup>61</sup> Anthony Iaccarino, *The Founding Fathers and Slavery*, BRITANNICA, <https://www.britannica.com/topic/The-Founding-Fathers-and-Slavery-1269536> (July 28, 2016) [<https://perma.cc/P8G2-3FNG>].

<sup>62</sup> See History.com Editors, *John Hancock*, HIST. (Nov. 9, 2009), [https://www.history.com/topics/american-revolution/john-hancock#section\\_4](https://www.history.com/topics/american-revolution/john-hancock#section_4) [<https://perma.cc/J4GG-T252>].

<sup>63</sup> History.com Editors, *George Washington*, HIST. (Oct. 29, 2009), <https://www.history.com/topics/us-presidents/george-washington> [<https://perma.cc/4WGW-93MZ>].

<sup>64</sup> History.com Editors, *John Jay*, HIST. (Jan. 28, 2010), <https://www.history.com/topics/us-government/john-jay> [<https://perma.cc/3NSH-VNK6>].

<sup>65</sup> History.com Editors, *Thomas Jefferson*, HIST. (Oct. 29, 2009), <https://www.history.com/topics/us-presidents/thomas-jefferson> [<https://perma.cc/WN44-W32R>].

<sup>66</sup> See Katherine J. Rosich, *Race, Ethnicity, and the Criminal Justice System*, AM. SOC. ASS'N (Sept. 2007), [asnet.org/sites/default/files/savvy/images/press/docs/pdf/ASARaceCrime.pdf](https://asnet.org/sites/default/files/savvy/images/press/docs/pdf/ASARaceCrime.pdf) [<https://perma.cc/B2AB-ATYK>].

This brings us to two classes of concern. First, the issue of the appropriateness of continued reverence for Confederate figures in and around our halls of justice should be easily resolved.<sup>67</sup> Those figures betrayed the United States of America and took up arms for causes that included apartheid and slavery.<sup>68</sup> It is utterly perplexing that courts—let alone any other subdivision of our country—would honor those who were on the wrong side of history and humanity and, in doing so, sometimes require a Black person to walk past a towering statue of a Confederate figure to enter a hall of justice. It is equally stunning that we could suggest to a Black child that racism is over when that child might live on a road and go to a public school named after a Confederate general.<sup>69</sup> In short, there is no place for the veneration of a Confederate figure anywhere on courthouse grounds, and no space in which a Confederate figure could or should be used to symbolize the justice of today.

Second, opposite that point lies the more difficult question: whether continued courthouse honor should be given to slaveholders who were not complicit in the Confederacy. Perhaps relevant to that issue is the axiom that those who cannot remember the past are condemned to repeat it.<sup>70</sup> There is value in the scrapbooks of history and, without some remembrances of slaveholders,<sup>71</sup> the story of our country—the good, the bad, and even the downright miserable—cannot be told.<sup>72</sup>

In fact, our national quest for a more perfect union is dotted with imperfections. It is not simple to determine where to draw the line with respect to the blemishes that should be addressed immediately and those that remain questions for tomorrow. To give history a quick, comprehensive scrub of every figure with any degree of antebellum stain, arguably, would be to play a dangerous game.

But this is not to say that a line cannot be drawn or that certain veneration cannot be consigned to a more appropriate corner of history.

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<sup>67</sup> See generally J. Michael Martinez, *State Displays of Confederate Symbols: Legal Challenges and the Political Question Doctrine*, 25 POL. & POL'Y 1 (Nov. 12, 2008), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1747-1346.1997.tb00456.x> [<https://perma.cc/SA8T-ZLM7>].

<sup>68</sup> *Id.*

<sup>69</sup> See S. POVERTY L. CTR., *Public Symbols*, *supra* note 35. Confederate memorials still speckle the southern landscape as well as the parks, streets, schools, dams, capitols, and other places that still adorn that area. *Id.* The illustration used in this essay is drawn from Manassas, Virginia, which has a fire department, a road, and at least two schools named after Confederate figures. *Id.*

<sup>70</sup> GEORGE SANTAYANA, *THE LIFE OF REASON: REASON IN COMMON SENSE* 284 (Scribner's ed. 1905).

<sup>71</sup> For example, presidents George Washington, Thomas Jefferson, James Madison, James Monroe, and Andrew Jackson each owned slaves. See Iaccarino, *supra* note 61.

<sup>72</sup> HINKS, *supra* note 9, at xxv (noting Walker's reference to the "miserable condition" of African Americans).

Like elections, revolutions have consequences. Monuments to Lenin, Stalin, and other authoritarian figures fell with the Soviet Union in the early 1990s.<sup>73</sup> In this country, colonists burned, melted, and destroyed figures of King George III in 1776.<sup>74</sup> In perhaps the closest model for modern America, “the purging ritual that comes with revolution” toppled statues and removed portraits of apartheid figures in South Africa in the mid-1990s.<sup>75</sup>

The American social revolution of 2020 emphasizes that there is no excuse for ignoring that slavery is racism and that those who supported the institution supported racism.<sup>76</sup> We are the world’s beacon of democracy, and to uphold as *symbols of justice* those who fought for and engaged in the most “monstrous *injustice*” in our nation’s history at doorsteps to the halls and houses at which this country dispenses due process and applies the rule of law today is antithetical to any notion of logic or common sense.<sup>77</sup> It cedes the moral high ground of justice, enables skeptics of the institution, and exposes the judiciary to taunts about hypocrisy and insincerity.<sup>78</sup> It congests space “for . . . conversation toward progress.”<sup>79</sup> It empowers memories of inequality sanctioned by the highest court of our land.<sup>80</sup>

It also sows doubt in the minds of people of color,<sup>81</sup> whose interaction with the justice system sometimes comes about for systemic

<sup>73</sup> See Pavlo Podobed, *Від ленінізму до ленінопаду* [*From Leninism to the fall of Lenin*], RADIO LIBERTY (Dec. 30, 2014) (Ukr.), <https://www.radiosvoboda.org/a/26770232.html> [<https://perma.cc/H2RD-7EXE>].

<sup>74</sup> See Andrew Lawler, *Pulling Down Statues? It’s a Tradition that Dates Back to U.S. Independence*, NAT’L GEOGRAPHIC (July 1, 2020), <https://www.nationalgeographic.com/history/2020/07/pulling-down-statues-tradition-dates-back-united-states-independence/#close> [<https://perma.cc/HC5F-CPUB>].

<sup>75</sup> Isabel Wilkerson, *Apartheid Is Demolished. Must Its Monuments Be?*, N.Y. TIMES ARCHIVES (Sept. 25, 1994), <https://www.nytimes.com/1994/09/25/world/apartheid-is-demolished-must-its-monuments-be.html> [<https://perma.cc/PB7A-XBQL>]; see also Deborah Douglas, *In Dealing with Confederate Monuments, South Africa Provides a Model*, THE CHI. REP. (Aug. 18, 2017), <https://www.chicagoreporter.com/in-dealing-with-confederate-monuments-south-africa-provides-a-model/> [<https://perma.cc/LQ32-72VQ>].

<sup>76</sup> See John R. Allen, *Systemic Racism and America Today*, BROOKINGS (June 11, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/06/11/systemic-racism-and-america-today/> [<https://perma.cc/TZH9-G9DR>].

<sup>77</sup> Abraham Lincoln, Peoria Speech (Oct. 16, 1854) (emphasis added) (transcript available at <https://www.nps.gov/liho/learn/historyculture/peoriaspeech.htm> [<https://perma.cc/R27A-F2X8>]).

<sup>78</sup> See Douglas, *supra* note 75.

<sup>79</sup> See *id.*

<sup>80</sup> See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) (upholding the constitutionality of racial segregation under the “separate but equal” doctrine).

<sup>81</sup> See W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* xxviii (2015). “Daily the [person of color came] more and more to look upon law and justice, not as protecting safeguards, but as sources of humiliation and oppression.” *Id.* Du Bois made this point well over 100 years ago. *Id.* The continued heraldry of such figures implies that there may be a measure of continued vitality in that observation. See *id.*

reasons.<sup>82</sup> Hardly anyone standing in those shoes could be assured of a fair shake in a place that, even unintentionally, clings to hints of a time when they might have counted as only sixty percent of a person and might have been deemed inferior, or outright denied liberty, because of a richness of melanin.<sup>83</sup> To distinguish those figures as modern-day pinnacles of the law is to flirt with the recall of “peculiar” views of justice from days past.<sup>84</sup>

In fact, all of that symbolism could well be considered part of an infrastructure of division in this country.<sup>85</sup> It is no accident that symbols of the Confederacy—which, as a nation 150 years removed from the Civil War, we now know to represent racism and an ideology of hate—were erected in most significant number in two twentieth-century periods in which what some have described as America’s racial caste system was alternately waxed and weakened.<sup>86</sup> The early 1900s saw southern states enact Jim Crow laws to disenfranchise African-Americans and re-segregate post-Civil War society.<sup>87</sup> That period also saw a significant increase in the dedication of Confederate iconography, as did the civil rights movement of the 1960s.<sup>88</sup> The message of the misplaced esteem afforded to those relics is clear: liberty and justice might be for all, but in varying degrees and at varying times. And so, it should be easy to draw a narrow line in the narrow circumstance of courthouse iconography. Although appropriate and important to honor positive contributions and achievements in American society, our modern illustration of justice must be free from the taint of slavery and the Confederacy. So, if a figure of yesterday “preached equality, but . . . didn’t practice it,”<sup>89</sup> insofar as it bought, owned, leased, loaned, or traded another human being, or if the figure fought for the Confederacy in support for that practice, then they should not be used to symbolize justice at the modern courts of today.

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<sup>82</sup> *Id.* at 10–11.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See Isabel Wilkerson, *America’s Enduring Caste System*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/magazine/isabel-wilkerson-caste.html> [<https://perma.cc/JYX8-RUA6>] (discussing whether our founding promises of “liberty and equality” have been compromised by a “racial caste system” that preceded this country’s founding and still persists today).

<sup>86</sup> *Id.* “Waxed and weakened,” of course, is an alliterative turn of phrase illustrating the point that the timing of the erection of such monuments was intentional; some were raised in support of the racial caste system in the Jim Crow era, and others were erected as those barriers were challenged during the civil rights movement of the 1960s.

<sup>87</sup> See S. POVERTY L. CTR., *Public Symbols*, *supra* note 35.

<sup>88</sup> *Whose Heritage? 153 Years of Confederate Iconography*, S. POVERTY L. CTR., [https://www.splcenter.org/sites/default/files/com\\_whose\\_heritage\\_timeline\\_print.pdf](https://www.splcenter.org/sites/default/files/com_whose_heritage_timeline_print.pdf) [<https://perma.cc/RRY8-WR44>].

<sup>89</sup> Walters & Davis, *supra* note 6.



## VII. CONCLUSION

Law is to be practiced, and justice is to be constantly pursued because while we can and, in fact, mostly find excellence in those areas, perfection is not attainable in either of those related fields. The most pervasive symbol in American courtrooms—Lady Justice—perfectly illustrates the fallibility of our justice system. Lady Justice is not naturally blind; therefore, she is naturally partial, and she must ensure her evenhandedness and fairness by covering her own eyes with a cloth.

So too must those who practice law, and those who pursue justice demand better symbolism of justice at courthouse doors. Simply because something—slavery and its attendant racism—was normal “then” does not mean that it is acceptable now. To this point, there intentionally has been no reference to the number of symbols that dot the landscape because even one such veneration is too many. Even today, there stand nearly 800 monuments to the Confederacy across the country,<sup>90</sup> most of which are spread across the southern United States, and dozens, if not hundreds, of which stand on courthouse grounds.<sup>91</sup> That heraldry is not just an “innocent remembrance[] of a benign history.”<sup>92</sup> Rather, it “purposefully celebrate[s] a fictional, sanitized Confederacy” and ignores the “death, . . . [and] the enslavement, and the terror that it actually stood for.”<sup>93</sup> To the extent such reverence on courthouse grounds is given to a slaveholder who preceded the Confederacy or who did not support secession, the intent of the veneration may be pure, but the underlying imperfection remains. The horror of the Confederacy rested in its enslavement and dehumanization of people of color, and anyone who engaged in that obsolescent practice of yesterday is not someone who should be used to symbolize the modern, evolved system of justice today.

Surely there are more such illustrations sprinkled throughout courthouses across the country in the form of portraits, plaques, or other markers of significance. To allow for the expression of an idea of justice rooted in a time of slave and master when the worth of an individual was measured by quantity—not of character, but of melanin—is malpractice. Injustice at that part of the courthouse implies injustice everywhere in the

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<sup>90</sup> See *Whose Heritage? Public Symbols of the Confederacy*, *supra* note 35.

<sup>91</sup> *Id.*; *Whose Heritage: Public Symbols of the Confederacy*, GOOGLE MAPS, <https://www.google.com/maps/d/viewer?mid=1yDVZz93PUT3wDXpl4I-qmEQiSWqNtpzA&ll=23.210013016804186%2C-99.77699332146352&z=4> [https://perma.cc/ER49-6VJC] (monument and marker map).

<sup>92</sup> *Mitch Landrieu's Speech on the Removal of Confederate Monuments in New Orleans*, N.Y. TIMES (May 23, 2017), <https://www.nytimes.com/2017/05/23/opinion/mitch-landrieu-speech-transcript.html> [https://perma.cc/AE8K-Y8XW] (remarking on the removal of three prominent Confederate monuments in New Orleans, Louisiana).

<sup>93</sup> *Id.*

courthouse. There is no better time than now for courthouses to discard the antiquated, habitual depictions of justice through those who participated in slavery and of those who fought and, in some cases, died for the belief that melanin-based inequality was a “great” and “natural” “truth.”<sup>94</sup>

Much as there was meaning in the rise of those illustrations, there will be meaning in their fall. Courthouse grounds and halls are “place[s] that everybody should feel a part of.”<sup>95</sup> There surely are more laudable and less imperfect figures to allegorize impartiality and fairness on our courthouse steps and in our courthouse halls.<sup>96</sup> Justice demands that we find them.

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<sup>94</sup> Stephens, *supra* note 34.

<sup>95</sup> *Whose Heritage?*, S. POVERTY L. CTR., <https://www.splcenter.org/data-projects/whose-heritage> [<https://perma.cc/F2RR-TKN9>] (highlighting former South Carolina Governor Nikki Haley’s remarks on July 10, 2015 regarding the removal of the Confederate battle flag from State House Grounds in Columbia).

<sup>96</sup> There is a temptation to specify a number of such figures. Ultimately, though, the determination of who to honor, and how to bestow such honor, should be a local decision. To the extent it is needed, and to the extent it would be welcomed, perhaps some guidance could be found in these exemplars. Louis Napoleon, born to a slave in New York City in 1800, helped conduct the Underground Railroad. Later, despite his illiteracy, he obtained a writ of habeas corpus for slaves transported to New York State that gave rise to what is colloquially referred to as the Lemmon Slave Case. *See Louis Napoleon*, HIST. SOC’Y OF THE N.Y. COURTS, <https://history.nycourts.gov/figure/louis-napoleon/> [<https://perma.cc/CMK6-M9UA>]; *see also* *Lemmon v. People*, 20 N.Y. 562 (1860). That case, of course, saw New York State free slaves transited through that state and perhaps was one of “the final development[s] of the law of freedom” within the state action realm. William H. Manz, *A Just Cause for War: New York’s Dred Scott Decision*, 79 N.Y. ST. BARJ. 10, 21 (2007). Others, whose efforts moved the law in matters of civil rights, may also merit consideration, such as Virginia Minor, whose battle for women’s suffrage took her to the United States Supreme Court and eventually contributed to the passage of the Nineteenth Amendment to the United States Constitution. *See Minor v. Happersett*, 88 U.S. 162 (1874). Similarly worthy is Gustavo Garcia, who won a landmark case challenging the systematic exclusion of Mexican-Americans from jury duty in Texas. *See Hernandez v. Texas*, 347 U.S. 475 (1954).

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EDUCATIONAL ADEQUACY CHALLENGES: THE IMPACT ON MINNESOTA CHARTER SCHOOLS

*Wendy Baudoin*

*Introduction*

Years after the civil rights movement, educational challenges in public schools have continued to plague classrooms and fill courtrooms. During the 1970s, litigation examined the

equitability of financing in public education systems.<sup>1</sup> Equity challenges later progressed into challenging academics, resources, and opportunities.<sup>2</sup> By 1989, the Kentucky Supreme Court found that the Kentucky public education system failed to provide its students with an “adequate education.”<sup>3</sup> In the years that followed, an “adequacy movement” across the nation began—its purpose was to address whether state constitutions were providing students with the opportunity to “achieve certain desired educational outcomes.”<sup>4</sup> These challenges have collectively been referred to as “educational adequacy.”<sup>5</sup>

As challenges to finances and school resources have evolved, one emerging factor has been adequacy in segregated environments. After the civil rights movement, racial segregation in public schools initially improved but has since continued to increase.<sup>6</sup> Desegregation orders from federal courts were initially prevalent, but their use has since been reduced.<sup>7</sup> Desegregation orders also varied but included the racial integration of students in educational environments and addressed local policies and practices.<sup>8</sup> For years, states and local districts have struggled to find racial balance within the public education system.<sup>9</sup> Some Supreme Court decisions have left states to

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<sup>1</sup> Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, in *ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY* 218, 226 (Nat'l Acad. Press, 2002), <https://www.nap.edu/read/10256/chapter/13>.

<sup>2</sup> Anthony P. Carnevale, Artem Gulish & Jeff Strohl, *Educational Adequacy in the Twenty-First Century*, CENTURY FOUNDATION (May 2, 2018), <https://tcf.org/content/report/educational-adequacy-twenty-first-century/>.

<sup>3</sup> Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* 175 (Nat'l Acad. Press, 1999), <https://www.nap.edu/read/6166/chapter/8#175>; *Rose v. Council for Better Educ. Inc.*, 790 S.W.2d 186, 189–90 (Ky. 1989).

<sup>4</sup> Minorini & Sugarman, *supra* note 3.

<sup>5</sup> *Id.*

<sup>6</sup> Beverly Daniel Tatum, *Segregation Worse in Schools 60 Years After Brown v. Board of Education*, SEATTLE TIMES (Sept. 14, 2017), <https://www.seattletimes.com/opinion/segregation-worse-in-schools-60-years-after-brown-v-board-of-education/>.

<sup>7</sup> Nikole Hannah-Jones, *School Districts Still Face Fights and Confusion on Integration*, ATLANTIC (May 2, 2014), <https://www.theatlantic.com/education/archive/2014/05/lack-of-order-the-erosion-of-a-once-great-force-for-integration/361563/>.

<sup>8</sup> *Id.*

<sup>9</sup> GROVER J. WHITEHURST, RICHARD V. REEVES & EDWARD RODRIGUE, *SEGREGATION, RACE, AND CHARTER SCHOOLS: WHAT DO WE KNOW?* 21–27 (Ctr. on Child. & Fam. Brookings) (Oct. 2016), [https://www.brookings.edu/wp-content/uploads/2016/10/ccf\\_20161021segregation\\_version-10\\_211.pdf](https://www.brookings.edu/wp-content/uploads/2016/10/ccf_20161021segregation_version-10_211.pdf).

deal with segregation issues that could not be remedied through purposeful racial balance or quotas.<sup>10</sup>

Projected to transform public education in the country, charter schools began opening in the early 1990s, beginning in Minnesota.<sup>11</sup> Minnesota is now facing challenges on educational adequacy amid concern that segregation has once again crept into the public education system. The ongoing Minnesota case *Cruz-Guzman* has challenged the adequacy of public education and renewed concern over the role charter schools play in segregation.<sup>12</sup> As such challenges emerge in courtrooms, the judicial treatment of educational adequacy may present legal and policy implications for Minnesota and for the future of its charter schools. This article will explore the educational adequacy movement and the challenges arising for charter schools based on the outcome of *Cruz-Guzman*.

First, this article discusses the history of federal education adequacy challenges stemming from segregation, fundamental rights, and economic disparities. Historically significant and current educational adequacy challenges in Minnesota are discussed. Educational adequacy challenges in Minnesota have ranged from complaints of unequal funding and resources<sup>13</sup> to the segregation of public schools.<sup>14</sup> However, relief for adequacy advocates has been met with judicial barriers. Most notable, *Skeen v. State* and *Cruz-Guzman v. State* confronted the justiciability of the plaintiffs' right to seek relief in court for lack of educational adequacy.<sup>15</sup>

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<sup>10</sup> Bob Egelko, *Supreme Court: Schools Can't Use Race to Assign Students*, SFGATE, <https://www.sfgate.com/bayarea/article/Supreme-Court-Schools-can-t-use-race-to-assign-2584155.php> (last updated Jan. 17, 2012).

<sup>11</sup> Chester E. Finn, Jr. & Brandon L. Wright, *Where Did Charter Schools Come From?*, EDUC. NEXT, <https://www.educationnext.org/where-did-charter-schools-come-from/> (last updated May 9, 2016).

<sup>12</sup> *Cruz-Guzman v. State*, 916 N.W.2d 1 (Minn. 2018). The Supreme Court has remanded the case, and the final outcome has not been determined.

<sup>13</sup> See *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993).

<sup>14</sup> See *Cruz-Guzman*, 916 N.W.2d 1.

<sup>15</sup> *Skeen*, 505 N.W.2d at 312; *Cruz-Guzman*, 916 N.W.2d at 4.

Second, this article discusses the history of charter schools, the rise of charter schools in Minnesota, and issues surrounding charter schools' racial isolation. To reformers, the opening of charter schools was a "market-based" model poised to give parents more choice in where their children receive educational services.<sup>16</sup> The model was expected to drive out poor-performing traditional schools by offering an alternative to the underserved traditional schools.<sup>17</sup>

According to a Century Foundation fellow, student-integration was also an initial charter school goal.<sup>18</sup> However, the introduction of charter schools into the public education arena has contributed to the resegregation of American public schools.<sup>19</sup> The issue of resegregation seems to have strengthened challenges to educational adequacy.<sup>20</sup>

Finally, this article discusses the legal and policy implications of a still undecided legal challenge seeking desegregation as a remedy to ensure educational adequacy in Minnesota public schools. This article evaluates options for charter schools concerned that the Minnesota judiciary could declare voluntarily-segregated schools unconstitutional. Charter schools' options likely include altering their business models and also the use of mediation to resolve adequacy challenges. Additionally, this article explores steps the Minnesota legislature could take to clarify the standard of adequacy students are entitled to.

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<sup>16</sup> Valerie Strauss, *What and Who Are Fueling the Movement to Privatize Public Education—and Why You Should Care*, WASH. POST (May 30, 2018), [https://www.washingtonpost.com/news/answer-sheet/wp/2018/05/30/what-and-who-is-fueling-the-movement-to-privatize-public-education-and-why-you-should-care/?noredirect=on&utm\\_term=.2caaa8c7ad63](https://www.washingtonpost.com/news/answer-sheet/wp/2018/05/30/what-and-who-is-fueling-the-movement-to-privatize-public-education-and-why-you-should-care/?noredirect=on&utm_term=.2caaa8c7ad63) (referencing to Joanne Barkan's "market-based" public education reform in the United States. Joanne Barkan, *Death by A Thousand Cuts: The Story of Privatizing Public Education in the USA*, 70 SOUNDINGS: J. POL. & CULTURE 97 (2018)).

<sup>17</sup> *Id.*

<sup>18</sup> Matt Barnum, *Are Charter Schools a Cause of—or a Solution to—Segregation?*, THE 74 (Apr. 11, 2016), <https://www.the74million.org/article/are-charter-schools-a-cause-of-or-a-solution-to-segregation/>.

<sup>19</sup> Jenn Ayscue et al., *Charters as a Driver of Resegregation*, CIVIL RIGHTS PROJECT 5–7 (Jan. 2018), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/charters-as-a-driver-of-resegregation/Charters-as-a-Driver-of-Resegregation-012518.pdf>.

<sup>20</sup> See *Cruz-Guzman*, 916 N.W.2d 1.

## I. A BRIEF HISTORY OF EDUCATIONAL ADEQUACY CHALLENGES

A. *A Summary of Federal Educational Adequacy Challenges*

The separate but equal standard defined in *Plessy v. Ferguson*<sup>21</sup> paved a constitutional path for public education facilities to purposefully maintain racially segregated schools.<sup>22</sup> It took decades before the Supreme Court overturned *Plessy*. In *Brown v. Board of Education*,<sup>23</sup> the Court reconsidered its previous position on “separate but equal” and declared that “in the field of public education” segregation is “inherently unequal.”<sup>24</sup> The Court reasoned that public school segregation was a violation of the Fourteenth Amendment’s Equal Protection Clause.<sup>25</sup> The violation, the Court proffered, was that “separate education[] facilities” lacked equality, and a lack of equality was akin to a deprivation of equal protection.<sup>26</sup> Although the decision in *Brown* acknowledged inherent inequality within segregated schools, it failed to establish a definitive standard for education beyond integration.<sup>27</sup> Further, *Brown* did not establish a fundamental right to public education.<sup>28</sup> Instead, the Court opined that if a state had established a public education right, students were entitled to that right “on equal terms.”<sup>29</sup>

The fundamental right to public education made its way into the courtroom again, nearly twenty years after *Brown*. *San Antonio Independent School District v. Rodriguez*<sup>30</sup> challenged disproportionate funding for predominately impoverished, racially-segregated schools as a basis

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<sup>21</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>22</sup> *Id.* at 552 (declaring that “If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”).

<sup>23</sup> *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954).

<sup>24</sup> *Id.* at 495.

<sup>25</sup> *Id.*; U.S. CONST. amend. XIV.

<sup>26</sup> *Brown*, 347 U.S. at 495.

<sup>27</sup> *Id.* at 494–95.

<sup>28</sup> *Id.* at 493.

<sup>29</sup> *Id.*

<sup>30</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

for an inadequate education.<sup>31</sup> In its decision, the Court maintained that a fundamental right to public education for any student did not exist.<sup>32</sup> The Court found that education did not fall into any category of fundamental rights written in the Constitution or previously recognized by the Court.<sup>33</sup> It reasoned that “the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.”<sup>34</sup>

In addition to the absence of a constitutional right to education, the *San Antonio* decision also proffered that “the Equal Protection Clause does not require absolute equality or precisely equal advantages” when “wealth is involved.”<sup>35</sup> The Court found that since many factors contribute to the education of students, no system can adequately ensure that all are equal.<sup>36</sup> Thus, a state’s ability to demonstrate all students have access to a free education with “teachers, books, transportation, and operating funds” demonstrates a level of adequacy, even if financial equality is not met.<sup>37</sup> In the majority opinion, Justice Powell dismissed consideration of constitutional implications when the state of Texas “assures ‘every child in every school district an adequate education.’”<sup>38</sup>

With only general legal guidance on methods of desegregating from *Brown* and a clear statement by *San Antonio* that education was not a constitutional entitlement, institutions grappled with creating diverse student populations and often found their diversity strategies challenged.<sup>39</sup>

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<sup>31</sup> *Id.* at 13–17.

<sup>32</sup> *Id.* at 35.

<sup>33</sup> *Id.* at 35–39.

<sup>34</sup> *Id.* at 30.

<sup>35</sup> *Id.* at 24.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (determining that a law school’s policy to establish student diversity was not a quota system, satisfied a compelling interest, and was narrowly tailored); *Gratz v. Bollinger*, 539



In at least one documented account, a Virginia county shut down all public education services to avoid desegregation.<sup>40</sup> The Supreme Court reaffirmed that unequal access to public education was not constitutionally protected.<sup>41</sup>

One year after *San Antonio*, the Supreme Court once again heard arguments challenging adequate education policies, specifically desegregation. In *Milliken v. Bradley*, the Supreme Court found that court-ordered desegregation plans, which called for inter-district transfers as a remedy for racially-imbalanced school environments, were unconstitutional when external districts are not a party in the segregation case nor responsible for causing the segregation.<sup>42</sup> The Court reasoned that

[b]efore the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district.<sup>43</sup>

At least one scholar has argued that the *Milliken* decision accounted for nearly 60% of the school segregation across the nation that followed.<sup>44</sup>

Subsequently, the Supreme Court in *Parents Involved in Community Schools v. Seattle School District* found that utilizing a whole-school racial-balancing technique to alleviate segregation and diversify the student population was also unconstitutional.<sup>45</sup> The Court found that race-balancing was a demographic goal and not an educational one.<sup>46</sup> A plan to create racial-balance in schools

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U.S. 244 (2003) (finding that a university's use of a numerical point-based application system providing points for certain racial groups amounted to racial preference).

<sup>40</sup> *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 220–23 (1964).

<sup>41</sup> *Id.* at 234 (stating that Defendant “can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia.”).

<sup>42</sup> *Milliken v. Bradley*, 418 U.S. 717, 752–53 (1974).

<sup>43</sup> *Id.* at 744–45.

<sup>44</sup> Erwin Chemerinsky, *Making Schools More Separate and Unequal: Parents Involved in Community Schools v. Seattle School District No. 1*, 2014 MICH. ST. L. REV. 633, 634 (2014).

<sup>45</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 708–11 (2007).

<sup>46</sup> *Id.* at 726.

that does not promote a “pedagogic concept” dependent on diversity achieves no “educational benefit.”<sup>47</sup> The Court further articulated that a sole focus on demographics to diversify a school was a “fatal flaw.”<sup>48</sup> In the plurality opinion, Chief Justice Roberts proffered that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>49</sup>

In its decision, the Court referred to precedent, which offered two areas where primary and secondary public education institutions can demonstrate a compelling government interest to racially-balance its enrollment. First, the Court affords a public education entity a right to remedy its historical and intentional discrimination.<sup>50</sup> Second, the Court permits a public entity to enforce a racially-balanced plan when it is limited to a strategy that more widely seeks to expose student populations to diversity.<sup>51</sup> As a result, states are challenged by an education system that can neither mandate segregated schools nor purposefully create racially balanced ones.<sup>52</sup>

#### *B. A Summary of Educational Adequacy Challenges in Minnesota*

The United States Constitution does not grant citizens a right to a public education.<sup>53</sup> However, every state in the country entitles its students to such a right.<sup>54</sup> It is under state constitutional provisions that educational adequacy challenges have gained momentum across the United States.<sup>55</sup> State courts have grappled with legal adequacy challenges.<sup>56</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 729–30.

<sup>49</sup> *Id.* at 748.

<sup>50</sup> *Id.* at 754 (Thomas, J., concurring).

<sup>51</sup> *Id.* at 723–24.

<sup>52</sup> See Egelko, *supra* note 10.

<sup>53</sup> Kelly Thompson Cochran, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 407 (2000).

<sup>54</sup> *Id.* at 408.

<sup>55</sup> See cases cited *infra* note 56.

<sup>56</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (rationalizing that public education adequacy challenges are legislative concerns since no fundamental right to education exists.); *Rose v. Council for Better Educ. Inc.*, 790 S.W.2d 186 (Ky. 1989) (determining inequitable public-school funding violated Kentucky’s Constitution and was inadequate); *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993) (ruling that financial disparity does not constitute public school inequality).

For states where the right to an adequate education exists, there is a real challenge in both defining adequacy appropriately and in finding a way to employ that definition.<sup>57</sup> There is no universal definition of adequacy for educational purposes, so states must rely on their own provisions and previous judicial decisions to define adequate public education.<sup>58</sup> The absence of clearly identifying a measure with which to assess educational adequacy rights likely negates the effect of such a right.<sup>59</sup>

In Minnesota, the state constitution provides for a “general and uniform system” of public education.<sup>60</sup> In 1913, *Associated Schools of Independent District No. 63 of Hector, Renville County v. School District No. 83 of Renville County*, upheld a legislative mandate to ensure that all Minnesota students “may be enabled to acquire an education which will fit them to discharge intelligently their duties as citizens . . . .”<sup>61</sup> The constitutional requirement has served as the basis for educational legal challenges, including race, financial inequities, and student outcomes.

### 1. Racial Isolation Challenges

Minnesota was a party to a federal educational adequacy challenge stemming from racial isolation in 1973. *Booker v. Special School District* sought to demonstrate that Minneapolis public schools were out of compliance with *Brown* and illegally engaging in segregation practices.<sup>62</sup> The court found that the Minneapolis school district enacted policies that promoted racial segregation.<sup>63</sup> At the time, three Minneapolis elementary schools and two junior high schools had greater than 70% minority enrollment, even though only a small portion of the entire district population

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<sup>57</sup> Rebell, *supra* note 1, at 232.

<sup>58</sup> *Id.* at 231–32

<sup>59</sup> William F. Dietz, *Manageable Adequacy Standards in Education Reform Litigation*, 74 WASH. U. L. Q. 1193, 1203 (1996).

<sup>60</sup> MINN. CONST. art. XIII, § 1.

<sup>61</sup> *Associated Sch. of Indep. Dist. No. 63 v. Sch. Dist. No. 83*, 142 N.W. 325, 327 (Minn. 1913) (citing *Bd. of Educ. of Sauk Ctr. v. Moore*, 17 Minn. 412, 416 (1871)).

<sup>62</sup> *Booker v. Special Sch. Dist. No. 1, Minneapolis, Minnesota*, 351 F. Supp. 799, 802 (D. Minn. 1972).

<sup>63</sup> *Id.* at 809.

identified as a minority race.<sup>64</sup> The court determined that policy decisions regarding the placement and capacity of school buildings, the assignment of teachers to schools, and the transfer of students “aggravate[d] and increase[d]” race-based segregation.<sup>65</sup> As a remedy, *Booker* established a percentage threshold for Minneapolis public schools, stating that 35% or less of a given school’s population should belong to a minority race.<sup>66</sup>

The second major challenge came a little over a decade later, in 1996.<sup>67</sup> Minneapolis NAACP and St. Paul School District wanted to establish racial integration as a component of an adequate educational environment.<sup>68</sup> The net result was a settlement between the parties, that led to the development of the “Choice is Yours” program.<sup>69</sup> The program provided an opportunity for economically-disadvantaged students to exercise school choice by transferring into more “suburban schools.”<sup>70</sup> The Minnesota Department of Education established an Administrative Rule addressing the classification of public school districts and schools based on racial demography.<sup>71</sup> The rule provided an operational definition of racially-isolated schools and districts.<sup>72</sup> A school district is racially-isolated when a protected student group exceeds 20% of a neighboring school district’s protected student group population.<sup>73</sup> Minnesota also identifies a school as racially-identifiable once the school’s enrollment of the protected student group exceeds 20% of all district students in the protected group in “the grade levels served by that school.”<sup>74</sup>

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<sup>64</sup> *Id.* at 802.

<sup>65</sup> *Id.* at 809.

<sup>66</sup> *Id.* at 810.

<sup>67</sup> Minorini & Sugarman, *supra* note 3, at 199.

<sup>68</sup> *Id.*

<sup>69</sup> Beena Raghavendran, *School Integration Lawsuit Heads to Minnesota Supreme Court*, STAR TRIBUNE (Jan. 8, 2018), <http://www.startribune.com/school-integration-lawsuit-heads-to-minnesota-supreme-court/468264213/>.

<sup>70</sup> *Id.*

<sup>71</sup> MINN. R. 3535 (2015).

<sup>72</sup> *Id.* R. 3535.0110.

<sup>73</sup> *Id.* subp. 7.

<sup>74</sup> *Id.* subp. 6.

Despite oversight and new programs, the Minnesota State Department of Education's efforts to voluntarily integrate schools have shown no discernable effect.<sup>75</sup> Legal challenges in the state have continued.<sup>76</sup> Questions about the judiciary's ability to address educational adequacy claims also arose as an issue of justiciability.<sup>77</sup>

## 2. Inequitable Funding Challenges

Though not directly challenging the adequacy of school systems, *Skeen v. State* challenged the relative harm produced by unequal school funding.<sup>78</sup> The plaintiff sought to demonstrate that unequal funding disproportionately harmed low-income students and students of color.<sup>79</sup> The core of the argument was that, given the wealth disparities in neighborhoods, students in non-wealthy communities were severely disadvantaged in education.<sup>80</sup> The plaintiff claimed such a disadvantage demonstrated a lack of uniform education; thus, the plaintiff claimed that unequal funding was a violation of the Minnesota Constitution's Education Clause.<sup>81</sup> The court ruled that Minnesota's Constitution provides free and public education as a fundamental right, as well as an entitlement to an adequate education.<sup>82</sup> However, it failed to find that funding disparities amounted to a non-uniform education.<sup>83</sup> Citing a "broad purpose" and a "standardized system," the court found that local school systems' capacity to raise their own revenue from their respective tax bases

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<sup>75</sup> Allison McCann, *When School Choice Means Choosing Segregation*, VICE NEWS (Apr. 12, 2017), [https://www.vice.com/en\\_us/article/j5d3q3/when-school-choice-means-choosing-segregation](https://www.vice.com/en_us/article/j5d3q3/when-school-choice-means-choosing-segregation).

<sup>76</sup> *Id.*

<sup>77</sup> Will Stancil & Jim Hilbert, *Justiciability of State Law School Segregation Claims*, 44 MITCHELL HAMLIN L. REV., 399, 424–27 (2018).

<sup>78</sup> *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993).

<sup>79</sup> *Id.* at 302–03.

<sup>80</sup> *Id.* at 306.

<sup>81</sup> *Id.* at 302–03; MINN CONST. art. XIII, § 1 (“Uniform system of public schools. The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.”).

<sup>82</sup> *Skeen*, 505 N.W.2d at 315.

<sup>83</sup> *Id.* at 315–16.

signified that “uniform” was not the same in meaning as “identical.”<sup>84</sup>

However, the court in *Skeen* did remark on the failure of the Minnesota legislature to properly define “uniform.”<sup>85</sup> The court determined the state legislature has a duty to define the elements of public education under the Minnesota Constitution.<sup>86</sup> Thus, *Skeen* left open the question of whether courts could intervene if the legislature fails to adequately define the quality of education a student is entitled to receive.

### 3. Inadequate Student Outcomes Challenges

Following the *Skeen* decision, plaintiffs in *Cruz-Guzman v. State* sought to force the Minnesota Department of Education to desegregate schools, citing that persistently segregated schools infringe upon Minnesota students’ right to an adequate education.<sup>87</sup> *Cruz-Guzman* plaintiffs focused on disparities in student enrollment along racial and socioeconomic grounds.<sup>88</sup> The plaintiffs argued that racial disparities in the Minneapolis and Saint Paul school districts amounted to state-sanctioned segregation, and segregation on its face was inadequate.<sup>89</sup> The primary complaint was that the State of Minnesota promotes or encourages segregated school systems through its policies and regulations.<sup>90</sup>

The Minnesota Administrative Rules define “segregation” within schools and districts as:

[T]he intentional act or acts by a school district that has the discriminatory purpose of causing a student to attend or not attend particular programs or schools within the district on the basis of the student’s race and that causes a concentration of protected students at a particular school.

A. It is not segregation for a concentration of protected students or white students to exist within schools or school districts:

(1) if the concentration is not the result of intentional acts motivated by a

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<sup>84</sup> *Id.* at 311.

<sup>85</sup> *Id.* at 309.

<sup>86</sup> *Id.* at 313.

<sup>87</sup> Class Action Complaint at paras. 3–4, *Cruz-Guzman v. State*, No. 27-CV-15-19117, 2015 WL 6774682 (Minn. Dist. Ct. Nov. 5, 2015) (hereinafter “*Cruz-Guzman* Class Action Complaint”).

<sup>88</sup> *Id.* at para. 3.

<sup>89</sup> *Id.* at para. 2.

<sup>90</sup> *Id.* at paras. 23–34.

discriminatory purpose;  
 (2) if the concentration occurs at schools providing equitable educational opportunities based on the factors identified in part 3535.0130, subpart 2; and  
 (3) if the concentration of protected students has occurred as the result of choices by parents, students, or both.<sup>91</sup>

According to the Minnesota Administrative Rules, segregation only occurs intentionally and not where the parents or students exercise school choice.<sup>92</sup> *Cruz-Guzman* challenged that the policies implemented by the Minnesota Department of Education promote segregation.<sup>93</sup> Plaintiffs asserted that education policies such as “boundary decisions for school districts and school attendance areas; the formation of segregated charter schools and the decision to exempt charter schools from desegregation plans; the use of federal and state desegregation funds for other purposes; the failure to implement effective desegregation remedies; and the inequitable allocation of resources” all supported segregation.<sup>94</sup>

The State fought to have the initial *Cruz-Guzman* claim dismissed but was denied.<sup>95</sup> The State appealed to the Minnesota Court of Appeals.<sup>96</sup> The court reasoned that the *Baker v. Carr* six-factor political analysis was the appropriate measure to assess whether the court could hear the claim.<sup>97</sup> Utilizing *Baker*, the court found that the issues posed by the plaintiffs were non-justiciable questions.<sup>98</sup> Further, the court cited *Skeen* and ruled that educational adequacy claims are legislative policy matters and are not matters for the judiciary.<sup>99</sup> Since the court determined the issue was non-justiciable, the case was dismissed.<sup>100</sup>

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<sup>91</sup> MINN. R. 3535.0110, subp. 9 (2015).

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

<sup>93</sup> *Cruz-Guzman v. State*, 916 N.W.2d 1, 6 (Minn. 2018).

<sup>94</sup> *Id.*

<sup>95</sup> *Cruz-Guzman v. State*, Nos. A16-1267, A16-1297, 2016 Minn. App. LEXIS 109 (Minn. Ct. App. Sept. 13, 2016).

<sup>96</sup> *Cruz-Guzman v. State*, 892 N.W. 2d 533 (Minn. Ct. App. 2017).

<sup>97</sup> *Id.* at 538–39 (referring to *Baker v. Carr*, 369 U.S. 186 (1962)).

<sup>98</sup> *Id.* at 541.

<sup>99</sup> *Id.*

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

After the Minnesota Court of Appeals dismissed the case, the Minnesota Supreme Court agreed to hear the case.<sup>101</sup> In 2018, the state Supreme Court heard arguments challenging educational equity in Minnesota schools.<sup>102</sup> At issue was whether the Minnesota judiciary might intervene when a question of justiciability hinders legal action on either uniform education or equal protection for students.<sup>103</sup>

The Minnesota Supreme Court focused on the justiciability of the claim under the Education Clause and the Equal Protection Clause.<sup>104</sup> The Minnesota Supreme Court rejected the Appellate Court's use of the U.S. Supreme Court's *Baker v. Carr* analysis, stating that the Minnesota Supreme Court had never adopted the *Baker* analysis to assess a case concerning political matters.<sup>105</sup> Instead, the court evaluated the text of Minnesota's Constitution and applicable case law.<sup>106</sup> In a 4-2 decision, the court found challenges under both clauses justiciable and remanded the case.<sup>107</sup>

The court's decision hinged on two primary considerations. First, the court found that the separation of powers doctrine is insufficient to prohibit the judiciary from determining whether the legislature carried out its duty.<sup>108</sup> The court considered it irresponsible to "unquestioningly accept[] that whatever the Legislature has chosen to do fulfills the Legislature's duty to provide an adequate education."<sup>109</sup> The court referenced previous cases where challenges to the Education Clause were brought and the issues were resolved on the merits of those cases.<sup>110</sup> Therefore, the court found

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<sup>101</sup> Cruz-Guzman v. State, 916 N.W.2d. 1 (2018).

<sup>102</sup> *Id.* at 4.

<sup>103</sup> *Id.* at 4–5.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 8 n.4.

<sup>106</sup> *Id.* at 8–12.

<sup>107</sup> *Id.* at 15.

<sup>108</sup> *Id.* at 9.

<sup>109</sup> *Id.* at 12.

<sup>110</sup> *Id.* at 8 (citing Bd. of Educ. of Sauk Ctr. v. Moore, 17 Minn. 412, 416 (1871) (ruling that a constitutional duty



that to decide against the plaintiff would be a dereliction of the court's duty.<sup>111</sup> The court concluded that designating racial segregation and public education as non-justiciable issues would be tantamount to concluding that no Education Clause claims are remediable in court.<sup>112</sup> Thus, the court held that the Minnesota constitutional definitions of "general and uniform system of public schools" and "thorough and efficient system of public schools" were subject to judicial interpretation.<sup>113</sup>

Second, the court found that no single system of measurement for educational adequacy exists in Minnesota.<sup>114</sup> While the majority opinion acknowledged the need for a measurable assessment of adequacy in Minnesota, it proffered that constructing an evaluative measure was separate and apart from the issue of justiciability.<sup>115</sup> The majority also wrote that under the Minnesota Constitution, the issue of a segregated school system was "indisputably justiciable."<sup>116</sup> The court also made no distinction between intentional and incidental segregation and noted "[i]t is self-evident that a segregated system of public schools is not 'general,' 'uniform,' 'thorough,' or 'efficient.'"<sup>117</sup>

In his dissent, Justice Anderson undertook a textualist approach.<sup>118</sup> He wrote that the term "adequate education" did not appear in the Minnesota Constitution.<sup>119</sup> While the dissent noted that "segregation" was justiciable, it objected to the plaintiff's position that racially imbalanced schools

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to ensure public education throughout Minnesota existed); *Curryer v. Merrill*, 25 Minn. 1, 6 (1878) (determining that the state's Education Clause was not violated when "common-school education" was afforded to all students in Minnesota); *Skeen v. State*, 505 N.W.2d 299, 312 (Minn. 1993) (finding that when "basic educational needs" were met there was no evidence the constitutional standard of education was not met)).

<sup>111</sup> *Cruz-Guzman*, 916 N.W.2d at 12.

<sup>112</sup> *Id.* at 9.

<sup>113</sup> *Id.* at 11–12.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 10.

<sup>117</sup> *Id.* at 10 n.6.

<sup>118</sup> *Id.* at 15.

<sup>119</sup> *Id.* at 16.

are inadequate because they are akin to segregation.<sup>120</sup> The dissent submitted that educational adequacy is not equivalent to “traditional segregation.”<sup>121</sup>

Additionally, the dissent emphasized that Minnesota’s Education Clause was “a [legislative] constitutional mandate” and was not subject to judicial activism.<sup>122</sup> The majority disagreed, however, and asserted that “[t]he framers could not have intended for the Legislature to create a system of schools that was ‘general and uniform’ and ‘thorough and efficient’ but that produced a wholly inadequate education.”<sup>123</sup> The case was remanded.<sup>124</sup> The parties are undergoing mediation, and a trial is set to proceed in 2021.<sup>125</sup>

## II. A BRIEF HISTORY OF CHARTER SCHOOLS

### A. *What Are Charter Schools?*

Historically, charter schools are said to have begun as an alternative environment to foster teacher flexibility and to target student populations underserved by traditional public schools.<sup>126</sup> In 1988, Professor Ray Budde revisited one of his previous ideas on improving education.<sup>127</sup> Budde offered a proposal that public schools and local school districts could develop new programs that were innovative and unique within the traditional school system model.<sup>128</sup> Albert Shanker, who served as the President of the American Federation of Teachers at the time, was drawn to the idea and further developed Budde’s concept.<sup>129</sup> Shanker was the first national

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<sup>120</sup> *Id.* at 16 n.1.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 16.

<sup>123</sup> *Id.* at 12.

<sup>124</sup> *Id.* at 15.

<sup>125</sup> J.D. Duggan, *MN’s Education Gap—Some Challenge School Integration As Solution*, MINN. SPOKESMAN-RECORDER (Sept. 4, 2019), <https://spokesman-recorder.com/2019/09/04/mns-education-gap-some-challenge-school-integration-as-solution>.

<sup>126</sup> Zachary Jason, *The Battle Over Charter Schools*, HARV. ED. MAG. (Summer 2017), <https://www.gse.harvard.edu/news/ed/17/05/battle-over-charter-schools>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

supporter of the charter schools movement.<sup>130</sup>

Within a few years, the charter school movement saw an increase in advocates and adoption in school districts.<sup>131</sup> Advocates for charter schools initially wanted a local charter school system that enhanced existing schools.<sup>132</sup> Once the movement expanded, the initial idea of supplementing traditional schools with specialized programs for specific students “gave way to the reality of a parallel education system.”<sup>133</sup>

The National Alliance for Public Charter Schools characterizes charter schools as flexible alternatives to traditional public schools.<sup>134</sup> Third-party contracts independently govern the operation of charter schools.<sup>135</sup> The contracted party is referred to as the “authorizer” and may include but is not limited to “a nonprofit organization, government agency, or university.”<sup>136</sup> While charter schools primarily operate as nonprofit educational organizations, 12% nationwide do operate on a for-profit basis.<sup>137</sup>

The structure and operations of charter schools today notably differ from traditional public schools in two ways. First, charter schools operate without conventional attendance zones.<sup>138</sup> Second, charter schools largely focus on running a “business” that provides education.<sup>139</sup> Thus, charter schools offer students and parents a choice as to where educational services are received.<sup>140</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

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

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

<sup>134</sup> *What is a Charter School? Reimagining Education: One School, One Classroom, One Student at a Time*, NAT’L ALL. FOR PUB. CHARTER SCH., <https://www.publiccharters.org/about-charter-schools/what-charter-school> (last visited Dec. 19, 2018).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Charter School FAQ*, NAT’L ALLIANCE FOR PUB. CHARTER SCH., <https://www.publiccharters.org/about-charter-schools/charter-school-faq> (last visited Dec. 19, 2018).

<sup>138</sup> *Id.*

<sup>139</sup> Tim Walker, *Racial Isolation of Charter School Students Exacerbating Resegregation*, NEA TODAY (May 4, 2018), <https://neatoday.org/2018/05/04/racial-segregation-in-charter-schools>.

<sup>140</sup> *What is a Charter School?*, *supra* note 134.

*B. The Rise of Charter Schools in Minnesota*

Minnesota has long adopted legislation that allows charter schools to operate within the state.<sup>141</sup> Saint Paul, Minnesota, is believed to have been the originator of the modern-day charter school movement, opening the first charter school, City Academy Charter, in 1992.<sup>142</sup> The school “recruited students from the streets” as part of its original mission.<sup>143</sup> It opened its first year with a population of approximately 25% homeless students.<sup>144</sup> The school also targeted students who were low-income and students who had previously dropped out or had prior disciplinary infractions.<sup>145</sup>

After the opening of the first charter school in Minnesota, charter schools in the state have experienced notable increases in student population.<sup>146</sup> Between 2013 and 2017, the population of students attending charter schools increased by 36%, compared to a 2% student population increase at traditional public schools.<sup>147</sup> At that time, the Minnesota Association of Charter Schools attributed the growth to existing charter schools expanding the grade levels served and to the opening of new charter schools.<sup>148</sup> It also projected continued growth for charter schools in both student population and in new school openings.<sup>149</sup> Despite the population growth, however, at that time charter schools accounted for only 6% of the entire public education population across the state of Minnesota.<sup>150</sup>

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<sup>141</sup> See MINN. STAT. § 120.064, subdiv. 7 (1995) (renumbered as MINN. STAT. § 124E.03, subdiv. 1 (2019)).

<sup>142</sup> Peter Jacobs, *Here's How America's First-ever Charter School Got Off the Ground*, BUSINESS INSIDER (June 20, 2015, 1:52 PM), <https://www.businessinsider.com/inside-the-first-charter-school-in-america-city-academy-2015-6>.

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

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Beena Raghavendran, *Charter School Enrollment is Surging in Minnesota*, STAR TRIBUNE (Mar. 2, 2017, 6:06 AM), <http://www.startribune.com/charter-school-enrollment-is-surging-in-minnesota/415018793>.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

*C. The Segregation Effect*

Nationally, many charter school students are educated in “extreme racial isolation.”<sup>151</sup> Charter schools are more likely to be established in segregated urban communities<sup>152</sup> and are often identifiable along racial lines.<sup>153</sup> Charter schools are particularly vulnerable to racial isolation since the schools operate under a business model that traditionally targets non-diverse racial and ethnic communities.<sup>154</sup> There is growing concern that the routine practice of charter models targeting communities of color threatens to return students to the educational times of “separate but equal.”<sup>155</sup>

Though the historical era of segregation was largely related to the design of public-school systems and segregation laws, the modern era of segregation is correlated with extrinsic factors such as “housing patterns” and the socioeconomic status of communities.<sup>156</sup> In both local public-school systems and charter schools, neighborhoods and communities are increasingly segregated.<sup>157</sup> Segregation within some public school districts has a relationship with the number of charter schools in its communities.<sup>158</sup> In other words, segregation in some local public schools

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<sup>151</sup> Ivan Moreno, *US Charter Schools Put Growing Numbers in Racial Isolation*, ASSOCIATED PRESS (Dec. 3, 2017), <https://www.apnews.com/e9c25534dfd44851a5e56bd57454b4f5>.

<sup>152</sup> ERICA FRANKENBERG, GENEVIEVE SIEGEL-HAWLEY & JIA WANG, CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 57–58 (Jan. 2010), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenberg-choices-without-equity-2010.pdf>.

<sup>153</sup> GROVER J. WHITEHURST, RICHARD V. REEVES, NATHAN JOO, & EDWARD RODRIGUE, BALANCING ACT: SCHOOLS, NEIGHBORHOODS AND RACIAL IMBALANCE 20–21 (Ctr. on Child. & Fam. Brookings) (Nov. 2017), [https://www.brookings.edu/wp-content/uploads/2017/11/es\\_20171120\\_schoolsegregation.pdf](https://www.brookings.edu/wp-content/uploads/2017/11/es_20171120_schoolsegregation.pdf).

<sup>154</sup> Walker, *supra* note 139.

<sup>155</sup> *Id.*

<sup>156</sup> Grover J. Whitehurst, *New Evidence on School Choice and Racially Segregated Schools*, BROOKINGS INST. (Dec. 14, 2017), <https://www.brookings.edu/research/new-evidence-on-school-choice-and-racially-segregated-schools/>.

<sup>157</sup> *Id.*

<sup>158</sup> T. Keung Hui, *NC Should Close Charter Schools that Aren't Diverse, New Report Says*, THE NEWS & OBSERVER (Mar. 16, 2018, 11:07 AM), <https://www.newsobserver.com/news/local/education/article205190044.html> (In North Carolina, 72% of public school districts showed an increase in segregation when a charter school was operating in the same district.).

increases as charter schools are introduced into the community.<sup>159</sup> Further, data suggests that even when local public schools begin to racially-diversify, racially-isolated charter school populations in the community increase.<sup>160</sup>

The National Alliance for Public Charter Schools maintains that school choice is the priority.<sup>161</sup> Charter school advocates perceive the racially isolated environment of a school as immaterial when a parent favorably views a school and chooses it for their child.<sup>162</sup> However, the policy implications of creating segregated environments are disastrous; research cites multi-faceted problems with racially imbalanced schools.<sup>163</sup> For example, schools with large minority populations “historically have fewer resources, less experienced teachers and lower levels of achievement.”<sup>164</sup> Thus, the problem exists beyond an individual’s choice of school and moves into a broader societal view of educational adequacy.

### III. CHARTER SCHOOL CHALLENGES

The increasing non-diverse student population in Minnesota charter schools has coincided with a number of educational adequacy legal challenges citing racial isolation as harmful.<sup>165</sup> Even as the final outcome of *Cruz-Guzman* is undetermined, new expansive adequacy challenges have arisen.<sup>166</sup> The outcome of these adequacy challenges likely threatens the design of independently

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<sup>159</sup> *See Id.*

<sup>160</sup> *See* Linda A. Renzulli & Lorraine Evans, *School Choice, Charter Schools, and White Flight*, 52 SOC. PROBS. 398, 410 (2005) (finding that when faced with integrated school districts, there appears to be a “white-flight” movement into charter schools). *See* Whitehurst, *supra* note 156 (noting that high schools in school districts with greater school-choice attendance policies have greater racial disparities in enrollment.).

<sup>161</sup> Andre M. Perry, *How Charter Schools Are Prolonging Segregation*, BROOKINGS INST. (Dec. 11, 2017), <https://www.brookings.edu/blog/the-avenue/2017/12/11/how-charter-schools-are-prolonging-segregation/>.

<sup>162</sup> *Id.*

<sup>163</sup> Moreno, *supra* note 151.

<sup>164</sup> *Id.*

<sup>165</sup> *See* Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Cruz-Guzman v. State, 916 N.W.2d 1 (Minn. 2018).

<sup>166</sup> *See* Forslund v. State, 924 N.W.2d 25 (Minn. Ct. App. 2019) (The plaintiffs unsuccessfully argued that certain teacher-tenure decisions violated the Minnesota State Constitution because the decisions may provide some students with an inadequate education).

operated charter schools. Charter schools in Minnesota will need to adopt reforms to sustain legal challenges and survive legislative changes as educational adequacy challenges play out in Minnesota courtrooms.

#### *A. Implications of Cruz-Guzman*

The court in *Cruz-Guzman* dismissed the State’s argument that school districts and charter schools needed to be separate parties to the claim.<sup>167</sup> The court determined the impact was “hypothetical” and “those possible effects are not enough to require that the school districts and charter schools be joined as necessary parties.”<sup>168</sup> The impact on charter schools, thus, will depend on the outcome of the lower court decision. While the final court decision is outstanding, the potential impact the decision will have should concern charter leaders. Charter schools in Minnesota should be proactive in their preparation for a verdict in either direction.

##### 1. Implications from a Favorable *Cruz-Guzman* Ruling for Plaintiffs

If *Cruz-Guzman* is favorable for plaintiffs seeking to desegregate Minnesota schools, courts are likely to be plagued with more educational adequacy disputes. Minnesota charter schools must be prepared to reconcile enrollment procedures in the face of the educational adequacy movement. One Minnesota educational advocacy group called the *Cruz-Guzman* ruling to continue the case “bittersweet.”<sup>169</sup> The group praised the court for its decision on the issue of justiciability but expressed concern that a future ruling could threaten school-choice options for parents and students.<sup>170</sup> If the *Cruz-Guzman* case is decided in favor of the plaintiffs, charter schools’ traditional enrollment process becomes uncertain.

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<sup>167</sup> *Cruz-Guzman*, 916 N.W.2d at 14.

<sup>168</sup> *Id.*

<sup>169</sup> *As Cruz-Guzman Lawsuit Advances, Parents and Community Members Speak Out on Potential Unintended Consequences for Students and Families of Color*, EDALLIES (July 25, 2018), <https://edalliesmn.org/blog/pr/cruz-guzman-lawsuit-advances-parents-community-members-speak-potential-unintended-consequences-students-families-color/>.

<sup>170</sup> *Id.*

Minnesota charter schools must be prepared to reconcile enrollment procedures in the face of the educational adequacy movement. Specific Minnesota charter schools could be affected by a favorable *Cruz-Guzman* outcome.<sup>171</sup> At the Friendship Academy of the Arts, African-American students make up 96% of the school's total student population.<sup>172</sup> The school also primarily serves students from economically disadvantaged backgrounds, with 85% of students meeting that classification.<sup>173</sup> Saint Paul is also home to Higher Ground Academy, which boasts a 100% African-American student population.<sup>174</sup> Due to the racially-isolated populations of these schools, a *Cruz-Guzman* ruling ordering desegregation threatens the traditional operation of these and similar schools. Unless a significant effort is undertaken to diversify the schools, it is unlikely they could continue to operate with their current demographics.

So, how are charter schools to respond to the racial segregation crisis? School-choice advocates have weighed in on the court's decision to send *Cruz-Guzman* back to the lower courts, and one attorney is hopeful *Cruz-Guzman* can separate involuntary segregation and "culturally affirming schools."<sup>175</sup> However, suppose *Cruz-Guzman* finds that Minnesota's racially isolated schools are segregated and thereby tantamount to an inadequate educational environment. In that case, charter schools may choose to consider: (1) changing business models to reduce racial isolation or (2) using Alternative Dispute Resolution (ADR) to resolve disputes.

- a. Changing business models may alleviate the segregating effect in charter schools.

With a business emphasis, an economic charter school model focuses minimally on "civil

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<sup>171</sup> Erin Hinrichs, *Why Charter School Advocates Have Mixed Feelings About the State Supreme Court's Integration Decision*, MINNPOST (July 26, 2018), <https://www.minnpost.com/education/2018/07/why-charter-school-advocates-have-mixed-feelings-about-state-supreme-courts-integr/>.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*



rights protections.”<sup>176</sup> The focus on market protection increases researchers’ concern that charter schools may promote, rather than hinder, segregation.<sup>177</sup> Charter schools have demographically shifted public school enrollment since their inception.<sup>178</sup> In Minnesota, it is alleged that charter schools have also contributed significantly to isolated educational services for impoverished minority students.<sup>179</sup> The majority of non-racially integrated populations in the Twin Cities are found in its charter schools.<sup>180</sup>

However, charter models in Minnesota have and can be adapted to seek more diverse student populations. The Century Foundation conducted a study on charter schools nationwide to identify models that undertook a methodological approach to create a diverse environment concerning student population, known as a “diverse-by-design model.”<sup>181</sup> Diverse-by-design models are charter models that are designed to have a diverse student population and that through student enrollment have achieved student diversity.<sup>182</sup> Utilizing IntegrateNYC’s “5 Rs of Real Integration,” the study found 125 charter schools models that were “intentionally diverse.”<sup>183</sup> Of all charter schools in operation across the state of Minnesota, only two have been identified as operating under a diverse-by-design model.<sup>184</sup> The two charter models in Minnesota, Bright Water Elementary (Minneapolis) and Cornerstone Montessori Elementary (Saint Paul), had visible or strong diversity designs.<sup>185</sup> These two schools can serve as models for Minnesota charter school

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<sup>176</sup> Ayscue et al., *supra* note 19, at 4–5.

<sup>177</sup> *Id.* at 5.

<sup>178</sup> Moreno, *supra* note 151.

<sup>179</sup> *Cruz-Guzman*, 916 N.W.2d at 5–6.

<sup>180</sup> INSTITUTE ON METROPOLITAN OPPORTUNITY, UNIV. MINN. L. SCH., THE MINNESOTA SCHOOL CHOICE PROJECT PART I: SEGREGATION AND PERFORMANCE 4 (Feb. 2017), [https://www.law.umn.edu/sites/law.umn.edu/files/metro-files/imo-mscp-report-part-one-segregation-and-performance.pdf\\_0.pdf](https://www.law.umn.edu/sites/law.umn.edu/files/metro-files/imo-mscp-report-part-one-segregation-and-performance.pdf_0.pdf).

<sup>181</sup> Halley Potter & Kimberly Quick, *Diverse-by-Design Charter Schools*, THE CENTURY FOUND. (May 15, 2018), <https://tcf.org/content/report/diverse-design-charter-schools/?agreed=1>.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

operators hoping to survive a favorable *Cruz-Guzman* ruling.

The change from an economic model to a diverse-by-design model does present challenges. Charter schools are limited in how to purposefully create diverse models. In *Parents Involved in Community Schools v. Seattle School District No. 1*, the court ruled the interest of promoting racial diversity alone could not be a determining factor in denying admission to a public school.<sup>186</sup> Therefore, charter schools will need to seek creative methods for increasing student diversity without specifically targeting race. One potential solution is to expand the reach beyond the geographical neighborhoods where charter schools are located. For example, transportation can be a barrier to families that might otherwise want to choose a charter school.<sup>187</sup> To overcome these barriers, Minnesota charter schools may be able to work with the community to provide or expand transportation services or other resources to provide more children an opportunity to attend.<sup>188</sup>

b. Alternative Dispute Resolution (ADR) is a remedy.

Since *Cruz-Guzman* attempts to secure integrated schools in Minnesota, particularly in the Twin Cities,<sup>189</sup> it seems unlikely financial settlements would satisfy *Cruz-Guzman*'s call for diverse student bodies. Although injunctive relief is the goal of *Cruz-Guzman*, the Minnesota Department of Education, charter schools, and the plaintiffs could use ADR to resolve education inadequacies resulting from racial isolation. Mediation may serve as a remedy now, just as it did when the "Choice is Yours" program was developed.<sup>190</sup>

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<sup>186</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726–30 (2007).

<sup>187</sup> See Valerie Strauss, *The Link Between Charter School Expansion and Increasing Segregation*, WASH. POST (Mar. 13, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/03/13/the-link-between-charter-school-expansion-and-increasing-segregation/>; See also Moreno *supra* note 151.

<sup>188</sup> See generally Frankenberg, Siegel-Hawley, & Wang *supra* note 152, at 81 (identifying transportation as one way to increase diversity); See generally Stancil & Hilbert *supra* note 77, at 414 (noting transportation and other options available to desegregate schools); See generally McCann *supra* note 75 (claiming that Minnesota has tried a variety of options to integrate students).

<sup>189</sup> *Cruz-Guzman Class Action Complaint* at paras 75–77.

<sup>190</sup> Raghavendran, *supra* note 69.

Solving disputes through mediation is particularly successful in areas where neither party is an experienced negotiator.<sup>191</sup> Further, mediation is a useful legal tool when both parties have a strong desire to represent their voice.<sup>192</sup> Here, charter school advocates are eager to make a case that single-race or predominate-race charter schools are choices, not segregated mandates.<sup>193</sup> Conversely, the plaintiffs in *Cruz-Guzman* want across-the-board desegregation.<sup>194</sup> However, the problem facing charter schools in a traditional judicial setting, is that the logic used to justify racial-isolation as a choice still creates a segregating effect. Using such logic, a charter school not enrolling any students of color by choice, could also be construed as a culturally affirming parental choice. The result of such a legal dispute then becomes a question of whether charter schools are merely segregated by choice and not by mandate. Thus, mediation serves as an effective alternative to litigating a segregation issue because it can allow both sides to express their positions and desired outcomes, which may not be relevant in or available to do in a judicial proceeding on segregation.

Historically, mediation has successfully been used to resolve segregation and racial isolation issues in lawsuits against public institutions of higher learning.<sup>195</sup> For example, Tennessee used mediation to resolve a decades-long legal battle over segregation in higher education systems.<sup>196</sup> The conflicting parties in Tennessee agreed to monetary settlements to improve diversity and

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<sup>191</sup> HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS* 117 (2004).

<sup>192</sup> *Id.*

<sup>193</sup> Josh Verges, *MN Supreme Court: Parents' Lawsuit Accusing State of Racially Segregating Students Can Proceed*, TWIN CITIES PIONEER PRESS (July 25, 2018, 10:17 AM), <https://www.twincities.com/2018/07/25/mn-supreme-court-parents-lawsuit-accusing-state-of-racially-segregating-students-can-proceed/>.

<sup>194</sup> *Cruz-Guzman Class Action Complaint* at paras. 76–77.

<sup>195</sup> *See Geier v. Univ. of Tenn.*, 597 F.2d 1056 (6th Cir. 1979).

<sup>196</sup> *Two Sides Celebrate Lawsuit's End*, ASSOCIATED PRESS (Jan. 26, 2001), [http://www.utdailybeacon.com/news/two-sides-celebrate-lawsuit-s-end/article\\_3825d2da-b316-5af7-9fac-9c0ccde1b990.html](http://www.utdailybeacon.com/news/two-sides-celebrate-lawsuit-s-end/article_3825d2da-b316-5af7-9fac-9c0ccde1b990.html) (The mediation process took over 1,200 hours to find a resolution.).

equality within the college system.<sup>197</sup> After years of court battles with no resolution, mediation resolved the matter within one year.<sup>198</sup> After the mediation agreement, the parties denoted that the resolution in Tennessee “provides a lesson” that even in lengthy cases concerning civil rights issues, resolution can occur.<sup>199</sup> European communities have even utilized mediators to tackle cultural-segregation issues.<sup>200</sup> One program sought to use mediation as a way to improve communication between public service institutions and Roma families and students.<sup>201</sup>

However, resolving segregation cases with mediation has not always benefited both parties. In 2000, the Maryland Higher Education Commission and the U.S. Department of Education’s Office of Civil Rights worked out a resolution where Maryland would consolidate some education programs and provide “unique and popular programs at historically black universities.”<sup>202</sup> Historically black colleges filed suit after Maryland Higher Education Commission approved online and cross-campus programs that drew white student populations from the historically black colleges’ campus programs.<sup>203</sup> By 2006, claims levied against the higher education system alleged that Maryland Higher Education Commission failed to desegregate institutions of higher learning.<sup>204</sup> The crux of the conflict resided with historically black colleges’ demand that other universities cease offering the same or similar programs, while the Commission on Higher Education maintained that monopolizing degree platforms “would harm students of all races.”<sup>205</sup>

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *About ROMEDI*, COUNCIL OF EUROPE, <http://coe-romed.org/romed1>.

<sup>201</sup> *Id.*

<sup>202</sup> Tim Prudente, *Decade-long Legal Battle to Scrub Segregation from Maryland Universities Returns to Federal Court*, BALTIMORE SUN (Jan. 8, 2017, 3:54 PM), <http://www.baltimoresun.com/news/maryland/education/higher-ed/bs-md-college-segregation-lawsuit-20170108-story.html>.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

Shortly after the lawsuit began, historically black colleges and the Maryland Higher Education Commission utilized mediation to try and resolve or reduce segregation within state institutions.<sup>206</sup> After a series of unsuccessful court-ordered mediations in 2011 and 2014, litigation in federal court was back on the table.<sup>207</sup>

Critics of mediation in segregation cases are also critical that an ADR process could underserve the “social importance” of a desegregation movement.<sup>208</sup> While acknowledging that mediation can create productive environments for settlement, critics argue that certain conflicts are best placed in the public purview.<sup>209</sup> Authors Suzanne McCorkle and Melanie J. Reese offer the example of Rosa Parks as a time in history when ADR would have had an underserved effect.<sup>210</sup> During the civil rights movement, Parks’s defiance on a public bus played out in the public purview and is said to have been instrumental in tackling segregation.<sup>211</sup> McCorkle and Reese argue that if Parks had internally settled the dispute through mediation, then “one crucial spark that exposed segregation and ignited public protest might not have occurred.”<sup>212</sup>

However, given that educational adequacy challenges often arise in connection with entire student population groups and not individual cases, mediation is not likely to underserve the parties or dampen a movement the way it may have in the case of Rosa Parks. Here, mediation gives all concerned parties a seat at the table, and the solutions derived from mediation are likely to affect an entire student group, not just one individual. Further, given the lack of specific desegregation ideas offered by courts, mediation may be an avenue to build a range of possible solutions. Thus, the mediation process and lessons learned are relevant considerations for charter schools that hope

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> SUZANNE MCCORKLE & MELANIE J. REESE, *MEDIATION THEORY AND PRACTICE* 76 (3d ed. 2019).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

to maintain their structure and models of operation in a post *Cruz-Guzman* environment.

## 2. Implications from a Non-favorable *Cruz-Guzman* Ruling for Plaintiffs

If the court in *Cruz-Guzman* decides in favor of the Minnesota Department of Education, charter schools will seemingly remain safe until the next legal challenge. However, the court's hesitance to define adequacy leaves legislative challenges as the primary method of reform available to a populace expressing concern for the educational needs of students. Therefore, the issue of adequacy is still one the Minnesota legislature and the Minnesota Department of Education's administrative rules may be forced to address.

### a. Legislative Implications

Legislative change is likely the next major step for educational adequacy advocates. The *Cruz-Guzman* dissent proffered that if the legislature is mandated to undertake the duty of establishing uniform education, then it should be reasoned the legislature do so.<sup>213</sup> Even the plaintiffs in *Cruz-Guzman* concede that the legislature should address the unresolved issue of defining what an adequate education for Minnesota students provides and make provisions to protect all students from segregated school environments.<sup>214</sup>

However, Minnesota has not yet tackled judicial decisions criticizing the legislature for inadequately meeting its educational duty. How the Minnesota legislature would grapple with the juxtaposition of a public requirement to operate non-segregated schools and a public-choice movement designed to serve specific student and community needs is unknown. However, other states offer examples of directions the Minnesota legislature could follow if there is a favorable *Cruz-Guzman* decision.

In Kentucky, a case challenging the equity of school system funding resulted in a court decision

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<sup>213</sup> *Cruz-Guzman v. State*, 916 N.W.2d 1, 20–22 (Minn. 2018) (Anderson, J., dissenting).

<sup>214</sup> *Id.* at 9.

rendering “the entire educational system unconstitutional.”<sup>215</sup> The court found that Kentucky did not provide a uniform and adequate education to its students.<sup>216</sup> The legislature’s response was to engage in a complete “overhaul” and offer a package of education reforms.<sup>217</sup> Kentucky legislators focused on laws that increased state spending, endorsed new statewide programs for teaching and learning, and administered performance-based student assessments.<sup>218</sup>

However, not all states have positively responded after being judicially challenged on adequacy claims. In Alabama, a court rendered the public education system partially unconstitutional because it provided an inadequate education to students.<sup>219</sup> Political opposition to the court decision led the state to defeat subsequent legislative measures designed to comply with judiciary standards of adequacy.<sup>220</sup>

The Minnesota legislature has previously attempted to tackle racial isolation in traditional public schools. In 2013, the Achievement and Integration Law was enacted.<sup>221</sup> The law, still in effect today, provides funding for school districts that have a comprehensive plan for racially integrating schools and creating more equitable environments.<sup>222</sup> While 171 school districts in Minnesota have recently undertaken Achievement and Integration Programs,<sup>223</sup> Minnesota Administrative Rule exempts charter schools<sup>224</sup> from being identified as “racially-isolated”

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<sup>215</sup> Peter Applebome, *Kentucky’s Sweeping Overhaul of Education Offers Lessons Both Positive and Negative*, N.Y. TIMES (Mar. 25, 1996), <https://www.nytimes.com/1996/03/25/us/kentucky-s-sweeping-overhaul-education-offers-lessons-both-positiveand-negative.html>.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Minorini & Sugarman, *supra* note 3, at 196.

<sup>220</sup> *Id.* at 201–02.

<sup>221</sup> Beth Hawkins, *Key Minnesota Desegregation Case Asks Chilling Question: Can Supreme Court Intervene to Guarantee an Adequate Public Education?*, THE 74 (Jan. 8, 2018) <https://www.the74million.org/article/key-minnesota-desegregation-case-asks-chilling-question-can-supreme-court-intervene-to-guarantee-an-adequate-public-education/>.

<sup>222</sup> MINN. STAT. §§ 124D.861–.862 (2019).

<sup>223</sup> *Achievement and Integration Program*, MINN. DEP’T EDUC., <https://education.mn.gov/MDE/dse/acint/> (last visited Sept. 20, 2020).

<sup>224</sup> MINN. R. 3535.0110, subp. 8.

schools or districts<sup>225</sup> or engaging in “segregation.”<sup>226</sup> In light of *Cruz-Guzman*, the Minnesota legislature can expand the Achievement and Integration program and require charter schools to be included as participants. Further, the Minnesota legislature has the capacity to and should amend its charter school statutes to require charter schools to be subject to existing statutes on racial isolation.

Without expanding the program, the legislature should clarify the Education Clause in the Minnesota Constitution. Given the history of adequacy challenges relating to Minnesota’s Education Clause, it seems unlikely that the courts can sufficiently resolve future matters unless the legislature takes action. The legislature should set forth a definition of “a general and uniform”<sup>227</sup> education system. The Minnesota Constitution delegates authority to the legislature to define adequate education; still, the court in *Cruz-Guzman* noted that the judiciary is not prohibited from determining whether it has been exercised appropriately.<sup>228</sup> The level of adequacy that students in a state are entitled to is precisely the type of policy decision that legislatures are designed to tackle. Abdicating that responsibility to courts shifts the policy-making burden away from the legislative branch and onto the judiciary. The Minnesota legislature should resolve this matter.

b. Administrative/Agency Implications

Should *Cruz-Guzman* determine a formula for measuring adequacy, the Minnesota Administrative Rule might be a starting point for reform. Currently, statute permits charter schools to operate outside the bounds of many public-school regulations that are applicable to traditional

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<sup>225</sup> MINN. R. 3535.0110, subp. 6–7.

<sup>226</sup> MINN. R. 3535.0110, subp. 9.

<sup>227</sup> MINN. CONST. art. XIII, § 1.

<sup>228</sup> *Cruz-Guzman v. State*, 916 N.W.2d 1, 9 (Minn. 2018).



districts and schools.<sup>229</sup> Their statutory status makes them unable to qualify as a “racially isolated school district” or as a “racially identifiable school” in Minnesota under Administrative Rule.<sup>230</sup> Education agencies could refine the rule to apply to charter schools since Minnesota Statute § 124E.03 provides that educational rules can be “made specifically applicable to a charter school.”<sup>231</sup> The rule could also be revamped to revise the definitions of racially-isolated and of segregation to ensure both definitions encapsulate stand-alone or choice-based racial isolation.

#### CONCLUSION

The history of segregation and racial isolation in the United States is lengthy and not without its own set of challenges. The lack of a fundamental right to education on a national level leaves states responsible for creating such an entitlement.<sup>232</sup> States are also left to assess the adequacy of any such entitlement.<sup>233</sup>

In Minnesota, segregation in public schools persists.<sup>234</sup> The question of whether non-mandated segregation qualifies as an inadequate education remains unanswered. Schools must compete with a legislature void of adequacy definitions and a judiciary hesitant to impart its interpretation. The ongoing legal battle involved in the *Cruz-Guzman* case is the start of what may be a drawn-out legal battle of the definition of adequacy in the Minnesota Constitution.

With the question of justiciability resolved, challenging the issue of educational adequacy will depend on the outcome of the *Cruz-Guzman* case. The decision, however, is poised to have lasting impacts on Minnesota charter schools. Charter schools will likely need to adapt to survive race-based adequacy challenges. It is advisable that charter schools either change their operational

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<sup>229</sup> MINN. STAT. § 124E.03, subdiv. 1 (2019).

<sup>230</sup> See MINN. R. 3535.0110, subp. 6–8.

<sup>231</sup> MINN. STAT. § 124E.03, subdiv. 1.

<sup>232</sup> See Cochran *supra* note 53, at 404–05.

<sup>233</sup> Rebell, *supra* note 1, at 231–32.

<sup>234</sup> McCann, *supra* note 75.

model to promote and achieve more diverse student populations or seek to mediate segregation and race-based cases. Since charter schools are independent educational-service providers,<sup>235</sup> they seem uniquely positioned to negotiate and create settlement agreements.

To quell the rise in educational adequacy challenges, Minnesota Administrative Rule on segregation and racially isolated schools must be inclusive of all public schools, including charter schools. The rule should also prohibit segregation by mandate and segregation by choice. Further, Minnesota legislation must address the ambiguous terms in the Minnesota Constitution of the “general and uniform system”<sup>236</sup> of education. The legislature should clarify what it means for a Minnesotan to receive an adequate public education because the legislature is most appropriate body to establish education policy in the state.

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<sup>235</sup> See *Charter School FAQ*, *supra* note 137.

<sup>236</sup> MINN. CONST. art. XIII, § 1.

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**The Human Journey Toward Justice:  
Reflections in the Wake of the Murder of George Floyd  
from a Community of Practitioners**

**Dr. Raj Sethuraju**

*In collaboration with Brent Lehman,  
Natasha Lapcinski, Taylor Saver, Kara Beckman, and Dr. Tamara Mattison<sup>1</sup>*

**MEMORIES AND REFLECTIONS FOLLOWING THE KILLING OF GEORGE FLOYD**

*The day after the killing of Mr. Floyd, I joined a large gathering of people at the junction of 38th and Chicago, where four police officers of the Minneapolis Police Department (MPD) killed George Floyd. I heard several speeches calling for justice for the arrest and criminal prosecution of the officers. Then, the gathering began to march. Conversing with fellow marchers, I learned that we were marching toward Minneapolis' Third Police Precinct on Lake Street. There were mothers, fathers, sons, daughters, the young, and the old. Some people were dressed casually, while others had just gotten off work. Some Native Americans were there with American Indian Movement signs and other signs calling for justice.<sup>2</sup> I saw a spectrum of people from Asian American and Latinx communities as well. There was no one leader, but there was synergy. The marchers came together to fill the necessary roles and to create a brave and safe protest march.*

*People jumped into action to shut down the upcoming junctions, so when we arrived on Hiawatha Avenue, it seemed as though the roads had been cleared, and traffic was stopped. I heard drumming and people chanting for justice, “No Justice, No Peace!”, “What’s His*

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<sup>1</sup> Dr. Raj Sethuraju, Brent Lehman, Natasha Lapcinski, Taylor Saver, Kara Beckman, and Dr. Tamara Mattison are all restorative justice practitioners in the Twin Cities metro area.

<sup>2</sup> Hannah Jeon, *Powerful Black Lives Matter Signs From Racial Justice Protests Around the World*, GOOD HOUSEKEEPING (July 14, 2020), <https://www.goodhousekeeping.com/life/g33024721/black-lives-matter-protest-signs-2020/>.

*Name? George Floyd! Say His Name! George Floyd!” and other chants to end police brutality. The march was spontaneous, and it brought in the voices of people who have been bystanders, people who have been in the trenches, and veterans of this movement for justice who picked up the cues to step into action. It was not an organized march, but it felt that way because everyone had come together under the call for justice.*

*I didn’t observe any action by members of the community that could be considered rioting. Terms such as “rioting” and “uprising” are intentionally used to discredit and undermine any movement’s goals and values. They are used to criminalize the message of the movement. The words “rioting” and “uprisings” are dog whistles used to conjure fear and public safety concerns, especially among the white community.<sup>3</sup> The fear distorts the message and calls for justice.<sup>4</sup> The general public and the policymakers, along with enforcement agencies, are pushed to react instead of reflecting, restoring, and reforming.<sup>5</sup> Language matters, primarily because our communities are often confined to zip codes, and we fail to have a relational understanding of the other.<sup>6</sup> This systematic and cultural oppression<sup>7</sup> does not allow us to address the pandemic of racism—instead, we react to the few who may cause harm the properties and a sense of peace.<sup>8</sup>*

*I witnessed people coming together, helping each other, sharing food and water, and acting out their values. People stopped and checked in with each other along the way. There was a lot of care and spontaneous humanity on display. I’m not naive to think that what I saw and witnessed was the whole truth, but what I witnessed was a call for justice from mostly communities of color who have been subjected to this systematic and cultural oppression. When they were marching on, I could feel that energy in their strides. They were walking their values; they fought for their beliefs and exercised their right to be heard, as the popular chant goes, “This is what democracy looks like.” People were present in the moment. They were exercising not just their constitutional rights but also their human rights. These inhumane actions taken by the MPD have a long history in this community.<sup>9</sup>*

<sup>3</sup> Katy Steinmetz, ‘A War of Words.’ *Why Describing the George Floyd Protests as ‘Riots’ is So Loaded*, TIME (June 8, 2020), <https://time.com/5849163/why-describing-george-floyd-protests-as-riots-is-loaded/>.

<sup>4</sup> Brian Dijkema, *Who’s Afraid of Social Justice?*, COMMENT (Aug. 1, 2019) <https://www.cardus.ca/comment/article/whos-afraid-of-social-justice/>.

<sup>5</sup> L.B. Klein & Andrew J. Rizzo, *Shifting From Reactive to Proactive: Using Social Justice and Ecological Approaches for Sexual Violence Prevention*, in CONF.: NAT’L ASS’N OF STUDENT PERSONNEL ADMINS. VIOLENCE PREVENTION STRATEGIES at Orlando, FL (Jan. 2016), [https://www.researchgate.net/publication/307512228\\_Shifting\\_from\\_reactive\\_to\\_proactive\\_Using\\_social\\_justice\\_and\\_ecological\\_approaches\\_for\\_sexual\\_violence\\_prevention](https://www.researchgate.net/publication/307512228_Shifting_from_reactive_to_proactive_Using_social_justice_and_ecological_approaches_for_sexual_violence_prevention).

<sup>6</sup> Jen Laskey, *How Your Zip Code Affects Your Health As a Black Woman*, TODAY, <https://www.today.com/specials/how-zip-code-affects-health-black-women/> (last visited Mar. 1, 2021).

<sup>7</sup> See JOE R. FEAGIN, *SYSTEMIC RACISM: A THEORY OF OPPRESSION* (2006).

<sup>8</sup> Matthew Legge, *The Psychology That Explains Your Reaction to Mass Protests*, PSYCH. TODAY (June 3, 2020), <https://www.psychologytoday.com/us/blog/are-we-done-fighting/202006/the-psychology-explains-your-reaction-mass-protests>.

<sup>9</sup> MPD150, ENOUGH IS ENOUGH: A 150-YEAR PERFORMANCE REVIEW OF THE MINNEAPOLIS POLICE DEPARTMENT (2017), [https://www.mpd150.com/wp-content/themes/mpd150/assets/mpd150\\_report.pdf](https://www.mpd150.com/wp-content/themes/mpd150/assets/mpd150_report.pdf).

*There is a history of abuse toward the indigenous populations, poor communities, the mentally ill, immigrants and Blacks.<sup>10</sup>*

*The march toward the Third Precinct became very symbolic. It was not just a march to protest against George Floyd's killing!*

*The journey for justice has been an ongoing call that came to fruition upon the killing of George Floyd. As people began to turn onto Hiawatha and marched toward Lake Street and the Third Precinct, I had to ask myself how different things are today than twenty, thirty, even forty years ago.<sup>11</sup> Whilst some people have a myopic perspective or say this is all just about George Floyd's killing, to me, it was not only rightfully recognizing the killing of George Floyd but also honestly acknowledging the history of police brutality and neglect from elected officials and accounting for lack of access to an environment free of micro and macro aggressions, housing, and jobs.<sup>12</sup> All of these social ills continued to bring more and more people to the march. As evening fell, there was an impending weather alert,<sup>13</sup> but the gathering did not seem to be disappearing or attenuating. As we approached Lake Street and Minnehaha Avenue, I realized the whole intersection was full of voices, calling for justice and officers' arrest. I looked into the Third Police Precinct, but there was minimal movement inside. As I walked around the building, people had surrounded the building shouting for justice. The businesses around the precinct had shut down and felt threatened. Volunteers were helping business owners move things out of the buildings.<sup>14</sup>*

As I reflected on the march, I realized I went to the junction to pay tribute to George Floyd's life. I saw his face and heard the narratives of the people who were gathering at the square. As I listened to the narratives, I understood the pain of those who joined the gathering. The intent was clear—to be fully present. I realized I needed and wanted to be a part of the march despite not knowing where we would end up. Some questions lingered in my mind. How long would the movement last? How long would we be marching? I realized my concerns were minimal in comparison to the purpose of the gathering. As I marched, I felt people being fully present—they did not come to be seen, but to be heard. I was humbled by the call for justice and the call to undo the many oppressive knees that have consistently pressed on Black and brown bodies.<sup>15</sup> Throughout the march, people were naming the various ways knees have been placed on the

<sup>10</sup> Meilan Solly, *158 Resources to Understand Racism in America*, SMITHSONIAN MAG. (June 4, 2020), <https://www.smithsonianmag.com/history/158-resources-understanding-systemic-racism-america-180975029/#sectionOne>.

<sup>11</sup> Jesse J. Holland, *Report: How Black America has Changed in 40 Years*, PBS (May 17, 2016), <https://www.pbs.org/newshour/nation/report-black-america-doing-much-better-than-40-years-ago>.

<sup>12</sup> Danyelle Solomon, Connor Maxwell & Abril Castro, *Systematic Inequality and American Democracy*, CTR. AM. PROGRESS (Aug. 7, 2019), <https://www.americanprogress.org/issues/race/reports/2019/08/07/473003/systematic-inequality-american-democracy/>.

<sup>13</sup> *May 2020 Weather in Minneapolis—Graph*, TIMEANDDATE.COM, <https://www.timeanddate.com/weather/usa/minneapolis/historic?month=5&year=2020> (last visited Mar. 1, 2021).

<sup>14</sup> Luke Mogelson, *The Heart of the Uprising in Minneapolis*, NEW YORKER (June 15, 2020), <https://www.newyorker.com/magazine/2020/06/22/the-heart-of-the-uprising-in-minneapolis>.

<sup>15</sup> Kate Slater, *What is Systemic Racism?*, TODAY (Feb. 4, 2021), <https://www.today.com/tmrw/what-systemic-racism-t207878>.

necks of Black and brown people for centuries. Some had not felt the oppressive knee until they viewed the video of the MPD officer killing George Floyd.<sup>16</sup>

For me, the march was a personal call to do more upstream work<sup>17</sup> instead of waiting for politicians' and theoreticians' invitations to start working for change. The gathering after George Floyd's killing was organized to do this upstream work and demand significant changes.<sup>18</sup> People were not satisfied with the past reforms of additional training for police officers and correctional officers. People have come to realize that the calls for training and changing law enforcement policies were simply another line item in a burgeoning budget for law enforcement.<sup>19</sup> For decades, police departments have gotten both state and federal funding to help "fix" policing and the "bad apples" within departments.<sup>20</sup> Still, such financings have not addressed culture and systemic oppression. This oppressive behavior is "baked into the culture of policing," given its origins.<sup>21</sup>

As academicians, we teach about the many theoretical perspectives about why laws are broken and harm is caused in our communities. We talk about the work of police, the justice system, and prisons; however that rhetoric and research still have not had a full impact on changing how these systems are operating for well over hundreds of years.<sup>22</sup> The marchers' chants reinforced the desire to be anchored in values versus policies and procedures. As a system, we've created policies and procedures that do not address the causes of oppression.<sup>23</sup> As academicians and practitioners, we teach and learn how to work downstream and stay in an emergency space.<sup>24</sup> However, much of what we teach people in academia have not changed the root causes of what's forcing people to fall into the stream in the first place.<sup>25</sup>

When you operate in an emergency mode, you are moved because of fear. We put a bucket under a leak to catch the water. We place a single shingle to patch the roof if we have time for that, but we don't have time, resources, or funds to replace the entire roof that is structurally broken. As a result, the ceiling becomes wet and moldy, and we have no choice but to replace the whole thing.

<sup>16</sup> Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020), <https://time.com/5847967/george-floyd-protests-trump/>.

<sup>17</sup> Mychal Denzel Smith, *Incremental Change Is a Moral Failure*, THE ATLANTIC (Sept. 2020), <https://www.theatlantic.com/magazine/archive/2020/09/police-reform-is-not-enough/614176/>.

<sup>18</sup> Alexis Okeowo, *How to Defund the Police*, NEW YORKER (June 26, 2020), <https://www.newyorker.com/news/news-desk/how-the-police-could-be-defunded>.

<sup>19</sup> Mariame Kaba & Andrea J. Ritchie, *We Want More Justice for Breonna Taylor Than the System That Killed Her Can Deliver*, ESSENCE (July 16, 2020), <https://www.essence.com/feature/breonna-taylor-justice-abolition>.

<sup>20</sup> Sam Levin, *'It's Not About Bad Apples': How US Police Reforms have Failed to Stop Brutality and Violence*, GUARDIAN (June 16, 2020), <https://www.theguardian.com/us-news/2020/jun/16/its-not-about-bad-apples-how-us-police-reforms-have-failed-to-stop-brutality-and-violence>.

<sup>21</sup> 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>.

<sup>22</sup> See Keeanga-Yamahtta Taylor, *We Should Still Defund the Police*, NEW YORKER (Aug. 14, 2020), <https://www.newyorker.com/news/our-columnists/defund-the-police>.

<sup>23</sup> Eve L. Ewing, *Blue Bloods: America's Brotherhood of Police Officers*, VANITY FAIR (Aug. 25, 2020), <https://www.vanityfair.com/culture/2020/08/americas-brotherhood-of-police-officers>.

<sup>24</sup> See Justin Ellis, *Minneapolis Had This Coming*, THE ATLANTIC (July 1, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/minneapolis-long-overdue-crisis/612826/>.

<sup>25</sup> Robert Maranto, *How Academia Failed to Improve Police Practices*, WALL ST. J. (June 10, 2020), <https://www.wsj.com/articles/how-academia-failed-to-improve-police-practices-11591807543>.

Our justice system is the same.<sup>26</sup> When we operate out of a place of emergency, it becomes a dogma, a religion, so to speak, and an unhealthy way of functioning. We become used to it and reinforce it so that it is our only known way of operation. On the contrary, when you operate in urgency, you recognize the situation's immediate needs without staying in feelings of fear.

LAKE STREET MARCH FROM 38TH AND CHICAGO TO LAKE ST. TO ST. PAUL AND BACK

*We gathered at the site of the killing of Mr. Floyd five days after the murder. A large group of people gathered at the junction of 38th and Chicago. The congregants stretched far and wide. I was with some friends in the gas station parking lot. We listened to many different speakers. These brothers, sisters, relatives, and passionate souls gave many stories, narratives, and experiences, all leading to the call for justice.*

*I often participate in gatherings of this nature and listen tentatively to the people's voices on stage and all around me. As a university faculty, I am usually on stage, talking about justice with an academic lens. But today, and the countless gatherings I have attended, I felt liberated to hear about our justice system and the many ways it is designed to hurt<sup>27</sup>. Distressed communities of color, especially our black and indigenous communities, the poor, mentally challenged, and others who have disproportionate contact with law enforcement agencies, courts, and correctional systems.<sup>28</sup> When these individuals talked and shared their stories, I am humbled to learn about our so-called justice system's dark corners.<sup>29</sup>*

*However, the underlying themes brought up by many of the speakers do sound familiar because the community has witnessed and experienced it for far too long without an appreciation for their pain.<sup>30</sup> The killing of Mr. Floyd is not an isolated incident, but it is a part of a long history of lynching. However, this lynching got televised. The lens that captured this brutality moved people from magical and naive consciousness of the work of public safety and forced us into what Paulo Freire called "critical consciousness."<sup>31</sup> Our naive perceptions about police work in the name of our public safety were quickly scrambled, and people "turned-up" in their way.*

<sup>26</sup> See Igor Derysh, *How Decades of Racist Policies and "White Mob Violence" Heightened Tensions in Minneapolis*, SALON (June 8, 2020), <https://www.salon.com/2020/06/08/decades-of-racist-policies-and-white-mob-violence-sparked-minneapolis-unrest-after-floyd-murder/>.

<sup>27</sup> Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html>.

<sup>28</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (10th ed. 2020).

<sup>29</sup> *Id.*

<sup>30</sup> See generally Jenn Schreiter & Niko Georgiades, *George Floyd Uprising in Minneapolis—Saint Paul—The First Two Weeks*, UNICORN RIOT (June 14, 2020), <https://unicornriot.ninja/2020/george-floyd-uprising-in-minneapolis-saint-paul-the-first-two-weeks/> (showing video footage of the first two weeks of protests against George Floyd's killing in Minneapolis).

<sup>31</sup> Paulo Freire, *PEDAGOGY OF THE OPPRESSED* (30th Anniversary ed. 2006).

*As I looked out into the gathering of people, I saw people of various ages and hues. I heard different accents, read beautiful signs, all calling for justice and the arrest of the officers who were directly involved in the killing of Mr. Floyd. As the speeches dwindled, people began to call for a march. I joined the movement alongside one of the organizers of the action. A young man who was devastated by the killing and all of the things he was learning at a rapid scale. He and a few other organizers began to call for the march, without much of a destination. However, as we started the movement, people began to whisper that we would march towards Lake Street and possibly end at the police station that was burned down. All through the march, people were excited. Some automatically began to monitor the movement to make sure we were not causing harm, directly marching and speaking to power and privilege, and calling for justice and healing.*

*The organizers were very clear that today we are marching for black lives, justice, and a call to end police brutality.<sup>32</sup> When we reached the junction of the police department, we all knelt, and the organizers made a few brief speeches. One of the organizers shared that we are marching towards the capitol, and there we will be joined by many other marchers. The people in the march got excited. The sun was slowly settling down as we moved on Lake Street towards St. Paul, Minnesota.*

*As we approached the bridge that connected Lake Street (Minneapolis) to Marshall (St. Paul), we could see barricades that the police set up on the St. Paul side of the bridge. As we marched on the bridge, we were warned not to advance in our march. We gathered to decide how to proceed. The crowd was not about to give up, so we pushed forward despite the warning. The police force began to launch gas canisters at us, and the air quickly became noxious. But we continued, now we began to see rubber bullets being fired at us.<sup>33</sup> The crowd started to disperse, running towards Lake Street. We began to retreat and gather back on the Minneapolis side of the bridge.*

*The rubber bullets hurt some of the members, but most of us were affected by the gas.<sup>34</sup> As we gathered, we made a collective decision to march back to the sacred ground—38th and Chicago. We stepped back, staying together and continued our chants. As we approached the Hiawatha Bridge, we realized police cars were on the bridge and scattered around under the bridge.<sup>35</sup> A few of the marchers and I saw a young man fell as he was trying to get away from an officer who was frantically pepper-spraying at the young man when he was on the ground.<sup>36</sup> We ran towards the young man to help him up. As I tried to pick him*

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<sup>32</sup> See generally Josiah Bates, 'These Protests Are the Community Grieving.' *Activists Say Minneapolis Leaders Need to Make Drastic Changes After George Floyd's Murder*, TIME (May 29, 2020), <https://time.com/5844252/minneapolis-activists-police-protests-george-floyd/> (describing some of the many groups and individual organizers involved with the Minneapolis protests following George Floyd's killing. The specific organizers of the event on this date are unknown, but they were often groups of community members like those highlighted in the article).

<sup>33</sup> Sam Richards, *Behind the Law Enforcement Response to the George Floyd Uprising—Pt 1: Munitions Delivery*, UNICORN RIOT (Dec. 3, 2020), <https://unicornriot.ninja/2020/behind-the-law-enforcement-response-to-the-george-floyd-uprising-pt-1-munitions-delivery/>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*



*up, I began to experience a burning sensation on my back. We were able to drag the young man away from the police. The police on the bridge shot at us, but we were able to get away. After establishing a safe distance, I began to complain about the burning sensation. As I felt my back, I realized that I was doused with pepper spray. But we had to keep marching because the police cars were heading our way. As the crowd began to disperse, a few of us entered a quiet street to head toward our vehicles.*

*The neighbors patrolled the street. We announced that we were not there to cause any harm; we were merely escaping police. The neighbors were friendly but cautious. One of the neighbors brought a gallon of milk. I was able to pour it on my back, which helped absorb some of the heat. We made it to our cars parked close to 38th and Chicago.*

*As I drove home, I realized that many of us came close to being harmed by the rubber bullets, and some of us were hurt by the tear-gas and pepper spray. However, for the most part, the marchers continued until we were assaulted. Many of us wanted to keep the march going, but we withdrew in the face of such aggression. Many of us marched because we did not want the fight for justice to end in the wake of violence and show of force. We were confident that others continued marching and would continue to advance. The day was long, but our resolve to stay with the values of justice continued to keep hope alive. If I could have invited my academic colleagues to witness the people's determination and resolve, it would have made a permanent stain on their presentation, lectures, and discussions.<sup>37</sup> These experiences continue to make me question my academic exposure. I am not comfortable in my educational role, and I continue to struggle with how activists are defined in our academic arenas. How good is our academic degree when we continue to churn up theories and research findings that have not impacted the lives of those who continue to fall deeper into injustice systems and are kept there by the oppressive knee of the system and those who guard it?*

*Until I saw myself as an activist, academia seemed beyond me. I continue to experience the imposter syndrome, primarily because I cannot think about any proper academic research. Still, I am often involved in panels, marches, and debates about reforming our racialized and oppressive systems.*

We are not asking anyone to forget their pain. If we do that, we will repeat the same harm. Forgiveness is not about forgetting. When we forget our mistakes or the wrongs that we have caused, we will repeat the same mistakes. When we repeat these mistakes and harms, we are merely journeying with the same thoughts and patterns. However, when we are grounded in our values, we can begin to recognize these thoughts and trends and the trauma and all the poison that we are carrying with us. By being present with our history, we allow ourselves to address that poisonous, patterned thinking, and work towards cleansing ourselves as we journey to repair our harms.

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<sup>37</sup> The emotional testimony of hearing our experiences alongside videos and pictures of what occurred would create a great deal of empathy in our colleagues for the injustice we all research and discuss on a daily basis. As such, this would influence the way they move forward in this work.

Once you state your values, they don't automatically grow with beautiful leaves and deep roots—our values must be nurtured. Nurturing happens through reflection, restoration, and reformation.

SUNDAY, MAY 31, 2020—MINNEAPOLIS, MN MARCH FROM US BANK STADIUM TO 35W BRIDGE  
**(MEMORIES FROM BRENT LEHMAN, RESIDENT OF ST. PAUL, MN)**

*In the afternoon on Sunday, May 31, 2020, Raj, Taylor, and I put together an impromptu medical kit with supplies and a dozen tear-gas eye-washing kits to hand out. We grabbed our backpacks and face protection and drove to US Bank Stadium. We joined a roaring gathering that started marching from US Bank Stadium in Minneapolis. The cheering, chanting, and pleading voices echoed off the buildings. It was a wonderful, loving group of people and the largest group I had seen over the past five days. Because the gathering spread over many blocks, dozens of people started chants and stepped in to lead when there was silence. I saw a few familiar faces, many younger people, and people greeting each other like new friends. As we passed an apartment building in the Northeast, many elders who could not join us cheered from the balconies. People offered each other masks, food, water, and tear-gas eye-washing kits. People took care of one another.*

*The gathering marched toward the 35W bridge and onto both the north and southbound lanes. Everyone in a car pulled off the bridge, cheered us on, and chanted with the crowds. Some people pulled over and joined the gathering. As the end of the group of marchers arrived on the bridge, we all took a knee to honor George Floyd, the speakers, and each other. Just as it was announced that Mayor Jacob Frey would be joining the gathering, the rumble and horn of a sizable, accelerating gasoline tanker drew everyone's attention as it barreled toward the crowd. People jumped up and immediately started helping each other get clear of the truck's path. People were on the lookout, making sure no one was trampled. The truck slammed on its brakes, and its front right tire came within inches from crushing a seated person who was struggling to get up.*

*Raj and a few others ran straight to the truck and pulled the person from under the truck tire. Other people jumped on the truck to stop the driver. I saw people in the truck's path and joined others directing people to move out of the way of the truck. Once the road was clear, the truck took off again, driving to the middle of the bridge. I looked around, disoriented, and realized I had lost Raj and Taylor, later finding out that they both jumped on the truck without a second thought. Raj and a group of three or four other people got the driver out of the vehicle, kept him alive, and kept the many young people pursuing the driver from doing something they would regret. People were understandably expressing their anger and tried to get to the driver. About five minutes later, the police arrived. Immediately after handing off the driver to the police, Raj was tear-gassed in the eyes.*

*After the truck came through, people immediately started helping each other get off the bridge safely. I spoke with a woman looking for her husband and kids. People immediately jumped into action to help her look. People supported each other off the bridge and climbed*

*over fences as the police aggressively approached. A group of four or five police vehicles drove on the bridge, and one officer sprayed tear-gas from the window of the car into the eyes of people trying to get off the bridge. A young person who had been sprayed in the eyes came up to me, and within seconds we found someone with an eye washing kit.*

*People were supporting each other, sharing what they had, and demonstrating what it looks like for a community to live out their values. As I reflect on that day, I learned a lesson about what honoring human life could look like in the most challenging situation. I saw what it looks like for people to risk their lives to live out their values in the most human way. The gathering had dispersed, and people recongregated at US Bank Stadium. Police encircled a group of marchers at the bridge's exit and arrested each, one at a time. Taylor and I found each other and met up with Raj, who had been separated on the other side of the bridge, where we learned what Raj had just been through. We got Raj some more tear-gas-washing kits for his eyes and headed to North Minneapolis.*

When a law enforcement officer runs towards a burning building, they are running because they value life. Does that make them a hero? No, it makes them human. When we use language that suggests we are an expert or a hero, we place ourselves above others, which strips their humanity and our own. When our humanity is denied, we begin alienating, distancing, disenfranchising, and harming people. When we run towards our values, we build trust, nurture humility, and work on wellness instead of our egos.

NORTH MINNEAPOLIS—NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP) COMMUNITY WATCH/ WELLNESS (SHARED BY TAYLOR SAVER, RESIDENT OF NORTH MINNEAPOLIS)

*“The greatness of a community is most accurately measured by the compassionate actions of its members”—Coretta Scott King.<sup>38</sup>*

*After parking my car in the mostly empty, fenced area behind a local church on West Broadway Avenue, I grabbed my face covering and quietly shuffled over to a group of volunteers huddled in the corner of the lot. As the NAACP MPLS volunteer coordinator checked us in, we grabbed our shirts—grey “My identity is not your crisis,” or yellow “Blacktivist” designs—which identified us, to each other and others in the community, as volunteers for the community watch.<sup>39</sup> There were laughs, smiles, and pleasant greetings as we received our instructions, but we knew the matter at hand was dangerous.*

*The communal trauma and grief regarding the killing of George Floyd are palpable in North Minneapolis, a community with intimate knowledge and history of the pain of the*

<sup>38</sup> Associated Press, *King’s Widow Urges Acts of Compassion*, L.A. TIMES (Jan. 17, 2000, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2000-jan-17-mn-54832-story.html> (quoting Coretta Scott King).

<sup>39</sup> Jared Goyette, *Citizen Patrols Organize Across Minneapolis as Confidence in the Police Force Plummet*, WASH. POST (June 7, 2020, 4:30 AM), [https://www.washingtonpost.com/national/citizen-patrols-make-statement-in-minneapolis/2020/06/06/cc1844d4-a78c-11ea-b473-04905b1af82b\\_story.html](https://www.washingtonpost.com/national/citizen-patrols-make-statement-in-minneapolis/2020/06/06/cc1844d4-a78c-11ea-b473-04905b1af82b_story.html).

*loss of life at the hands of MPD.<sup>40</sup> Hours earlier, a semi-truck went through those of us marching; buildings and businesses on the south side had been burned and looted; and now threats had been made against black-owned businesses over the north.<sup>41</sup> Our call was to come together and keep watch over the streets we call home, and the businesses that keep us fed and serve our community. We were grouped up with others, and sent out to keep watch.*

*Gunshots—Time to Get Back in the House. When gunshots were heard, some took cover where they could, and others rushed back to the restaurant that served as the base of operations for the group and waited for the all-clear signal to be given.<sup>42</sup> Throughout these moments of tension were moments of real community. Youth, North Minneapolis residents, and local representatives banding together to create systems of care that work for our community.<sup>43</sup> We communicated over walkie talkies, texts, and calls. We chatted with passersby, received honks of support and appreciation from other residents, exchanged stories, and shared food. Some chose to carry weapons, others decided to be present without, but we were all there to set aside momentary differences and come together for each other. In our society, we've been thoroughly trained to see the world through lenses of division, particularly when in a place of fear. In my experiences here, moments like these can teach us that the differences we see in each other only divide us when we are in a community without a shared vision and trust.*

*Throughout the next few nights, those of us who continued to show up witnessed the building of something special. Housed in a local restaurant and church space was a community watch group, a pantry with necessities for those in need, donated food to feed the volunteers and community, and a volunteer emergency medical technician (EMT) ready to report as needed.<sup>44</sup> The chief of police would visit on occasion. News crews came and went.<sup>45</sup> At the heart of it all was a dedication to community wellness, liberation through shared power, and the unmistakable sense of a community providing for and protecting itself.<sup>46</sup>*

When we create systems, we do so because we believe they are serving us. We build systems and then are forced to dance around the system, which in turn maintains it, even when it has never really worked. We become trapped in dualistic narratives, right or wrong, true or false, black or

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<sup>40</sup> Justin Ellis, *Minneapolis Had This Coming*, THE ATLANTIC (July 1, 2020, 12:45 PM), <https://www.theatlantic.com/ideas/archive/2020/06/minneapolis-long-overdue-crisis/612826>.

<sup>41</sup> Chris McGreal & Lois Beckett, *Truck Drives Through Crowd of Protestors on Minneapolis Bridge*, THE GUARDIAN (May 31, 2020, 8:24 PM), <https://www.theguardian.com/us-news/2020/may/31/semi-truck-drives-through-crowd-of-protesters-on-minneapolis-bridge>.

<sup>42</sup> Goyette, *supra*, note 39.

<sup>43</sup> Nate Scott, *The Morning After Protests, Communities Come Together to Clean Up Streets*, USA TODAY (May 30, 2020, 8:32 AM), <https://ftw.usatoday.com/2020/05/george-floyd-protests-cleaning>.

<sup>44</sup> Nick Mancall-Bitel, *Mutual Aid Groups Band Together to Feed Communities Through Crisis*, EATER (June 4, 2020, 3:41 PM), <https://www.eater.com/2020/6/4/21280367/mutual-aid-groups-food-donations-george-floyd-protests>.

<sup>45</sup> Goyette, *supra* note 39.

<sup>46</sup> *Id.*

white, and we reinforce the same supremacist ideals that we are trying to undo. We became exhausted because we were working towards efficiency instead of empathy and engagement.

This is how restorative practices have been harmed by practitioners who have not done deep, internal, anti-racist work.<sup>47</sup> We have been shown to operate out of a ceremonial mind instead of a ritual heart.

RESTORATIVE JUSTICE PRACTITIONERS GATHERING (AS SHARED BY DR. RAJ SETHURAJU)

*Incidentally, a week after the march, I was in a Zoom call with restorative justice practitioners. It was interesting because the person who organized the Zoom gathering started to invite us to share how we were feeling and asked what the latest book we were reading. Meanwhile, I sat still, with my heart in the trenches on Lake Street in Minneapolis, in St. Paul, and North Minneapolis.*

*As I listened, I heard a conversation on how people were expanding their horizons on restorative justice and social justice to include racial justice and how to be anti-racist. When it was my turn to share, I asked, “Are we lacking knowledge, or are we lacking a way of being?”*

*People’s responses about what they were reading were challenging to hear, knowing that these themes are not new and have been in existence for a long time. Authors have written about racial justice, the need to address disparities, and how mass incarceration impacts communities of color.*

*Michelle Alexander’s book, “The New Jim Crow,” just celebrated its tenth year of publication.<sup>48</sup> As people continued to share, I did not recognize a spirit in their responses. As I listened, I reflected on the sense of the young and old, black and white communities that I marched with. I heard their voices and calls to undo policing and decrease the footprints of policing.<sup>49</sup> That feeling on the Zoom call lacked the same depth that I heard in the streets. I witnessed how privileged many of us are. Many of us call ourselves restorative justice practitioners and have been complicit and have stood along with these systems that have continuously placed their knees on black and brown bodies.*

*As people were describing their readings, it became apparent that we need to stop this intellectual masturbation process. We need to get down to as many marches and protests as possible—stand alongside people—to listen and learn from*

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<sup>47</sup> EDWARD C. VALANDRA, WANBLI W. HOKŠILA & J. ROBERT G. YAZZIE, *COLORIZING RESTORATIVE JUSTICE: VOICING OUR REALITIES* (2020).

<sup>48</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (10th ed. 2020).

<sup>49</sup> Josie Duffy Rice, *The Abolition Movement*, VANITY FAIR (Aug. 25, 2020), <https://www.vanityfair.com/culture/2020/08/the-abolition-movement>.

*them.<sup>50</sup> We do not have a deficit in academic research or knowledge of addressing police, judicial, and correctional brutality. The culture of denial and indifference has created and maintained this brutality has always been apparent for those that have to shoulder it.<sup>51</sup>*

*As the conversation returned to me once again, I simply stopped and invited people to keep going to marches; get out from behind their screens and curtains and subject themselves to the voices of the people.*

*As restorative justice practitioners, we tend to say these are the values that guide our work. Still, when you step into the role you play within a system, you are entrenched in it. We are often governed by politics and procedures, rights, and wrongs. We fail to recognize the dissonance between our values and the way we operate. While marching, one feels the seamless connection between values and what people were marching for. I continue to think, “How can we in academia stop reading about these movements and start to experience the movement?”*

As we were struggling and walking the path towards healing and transforming from punitive ideologies to restorative justice practices, we ran into the Republican National Convention (RNC). On Monday night of the 2020 Republican National Convention, Mr. Pollack, the father of one of the victims in Stoneman Douglas High School shooting (Parkland shooting), started a meaningful school discipline conversation.<sup>52</sup> During the 80s, 90s, and 2000s, we allowed for a “law and order” mindset to inform public safety in our schools.<sup>53</sup> As a result, zero-tolerance policies, school “safety” measures, and classroom management policies and procedures based on control and authority became mainstream practices in our schools. These policies also invited the presence of police officers onto school grounds.

Yes, we are loudly wondering if these tough love, zero-tolerance, school “safety” measures yielded safe schools. Who was saved by these policies and procedures? Despite their purpose to create a sense of safety, did the policies and procedures address the many underlying concerns related to the harm done in the cafeteria, playground, buses, and classroom? For example, as I read more about Stoneman Douglas High School practices, regardless of the school’s intention to implement restorative justice practices, they still suspend and expel the students who commit this unspeakable violence.<sup>54</sup> Furthermore, the school also had a school resource officer on the ground.

<sup>50</sup> Paresh Dave, *Factbox: What Changes are Governments Making in Response to George Floyd Protests?*, REUTERS (June 10, 2020), <https://www.reuters.com/article/us-minneapolis-police-protests-response/factbox-what-changes-are-governments-making-in-response-to-george-floyd-protests-idUKKBN23I01D>.

<sup>51</sup> Wendi C. Thomas, *Ignoring Justice Just Makes It Worse*, THE UNDEFEATED (July 13, 2016), <https://theundefeated.com/features/ignoring-injustice-only-makes-it-worse/>.

<sup>52</sup> Andrew Pollack (born February 18, 1966) is an American author, school safety activist, and entrepreneur whose daughter, Meadow, was killed in the Stoneman Douglas High School shooting in 2018. *Andrew Pollack*, [https://en.wikipedia.org/wiki/Andrew\\_Pollack](https://en.wikipedia.org/wiki/Andrew_Pollack) (last visited Jan. 1, 2021); ABC News, *Andrew Pollack’s Speech at the 2020 RNC*, YOUTUBE (Aug. 24, 2020), <https://www.youtube.com/watch?v=RMBNfEZCB18>. See Derek W. Black, *Zero Tolerance Discipline Policies Won’t Fix School Shootings*, THE CONVERSATION (Mar. 15, 2018), <https://theconversation.com/zero-tolerance-discipline-policies-wont-fix-school-shootings-93399>.

<sup>53</sup> Black, *supra* note 52.

<sup>54</sup> See Parkland School District, *Things You Should Know: Possession or Use of Weapons in School* (2021), <https://www.parklandsd.org/about-us/things-you-should-know>.

As Mr. Pollack expressed his pain on stage, he said, “people failed his daughter.”<sup>55</sup> As restorative justice practitioners, we couldn’t agree more with Mr. Pollack. We have witnessed principals, teachers, and staff fail our scholars regularly.<sup>56</sup> We have also seen community and society fail our schools.<sup>57</sup> We, human beings in general, fail each other.<sup>58</sup> Mr. Pollack, you resolutely said you are interested in answers and solutions. My hopeful response is that if we invest in restorative justice practices—ones grounded in climate, culture, and environment—we can and will breathe empathy, respect, humility, and care for one another.<sup>59</sup> These values, when nurtured, will become the best form of safety and wellness. These values have a much better chance of preventing harm from continuing in our schools and communities. Restorative justice practices are not divisive and aimed at blaming teachers and coddling harmful behaviors. When fully and mindfully implemented, restorative justice practices have a strong presence in undoing risk and perpetuation of harm.<sup>60</sup>

Mr. Pollack, we are deeply sympathetic to the loss of your child, along with many of the other children and staff, during the Parkland shooting. We all have witnessed many such mass shootings in our schools.<sup>61</sup> Like the Parkland shooting, these shootings led to many innocent lives being claimed and many more suffering from post-traumatic stress disorder (PTSD) as well as many other forms of trauma-related ailments.<sup>62</sup> As Mr. Pollack spoke at the RNC, we felt his pain and were quickly transported back to the shooting and the many images that we all witnessed via media. The shooting happened on Valentine’s Day in 2018.<sup>63</sup> A month after the

<sup>55</sup> See Associated Press, *Father of Parkland School Shooting Victim Ties Kids’ Safety to Trump Victory*, NBC 9 NEWS (Aug. 24, 2020), <https://www.9news.com/article/news/nation-world/parkland-father-andrew-pollack-rnc-speech/507-e22ed8e8-5109-4d37-b328-517a3ec8b1d9>.

<sup>56</sup> See Matthew Lynch, *18 Reasons the U.S. Education System is Failing*, THE ADVOCATE (Apr. 3, 2017), <https://www.theadvocate.org/10-reasons-the-u-s-education-system-is-failing/>.

<sup>57</sup> *Id.*

<sup>58</sup> See MORLEY D. GLICKEN, *SOCIAL WORK IN THE 21ST CENTURY* 3 (SAGE Publ’n, 2d ed. 2010), [https://www.sagepub.com/sites/default/files/upm-assets/38141\\_book\\_item\\_38141.pdf](https://www.sagepub.com/sites/default/files/upm-assets/38141_book_item_38141.pdf).

<sup>59</sup> See *Evidence Supporting the Use of Restorative Justice*, RESTORATIVE JUST. COUNCIL <https://restorativejustice.org.uk/resources/evidence-supporting-use-restorative-justice> (last visited Mar. 1, 2021); see also Jeff Latimer, Craig Dowden & Danielle Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 PRISON J. 127 (2005), [https://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj\\_meta%20analysis.pdf](https://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj_meta%20analysis.pdf); Jeff Latimer & Steven Kleinknecht, *The Effects of Restorative Justice Programming: A Review of the Empirical*, DEP’T. JUST. CAN., [https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr00\\_16/rr00\\_16.pdf](https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr00_16/rr00_16.pdf) (last visited Mar. 1, 2021); GSSW Communication Team, *Restorative Justice Policy*, U. of Denv. Graduate Sch. of Soc. Work (June 27, 2019), <https://socialwork.du.edu/news/restorative-justice-policy>.

<sup>60</sup> See *Evidence Supporting the Use of Restorative Justice*, *supra* note 59; Latimer et al., *supra* note 59, at 127; Latimer & Kleinknecht, *supra* note 59; *Restorative Justice Policy*, *supra* note 59.

<sup>61</sup> *Ten Years of Mass Shootings in the United States*, EVERYTOWN (Nov. 21, 2019), <https://maps.everytownresearch.org/massshootingsreports/mass-shootings-in-america-2009-2019/> (compiling and analyzing ten years (2009 to 2018) of original data on mass shootings in the United States).

<sup>62</sup> *Id.* (“Studies of survivors from various mass shootings consistently find that mass shootings harm the mental health of both direct survivors and community members, including psychological symptoms like post-traumatic stress and depression.”).

<sup>63</sup> Elizabeth Chuck, Alex Johnson & Corky Siemaszko, *17 Killed in Mass Shooting at High School in Parkland, Florida*, NBC NEWS (Feb. 14, 2018), <https://www.nbcnews.com/news/us-news/police-respond-shooting-parkland-florida-high-school-n848101>.

shooting, schools across the country spoke out about the pain. Students marched out of their classrooms and read the students' names and staff who were shot on that fateful day.<sup>64</sup> They did not come to ask for stricter laws, for more punishment, or revenge; they came because their naïve consciousness had been burst, and they were now asked to engage in critical consciousness work.<sup>65</sup> In their way of being, our young scholars demonstrated that we need better services and lead with love policies to counter violence and harm. Our young scholars marched, went to the White House, and collaborated with other community members who face gun violence.<sup>66</sup> They took on the role of community change-makers and fought for humane policies.

The young scholars are calling for restorative justice practices as our current systems have not worked. Their actions continue to make us better people. Like many, we too wanted revenge and stricter policies after watching the videos of the families in pain; yet, we know we can't take away the pain; as educators, practitioners, and colleagues we can only walk alongside and continue to do our part every day to prevent such tragedies in the communities we walk and work with daily.

One of the ways we have found ourselves working to address and undo violence and tragedies was through restorative justice practices.<sup>67</sup> Restorative justice practices come to us through our many indigenous communities worldwide, especially in Minnesota and the United States.<sup>68</sup> This ancient wisdom is rooted in our focus on relationships. Deepening human relationships and learning about each other, because everyone has a story, allows us to humanize each other and see each other as relatives. As we increase our healthy relationships, we can further our values and let our values inform our interactions.<sup>69</sup> Restorative justice practices will enable us to see and feel each other's humanity and not otherize, objectify, and criminalize our fellow relatives. When held with integrity, restorative justice practices centers on the underlying concerns related to harm and ensures needs are addressed rather than pushed off onto other systems or groups.

Nelson Mandela spoke about the idea of Ubuntu—of believing deeply in the interconnectedness and humanity of all other beings—even after stepping out of twenty-five years of incarceration.<sup>70</sup> Mandela witnessed the violence perpetrated in South Africa as the

<sup>64</sup> Charlotte Alter, *The School Shooting Generation Has Had Enough*, TIME (Mar. 22, 2018), <https://time.com/longform/never-again-movement/>.

<sup>65</sup> See Melissa Block, *Parkland Family Reflects on A Year of Anguish and Activism*, NPR (Feb. 11, 2019), <https://www.npr.org/2019/02/11/692490215/parkland-family-reflects-on-a-year-of-anguish-and-activism>.

<sup>66</sup> See, e.g., NPR, *Teens on Guns in America*, YOUTUBE (Feb. 7, 2019), <https://www.youtube.com/watch?v=yxGrxpcqeA>.

<sup>67</sup> *Restorative Justice and School Violence*, CRIM. JUST., <http://criminal-justice.iresearchnet.com/crime/school-violence/restorative-justice-and-school-violence/> (last visited Jan. 21, 2021).

<sup>68</sup> *The Indigenous Origins of Circles and How Non-Natives Learned About Them*, LIVING JUST. PRESS, <http://www.livingjusticepress.org/?SEC=0F6FA816-E094-4B96-8F39-9922F67306E5> (last visited Mar. 1, 2021).

<sup>69</sup> See, e.g., GRAND CHALLENGES FOR SOC. WORK, PROGRESS AND PLANS FOR THE GRAND CHALLENGES: AN IMPACT REPORT AT YEAR 5 OF THE 10-YEAR INITIATIVE 14–15 (2021), <https://grandchallengesforsocialwork.org/wp-content/uploads/2021/01/GCSW-Impact-Report.pdf>.

<sup>70</sup> Nelson Rolihlahla Mandela (July 18, 1918–Dec. 5, 2013) was a South African anti-apartheid revolutionary, political leader and philanthropist who served as President of South Africa from 1995 to 1999. *Nelson Mandela*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Nelson\\_Mandela](https://en.wikipedia.org/wiki/Nelson_Mandela) (last updated Jan. 21, 2021). See also Hlumelo Siphe Williams, *What Is the Spirit of Ubuntu? How Can We Have It in Our Lives?*, GLOB. CITIZEN (Oct. 19, 2018), <https://www.globalcitizen.org/en/content/ubuntu-south-africa-together-nelson-mandela/> (“Nelson Mandela is the true definition of Ubuntu, as he used this concept to lead South Africa to a peaceful post-apartheid transition. He never had the intention of teaching our oppressors a lesson. Instead, he operated with compassion and integrity, showing us that for us to a better South Africa, we cannot act out of vengeance or retaliation, but out of peace.”).



dominant African community tried to hold on to power after decolonization. In the name of public safety for the dominant society, human beings were killed, violated, and incarcerated. The apartheid system that was in place in South Africa continued to maintain the safety of the white Afrikaans. The focus on safety, power, and privilege led to untold violence and violations.<sup>71</sup>

However, when Nelson Mandela became the first indigenous president of South Africa, he did not seek revenge. Instead, he asked to listen and undo the harm through the restoration of common humanity. He asked Bishop Desmond Tutu to conduct a truth and reconciliation process.<sup>72</sup> Given the gravity of pain and historical and intergenerational trauma, restoration of relationships will take time, and he did not expect any magic. Instead, he relied on the miracle of humanity and a process aimed at transforming the nation's pain. As we know, the transformation is still in progress, given how deeply the apartheid system truly devastated the land and its many black and brown communities.

When people question the narrative of restorative justice practices, we wonder if they express the deep pain they are still experiencing.<sup>73</sup> We know each of us will miss our children if they are suddenly taken away from us by violence. We empathize with Mr. Pollack and the many hundreds of families. Your pain is our pain, and we will not let the voices of these individuals be forgotten as we journey in search of love and justice.

We invite the nation to listen to Mr. Pollack and not react to his perspective. Many political and policy professionals underscore and emphasize Mr. Pollack's growing call for disciplinary and punitive practices in schools and the greater communities. Let us acknowledge that the cry for more stringent laws and systems in response to this tragedy is because we are looking for quick answers and solutions. Our need for immediate gratification and retributive actions continues to push aside mindful solutions, and as a result, these problems keep resurfacing. Let us dig deeper.

Unlike "law and order," restorative justice practices encourage us to confront the reality facing our nation and culture humanely. We cannot arrest our way out of harm, and a single narrative cannot inform our pursuit of justice. When fully and humanely introduced and engaged, restorative justice practices have the potential of limiting, resolving, and finally undoing harm in schools and our communities.<sup>74</sup>

Our feelings for our brothers, sisters, relatives, and communities push us to ask different types of questions. Questions that will enable us to move out of survival mode, where emergencies and urgencies occupy our senses. What could we have done for the community members who caused the harm? What upstream work should we be focused on to help address violence, hate, and disenfranchisement? How do we humanize our systems, like schools, so that our scholars can come into a loving, caring, and embracing community and not be pushed into perpetual survival space in their bodies? Restorative justice practices urge us to engage our hearts and our executive function and remember that we, as educators, do essential, meaningful, and value-centered work. Restorative justice practices guide us to do heart work, not hard work.

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<sup>71</sup> Finbarr O'Reilly, *Looking at White Privilege Under Apartheid*, N.Y. TIMES, LENS BLOG (Sept. 14, 2016), <https://lens.blogs.nytimes.com/2016/09/14/looking-at-white-privilege-under-apartheid/>.

<sup>72</sup> See *Reparations & Rehabilitation Committee Transcripts, Policies & Articles*, TRUTH & RECONCILIATION COMM'N, <https://www.justice.gov.za/trc/reparations/index.htm> (last visited Mar. 1, 2021).

<sup>73</sup> See Camonghne Felix, *Aching for Abolition As a Survivor of Sexual Violence, I Know Prison Isn't the Answer*, THE CUT (Oct. 1, 2020), <https://www.thecut.com/2020/10/aching-for-abolition.html>.

<sup>74</sup> Aviva Stahl, *We Have Already Stopped Calling the Cops*, BUSTLE (July 21, 2020), <https://www.bustle.com/rule-breakers/police-abolition-domestic-violence>.

We know we cannot go back in time to address the pain of those who caused the harm and take away the hurt from those who are suffering because of the harm. The Sankofa principle invites us to move forward while listening and learning from the past.<sup>75</sup> The lessons from apartheid, enslavement, genocide, and settler colonialism all ask us to deepen our relationship with our fellow human beings.<sup>76</sup> The lessons invite us to see our humanity in each other and lead with love and justice in our hearts. We cannot end violence and harm by causing more harm in the name of the law, procedures, ordinance, and expectations.

Today, we ask Mr. Pollack and the many voices in pain and who feel left out because we are pivoting towards restorative justice practices to call for reflection, restoration, and reformation—leading to transformation.<sup>77</sup> Let us walk together and work together in anchoring ourselves in our values of respect, justice, and love. Let us not fail our children again by avoiding the heart work of prevention through healing and restoration.

We do not have all the answers, but collectively—all of us together do—and we are the solution we have been waiting for. So let us engage these practices indigenous to so many of us and RISE. We must reflect to restore, and restore to reform, which in turn will equal transformation. As Richard Rohr always reminds us, “pain not transformed, will transfer.”<sup>78</sup>

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<sup>75</sup> See *The Power of Sankofa: Know History*, BEREA COLLEGE, <https://www.berea.edu/cgwc/the-power-of-sankofa/> (last visited Jan. 21, 2021).

<sup>76</sup> Lerato Mogoatlhe, *4 Things the World Can Learn From South Africa About Racial Justice*, GLOBAL CITIZEN (June 18, 2020), <https://www.globalcitizen.org/en/content/apartheid-lessons-racial-justice-south-africa/>.

<sup>77</sup> See THE FORGIVENESS PROJECT (2020), <https://www.theforgivenessproject.com/storytellers/>; Chris Hausmann, *The Little Book of Racial Healing: Coming to the Table for Truth-Telling, Liberation, and Transformation*, *The Little Book of Race and Restorative Justice: Black Lives, Healing, and U.S. Social Transformation*, 4 J. OF SOC. ENCOUNTERS 125 (2020) (reviewing books regarding restorative justice); Jack Rice Law, *Groundbreaking Restorative Justice Finds Success in Minnesota*, PR NEWSWIRE (Dec. 9, 2020), <https://www.prnewswire.com/news-releases/groundbreaking-restorative-justice-finds-success-in-minnesota-301188901.html>; Darren Thompson, *Ramsey County Sentences Native Organizer for Columbus Statue Toppling*, UNICORN RIOT (Dec. 15, 2020), <https://unicornriot.ninja/2020/ramsey-county-sentences-native-organizer-for-columbus-statue-toppling/> (discussing restorative justice as an alternative and referencing related report prepared Dr. Raj J. Sethuraju); *Access to Justice: Delivering Restorative Justice for Hate Crime*, WHY ME? (2021), <https://why-me.org/campaigns/hate-crime-restorative-justice/>.

<sup>78</sup> RICHARD ROHR, *A SPRING WITHIN US: A BOOK OF DAILY MEDITATIONS* 199, 120–21 (2016).

# The Seven (at least) Lessons of the Myon Burrell Case

LESLIE E. REDMOND & MARK OSLER

## I. INTRODUCTION

For much of the world, 2020 was a troubling year, but few places saw as much uproar as Minnesota. The police killing of George Floyd set off protests in Minnesota and around the world,<sup>1</sup> even as a pandemic and economic downturn hit minority communities with particular force.<sup>2</sup>

But, somehow, the year ended with an event that provided hope, promise, and a path to healing. On December 15, 2020, the Minnesota Board of Pardons granted a commutation of sentence to Myon Burrell, who had been convicted of murder and attempted murder and sentenced to life in prison.<sup>3</sup> The Burrell case, closely examined, is a Pandora's box containing many of the most pressing issues in criminal justice: racial disparities, the troubling treatment of juveniles, mandatory minimums, the power (and, too often, lack) of advocacy, the potential for conviction and sentencing review units, clemency, and the need for multiple avenues of second-look sentencing. The purpose of this essay is to briefly explore each of these in the context of this one remarkable case, and to use this example to make a

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<sup>1</sup> Damien Cave, Livia Albeck-Ripka & Iliana Magra, *Huge Crowds Around the Globe March in Solidarity Against Police Brutality*, N.Y. TIMES, (June 6, 2020), <https://www.nytimes.com/2020/06/06/world/george-floyd-global-protests.html>.

<sup>2</sup> Heather Long, Andrew Van Dam, Alyssa Fowers & Leslie Shapiro, *The COVID-19 Recession is the Most Unequal in Modern U.S. History*, WASH. POST (Sept. 30, 2020), <https://www.washingtonpost.com/graphics/2020/business/coronavirus-recession-equality/>; Joel Neel, *Forum: Pandemic's Disproportionate Impact on Minority Communities in U.S. Cities*, NPR.ORG (Sept. 30, 2020), <https://www.npr.org/sections/health-shots/2020/09/30/917857018/forum-pandemics-disproportionate-impacts-on-minority-communities-in-u-s-cities>; William F. Marshall III, M.D., *Coronavirus Infections by Race: What's Behind the Health Disparities?*, MAYO CLINIC (Aug. 13, 2020), <https://www.mayoclinic.org/diseases-conditions/coronavirus/expert-answers/coronavirus-infection-by-race/faq-20488802>.

<sup>3</sup> Leah Asmalash, *He Was Sentenced to Life in Prison While a Teenager. 18 Years Later, Myon Burrell Walks Free*, CNN (Dec. 18, 2020), <https://www.cnn.com/2020/12/16/us/myon-burrell-release-trnd/index.html>.

crucial point about criminal justice reform: To really make change, many fixes must be pursued at once, through a variety of methods. Just as it took many converging issues to create deep injustice in the Burrell case, there must be many converging paths to reform.

## II. THE MYON BURRELL CASE

Shortly before Thanksgiving in 2002, an eleven-year-old girl named Tyesha Edwards was shot to death while doing homework in the dining room of her home at 3431 Chicago Avenue South in Minneapolis. The intended victim was Timothy Oliver, a seventeen-year-old who was standing outside in front of the house next door.<sup>4</sup>

Oliver named Isaiah (“Ike”) Tyson, Hans Williams, and Burrell (whom he knew as “Skits”) as those involved in the shooting, and all three were arrested and charged with the murder.<sup>5</sup> Burrell was charged as an adult. Williams pled guilty to second-degree murder for the benefit of a gang, and Tyson pled guilty to second-degree murder and attempted first-degree murder for the benefit of a gang.<sup>6</sup>

Burrell, who denied involvement in the shooting from the time of his arrest, proceeded to trial before a jury and was convicted of first-degree murder and other charges. Oliver was the only eyewitness to testify that Burrell was the shooter.<sup>7</sup> Myon Burrell was sentenced to life in prison plus 12 months on the first-degree murder for the benefit of a gang charge and a consecutive term of 186 months for the attempted murder for the benefit of a gang of Timothy Oliver.<sup>8</sup>

The conviction was overturned by the Minnesota Supreme Court in May of 2005 because of mistreatment of Myon Burrell during interrogation, among other issues.<sup>9</sup> At re-trial, Burrell elected to forego a jury and have Hennepin County District Judge Charles A. Porter, Jr. serve as the trier of fact. In April of 2008, he was again convicted of murder in the first degree and attempted murder. He was sentenced to life in prison plus 60 months for the murder and a consecutive term of 186 months for the attempted murder

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<sup>4</sup> State v. Burrell, 697 N.W.2d 579, 584–80 (Minn. 2005).

<sup>5</sup> *Id.* at 585.

<sup>6</sup> *Id.* at 588.

<sup>7</sup> *Id.* at 589.

<sup>8</sup> *Id.* at 590–91.

<sup>9</sup> *Id.* at 598–99.

of Timothy Oliver.<sup>10</sup> The Minnesota Supreme Court overturned this sentence while affirming the conviction, and at his third and final sentencing Burrell received a life sentence (with parole eligibility after 30 years) plus 12 months for the murder of Tyesha Edwards and a consecutive 180-month term for the attempted murder of Timothy Oliver.<sup>11</sup>

Since Burrell's 2002 arrest, underlying allegations and evidence have shifted markedly. Isaiah ("Ike") Tyson, who testified in his own plea hearing that Burrell was the shooter, testified at the second trial (and has repeated since that time) that he was, in fact, the shooter and that Burrell was not present. Timothy Oliver, who identified Myon Burrell as the shooter at the first trial, died between the first and second trials.<sup>12</sup> Some witnesses presented by the government at the trials later retracted their claims.

In the spring of 2020, both activists in the community (including co-author Leslie Redmond) and United States Senator Amy Klobuchar called for an investigation into the conviction and sentence of Myon Burrell.<sup>13</sup> Senator Klobuchar served as the County Attorney for Hennepin County at the time of the first trial.

In response to this call, Laura Nirider, Clinical Professor of Law and Co-Director of the Center on Wrongful Convictions at the Northwestern Pritzker School of Law, and Barry Scheck, Co-Founder of the Innocence Project and Professor of Law at the Benjamin N. Cardozo School of Law at Yeshiva University, convened a panel of national legal experts. Co-author Mark Osler served as the chair of that panel.<sup>14</sup> The 59-page Report produced by that independent panel was publicly released on December 8, 2020. It recommended that Burrell be released because "no purpose is served by Burrell's continuing incarceration, and no negative fact overwhelms the

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<sup>10</sup> Burrell v. State, 858 N.W.2d 779, 782 (Minn. 2015).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Stephen Montemayor, *Amy Klobuchar Urges Hennepin County Attorney to Investigate Myon Burrell Case*, MINNEAPOLIS STAR-TRIB. (Mar. 5, 2020), <https://www.startribune.com/amy-klobuchar-urges-hennepin-county-attorney-to-investigate-myon-burrell-case/568533312/>.

<sup>14</sup> MARK OSLER ET AL., REPORT OF THE INDEPENDENT PANEL TO EXAMINE THE CONVICTION AND SENTENCE OF MYON BURRELL (Dec. 8, 2020), <https://news.stthomas.edu/wp-content/uploads/2020/12/2020-12-Burrell-Report-Master.pdf> [hereinafter Burrell Report].

imperative of freedom.”<sup>15</sup> One week later, Burrell’s commutation was granted and he was released the same day.<sup>16</sup>

### III. THE SEVEN LESSONS OF THE MYON BURRELL CASE

#### A. Race Matters

America is a nation built on the exploitation and criminalization of Black people.<sup>17</sup> Thus every institution, policy, law, and practice must be viewed in a historical context. The American criminal justice system is no exception.<sup>18</sup> The modern criminal justice system reveals the continuation of the criminalization of Black people. In *The Souls of Black Folk*, W.E.B. Du Bois asked, “How does it feel to be a problem?”<sup>19</sup> This becomes the question to Myon Burrell and other Black youth who are disproportionately impacted by the juvenile justice system.<sup>20</sup>

In the United States, it is impossible to talk about Myon Burrell’s case without acknowledging the critical role racial disparities play in the criminal justice system.<sup>21</sup> The criminal justice system was designed in an effort to control and discipline the population.<sup>22</sup> Ironically, this same criminal justice system was rooted in efforts to achieve rehabilitation rather than punishment.<sup>23</sup>

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<sup>15</sup> *Id.* at 5.

<sup>16</sup> Will Wright, *Minnesota Releases Myon Burrell, Man Given Life Sentence After a Murder*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/us/myon-burrell-released-commuted.html>.

<sup>17</sup> JOE FEAGIN, *HOW BLACKS BUILT AMERICA: LABOR, CULTURE, FREEDOM, AND DEMOCRACY* (2015).

<sup>18</sup> Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOCIO. REV. 151, 162 (2004).

<sup>19</sup> W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK*, (Henry Louis Gates ed., Oxford University Press 2007) (1903).

<sup>20</sup> Artika Tyner, *The Emergence of the School-to-Prison Pipeline*, A.B.A. (Jun. 1, 2014), [https://www.americanbar.org/groups/gpsolo/publications/gpsolo\\_ereport/2014/june\\_2014/the\\_emergence\\_of\\_the\\_school-to-prison\\_pipeline/](https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2014/june_2014/the_emergence_of_the_school-to-prison_pipeline/) (“children of color are more likely to be referred out of the classroom and receive harsher punishment for their actions”).

<sup>21</sup> Pettit, *supra* note 18, at 162.

<sup>22</sup> Pedro Noguera, *Preventing and Producing Violence: A Critical Analysis of Responses to School Violence*, 65 HARV. EDUC. REV. 189 (1995).

<sup>23</sup> RACHEL ELISE BARKOW, *PRISONERS OF POLITICS* 56 (2019).

The criminal justice system has been used as a vehicle to force Black people into second-class citizenship, a concept Michelle Alexander addresses in her book *The New Jim Crow*.<sup>24</sup> Until his recent release, Myon Burrell was dehumanized and his image was used as a symbol for what is wrong with the Black community by the media and prosecutors. In 2002, after the murder of Tyesha Edwards, Burrell was never viewed as a sixteen-year-old teenager or even a human being whose life mattered. Myon was limited to the labels of “criminal” and “murderer.”

Within the four corners of the Burrell case, there was a hidden but striking example of the way race matters, particularly in the way Black men are viewed. The public properly was made well aware of the tragic loss of eleven-year-old Tyesha Edwards in the shooting for which Burrell was convicted. However, the intended target of the bullet—Timothy Oliver, who had a round go through the leg of his pants—was not accorded the status of “victim” at the trial or in the public eye.<sup>25</sup> There was no allegation that Oliver was involved in doing anything other than standing there at the time of the shooting. He was reputed to have instigated the conflict merely by making faces (“mean mugged”) at people associated with Burrell.<sup>26</sup>

When Oliver was shot dead in the street a year later, a story on the case focused almost exclusively on gang membership and Oliver’s relationship to the Burrell case.<sup>27</sup> The article was titled “*Bullets Find Teen Who Had Cheated Death*.”<sup>28</sup>

The failure to recognize Oliver as a victim of the crime, or even as a juvenile like Edwards and Burrell, is telling. While Tyesha Edwards was viewed accurately as an “innocent” victim, Oliver was seen as a non-victim who “cheated death,” despite the fact that he was a seventeen-year-old who was shot at while talking to someone in front of a house, allegedly for making mean faces at them. Does race matter in the way this Black child was viewed?

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<sup>24</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

<sup>25</sup> *The Murder of 11-Year-Old Tyesha Edwards by Myon Burrell*, HENNEPIN CNTY. ATT’Y., <https://www.hennepinattorney.org/news/news/2020/February/myon-burrell-statement> (Sentencing Transcript, 2003, on file with the authors. As recently as 2020, the prosecutors in the case publicly described Oliver only as a “rival gang member”).

<sup>26</sup> *State v. Burrell*, 772 N.W.2d 459, 462 (Minn. 2009).

<sup>27</sup> David Chanan & Howie Padilla, *Bullets Find Teen Who Had Cheated Death*, MINNEAPOLIS STAR TRIB. (Jan. 29, 2004), <https://www.startribune.com/jan-29-2004-bullets-find-teen-who-had-cheated-death/196779051/>.

<sup>28</sup> *Id.*

The answer to that question is clearly laid out in 400 years of American history.

*B. Juvenile Offenses Are Different*

Recently, there has been serious national and local attention on the importance of criminal justice reform and the call to action to end mass incarceration. However, there is a need to focus on the juvenile justice system within that larger framework.

The juvenile justice system is intended to recognize the youthfulness and potential futures of children.<sup>29</sup> Unfortunately, this consideration was not given to Myon Burrell and is still not given to many other young Black youth. Myon's case reminds us of the purpose of the juvenile justice system and that we cannot afford to throw away our youth.

In 1899, the first juvenile court system was established in Chicago, Illinois.<sup>30</sup> The court desired to rehabilitate rather than punish juvenile offenders.<sup>31</sup> Juvenile courts were based on the legal doctrine of *parens patriae*, which means "parent of the country."<sup>32</sup> This doctrine gave the state the power to serve as guardian over juveniles.

In 1940, researcher Mary Huff Diggs surveyed juvenile courts across the country.<sup>33</sup> Diggs found what we now call "disproportionate minority contact."<sup>34</sup> She found that Black children were coming into contact with courts at a younger age, were less likely to have cases dismissed, and were committed to an institution, referred to an agency or individual much more

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<sup>29</sup> *Youth in the Justice System: An Overview*, JUVENILE LAW CENTER, <https://jlc.org/youth-justice-system-overview>.

<sup>30</sup> Perry L. Moriearty, *Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285, 294 (2008).

<sup>31</sup> *Id.* at 286.

<sup>32</sup> *Parens Patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>33</sup> Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 401 (2017).

<sup>34</sup> Alex R. Piquero, *Disproportionate Minority Contact*, 18 FUTURE CHILD. 59, 59–79 (2008) (noting that Black youth are overrepresented at almost every stage of the juvenile justice system).



frequently than White youth were.<sup>35</sup> Historically, these disparities can be attributed to intentional and blatantly race-based policies.<sup>36</sup>

Pursuant to Minnesota statutes, the juvenile justice system is “a civil proceeding designed to protect the child from the consequences of his or her own conduct, develop individual responsibility for unlawful behavior, rehabilitate him or her, and, at the same time, promote public safety.”<sup>37</sup> The juvenile court has jurisdiction over individuals under the age of 18 who engage in unlawful conduct.<sup>38</sup>

The purpose of the laws relating to children alleged or adjudicated to be delinquent is to “promote the public safety and reduce juvenile delinquency by maintaining the integrity of the substantive law prohibiting certain behavior and by developing individual responsibility for lawful behavior.”<sup>39</sup> Juvenile court systems should pursue this purpose by means that are “fair and just, that recognize the unique characteristics and needs of children, and that give children access to opportunities for personal and social growth.”<sup>40</sup>

The state struggles with a disproportionate amount of youth of color involved in the juvenile justice system. In fact, Minnesota disparities are both “higher than national levels and more severe in magnitude than those of many comparable states.”<sup>41</sup> This means that the adverse effects of having a juvenile delinquency record disproportionately impact youth of color.<sup>42</sup> In Minnesota, Black youth are four times more likely to be arrested, two times more likely to be referred to adult court, and 50% less likely to be sentenced directly to probation.<sup>43</sup> Many factors contribute to overrepresentation of youth of color

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<sup>35</sup> Mary Huff Diggs, *The Problems and Needs of Negro Youth as Revealed by Delinquency and Crime Statistics*, 9 J. NEGRO EDUC., 311, 313–316 (1940).

<sup>36</sup> NATIONAL RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH (Richard J. Bonnie et al. eds., 2013), <https://www.nap.edu/read/14685/chapter/10>.

<sup>37</sup> MINN. STAT. § 260B.001, subd. 2 (2020).

<sup>38</sup> *Id.* (There is a difference between unlawful conduct and misbehavior. Laws such as “disturbing the peace” have made it hard to tell the difference).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

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

<sup>42</sup> *Id.*

<sup>43</sup> U.S. DEP’T OF JUSTICE, DISPROPORTIONATE MINORITY CONTACT TECHNICAL ASSISTANCE MANUAL (2009), <https://www.sedgwickcounty.org/media/24941/ojdp-dmc-technical-assistance-manual-july-2009.pdf>.

in system involvement, including inequitable distribution of resources in communities, bias within policies and practices of juvenile justice agencies, and underlying social conditions of communities, especially poverty.<sup>44</sup>

### C. *The Problem of Mandatory Minimums*

Myon Burrell, a juvenile who either was not involved in the shooting of Tyesha Edwards or (at worst) was goaded into it by adults,<sup>45</sup> received a life sentence plus a term of years because of the operation of mandatory minimums.

First, even though no one alleges that anyone was shooting at Tyesha Edwards (Timothy Oliver was clearly the target), Burrell was convicted of first-degree murder under a theory of premeditation and transferred intent.<sup>46</sup> The first-degree murder statute allows for only one, mandatory, sentence: life in prison.<sup>47</sup>

Two other mandatory sentences applied to Burrell as well: he was ultimately sentenced to 12 months concurrent to the life term on the murder charge because the crime was allegedly for the benefit of a gang, and 6 months on the attempted murder charge for the same reason.<sup>48</sup>

A life sentence plus a term of years—even with the possibility of parole after three decades—is a remarkably harsh mandatory sentence in these circumstances, which included a sixteen-year-old defendant,<sup>49</sup> unstable

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<sup>44</sup> *Id.*

<sup>45</sup> Burrell Report, *supra* note 14, at 14.

<sup>46</sup> Under Minnesota law, premeditation is transferrable; MN 609.185(a)(1) allows that first degree murder exists if the defendant “causes the death of a human being with premeditation and with intent to effect the death of the person *or another*.” [emphasis added] MINN. STAT. § 609.185(a)(1) (2020).

<sup>47</sup> MINN. STAT. § 609.185 (2020). Currently, a conviction for premeditated first-degree murder is life without the possibility of parole. However, at the time Burrell was sentenced, parole after 30 years was possible, and this was contemplated at his sentencing. Burrell Sentencing Transcript, May 1, 2008, p. 1812.

<sup>48</sup> These add-ons went through several permutations in the course of appeals in this case, and ultimately were determined by the Minnesota Supreme Court. *Burrell v. State*, 858 N.W. 2d 779, 781-782 (Minn. 2015).

<sup>49</sup> Because youth are especially prone to change as they mature, mandatory minimums are particularly problematic when applied to them. Suzanne S. La Pierre & James Dold, *The Evolution of Decency: Why Mandatory Minimum and Presumptive Sentencing Schemes Violate the Eighth Amendment for Child Offenders*, 27 VA. J. SOC. POL'Y & L. 165, 168-75 (2020).

testimony, and two judgments that were overturned by the state's Supreme Court. But in the end, this was a sentence required by the statute.

In short, mandatory sentences flatten narratives; the things that make a case and the people involved distinctive are lost, and everything is reduced to simply the label applied to the crime. Not all first-degree murders or the people convicted are the same, but the law demands the same sentence for all. Distinctions between different people and situations are lost, and with it goes human dignity.

One troubling aspect of mandatory minimums is that they shift discretion from judges to prosecutors—because mandatory minimum sentences are tied to the charge of conviction, it is the prosecutor's power to choose the charge that determines the sentence. Unlike judges, who rule on sentencing in a public way that is made accountable through appeals, prosecutors are largely unaccountable for charging decisions and make them in the opaque setting of their office. Professor Stuntz critiqued this with a sharply honed edge: “harsh sentencing statutes give prosecutors the ability to define their own sentencing rules.”<sup>50</sup>

And so it was for Myon Burrell. Why was he charged with first-degree murder? Because that is what the prosecutors chose, knowing the potential sentence. He could have been charged with second-degree murder,<sup>51</sup> under a theory of transferred intent, or of third-degree murder<sup>52</sup> as reckless. There is a lazy assumption that prosecutors always bring forth the most serious charge, but that simply isn't true. In fact, in the majority of cases in the United States, a less serious charge is brought as part of a plea agreement—and the only difference is that the person in that case chooses not to exercise their constitutional right to a trial. Even within the four squares of the Burrell case, this is true: the two adults involved with the crime, the ones who would have had sway over the child, Burrell, both pled guilty to second-degree murder and avoided the mandatory sentence of life in prison.<sup>53</sup>

The Burrell case brings to the surface the cruel advantage that mandatory minimums give to prosecutors: It allows them both to jack up sentences (as with Burrell) and to lower them (as with the adults involved)

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<sup>50</sup> William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 595 (2001).

<sup>51</sup> MINN. STAT. § 609.19 (2020).

<sup>52</sup> MINN. STAT. § 609.195 (2020).

<sup>53</sup> *State v. Burrell*, 697 N.W.2d 579, 588 (Minn. 2005).

as political motivations or personal instincts—rather than justice—demand, all while under no requirement to divulge their reasons for doing so.

*D. The Power of Advocacy Outside the Courtroom*

The Preamble to the United States Constitution begins with “We the People of the United States...”<sup>54</sup> This sets the tone for the Constitution and lays the foundation for our country. Myon Burrell’s case provides a modern-day example of the true power of the People. When the justice system closed its doors to Burrell, the People opened them back up. In a conversation with co-author Leslie Redmond, Burrell states that he believes “everything that came out of the situation was because of community advocacy.”<sup>55</sup>

Long before Burrell’s case received national news, his family fought tirelessly on his behalf. However, it was not until they gained the attention of Robin McDowell, an investigative reporter at the Associated Press, that Burrell’s case would reach a major breakthrough. On January 28, 2020, McDowell published an article provocatively titled *Amy Klobuchar Helped Jail Teen for Life, But Case Was Flawed*.<sup>56</sup> The following day, a community-led press conference was held at the Minneapolis Government Center.<sup>57</sup> Former presidents of the Minneapolis NAACP Nekima Levy Armstrong and Leslie E. Redmond were two of the many organizers that called on Senator Klobuchar and Hennepin County Attorney Mike Freeman to right their wrongs by reviewing Burrell’s case.<sup>58</sup> This press conference garnered local and national news but did not receive a response from Senator Klobuchar and

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<sup>54</sup> U.S. CONST. pmb1.

<sup>55</sup> Myon Burrell, Personal Communication, Jan. 30, 2021.

<sup>56</sup> Robin McDowell, *Amy Klobuchar Helped Jail Teen for Life, but Case was Flawed*, ASSOCIATED PRESS (Jan. 28, 2020), <https://apnews.com/article/115076e2bd194cfa7560cb4642ab8038/gallery/d3783e60c23e4457b657e510358cdccf>.

<sup>57</sup> RAW: *Minneapolis NAACP President Responds to AP Investigation into Myon Burrell Case*, KARE 11 (Jan. 29, 2020), <https://www.kare11.com/video/news/local/raw-minneapolis-naacp-president-responds-to-ap-investigation-into-myon-burrell-case/89-51f0fbe7-ce3d-418c-94fe-07814ef1ec00>.

<sup>58</sup> *Id.*

pushed Attorney Freeman to double down on his conviction.<sup>59</sup> However, the community did not relent from its fight for Burrell's freedom.

By February 2020, media attention gained support from many Minnesotans, including Joe McLean who was the jury foreman when sixteen-year-old Myon Burrell was sentenced to life in prison.<sup>60</sup> McLean came forward in local and national news outlets urging Attorney Freeman to reopen the case and explaining how he regrets convicting Burrell.<sup>61</sup> The NAACP even issued a statement on the injustice and lack of evidence in the Burrell case.<sup>62</sup>

On March 1, 2020, protestors shut down Senator Klobuchar's presidential campaign rally in Minnesota.<sup>63</sup> Senator Klobuchar dropped out of the 2020 presidential race the following day.<sup>64</sup> Her team reached out to the then president of the Minneapolis NAACP, Leslie E. Redmond, to arrange a meeting with Burrell's family and Nekima Levy Armstrong. The meeting was the first opportunity Senator Klobuchar had to meet Burrell's family and hear from them directly. During the meeting, Armstrong urged Senator Klobuchar to release a statement pushing for an independent investigation of Burrell's case and reiterated her support for Conviction Integrity Units. On March 5, 2020, Senator Klobuchar joined the fight by releasing a statement

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<sup>59</sup> Matt Sepic, *Freeman Says He's Still Waiting for New Evidence to Reconsider Myon Burrell Case*, MPR NEWS (Feb. 25, 2020), <https://www.mprnews.org/story/2020/02/24/freeman-says-hes-still-waiting-for-new-evidence-to-reconsider-myon-burrell-case>.

<sup>60</sup> *Jury Foreman Regrets Convicting Teen in Girl's 2002 Death*, CBS MINN. (Feb. 1, 2020), <https://minnesota.cbslocal.com/2020/02/01/jury-foreman-regrets-convicting-teen-in-girls-2002-death/>.

<sup>61</sup> *Id.*

<sup>62</sup> *NAACP Issues Statement on the Injustice and Lack of Evidence in the Myon Burrell Case*, NAACP (Feb. 1, 2020), <https://www.naacp.org/latest/naacp-issues-statement-injustice-lack-evidence-myon-burrell-case/>.

<sup>63</sup> Brianna Pfannenstiel, *Amy Klobuchar Cancels Rally After Black Lives Matter Protesters Seize Stage at Minnesota Event*, USA TODAY (Mar. 1, 2020), <https://www.usatoday.com/story/news/politics/elections/2020/03/01/myon-burrell-protestors-shut-down-amy-klobuchar-event-before-super-tuesday/4926779002/>.

<sup>64</sup> Nick Corasaniti, *Amy Klobuchar Drops Out of Presidential Race and Endorses Biden*, N.Y. TIMES (Mar. 2, 2020), <https://www.nytimes.com/2020/03/02/us/politics/amy-klobuchar-drops-out.html>.

which included both of Armstrong's requests.<sup>65</sup> The National NAACP and Minneapolis NAACP both publicly applauded Senator Klobuchar's letter.<sup>66</sup>

Once Senator Klobuchar was on board, it opened up the door for the expert legal panel, pardon hearing, and the formation of Minnesota's first Conviction Review Unit. The people pushed Senator Klobuchar, and she used her influence and power to push down the pathway toward Burrell's freedom.

Lawyers often have more power and influence than they would like to acknowledge. Charles Hamilton Houston reminded us that "a lawyer's either a social engineer or a parasite to society."<sup>67</sup> Thankfully, in this situation, Senator Klobuchar ultimately chose to be a social engineer. Burrell's case revealed that there is a pathway to redemption for all of us, not just those who have criminal records. It is time for prosecutors to assume their roles as "ministers of justice"<sup>68</sup> which requires them to seek out truth rather than convictions.

#### *E. The Potential of Conviction & Sentencing Review Units*

Emerging out of the innocence movement, the United States has seen significant growth in the development of what are variously known as "Conviction Integrity Units" or "Conviction Review Units." A recent survey of units in the United States revealed over 75 existing entities that are charged with taking a second look at troubling convictions.<sup>69</sup> Many new units are the products of progressive prosecutors who have been elected across the country.<sup>70</sup>

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<sup>65</sup> Robin McDowell & Michael Rezendes, *Klobuchar Calls for Independent Review of Black Man's Case*, ASSOCIATED PRESS (Mar. 5, 2020), <https://apnews.com/article/ca6a1a5b1770506d96e659b8a2c5050f>.

<sup>66</sup> NAACP Commends Senator Amy Klobuchar's Call for Independent Investigation and Review into the Case Involving Myon Burrell, NAACP (Mar. 5, 2020), <https://www.naacp.org/latest/naacp-commends-senator-amy-klobuchars-call-independent-investigation-review-case-involving-myon-burrell/>.

<sup>67</sup> Steven D. Jamar, *Biographical Sketches: Charles Hamilton Houston*, HOWARD U. SCH. L. (2004), <http://law.howard.edu/brownat50/BrownBios/BioCharlesHHouston.html>.

<sup>68</sup> MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. (A.B.A. 1983).

<sup>69</sup> Mark Osler & Leslie Redmond, Survey of Conviction Integrity/Review Units, (Jan. 2020) (unpublished survey) (on file with the authors).

<sup>70</sup> Elizabeth Webster, *Postconviction Innocence Review in the Age of Progressive Prosecution*, 83 ALB. L. REV. 989, 990 (2020).

There is a broad consensus among experts about the primary causes of wrongful convictions: misconduct by police and prosecutors, ineffective defense counsel, junk science, bad identification procedures, faulty eyewitness identifications, coercive interrogations, and unreliable informants.<sup>71</sup> Several of these factors were at play in the Burrell case. Specifically, the role of unreliable informants played a major role in the panel's analysis.<sup>72</sup> The Burrell Panel was fortunate to have the involvement of many of the leaders in the innocence and wrongful conviction movement, including Innocence Project co-founder Barry Scheck and Northwestern University's Laura Nirider.<sup>73</sup>

Even with all of that experience in wrongful convictions, the Burrell panel went beyond the normal charge of conviction integrity reviews and examined the integrity of the *sentence* as well.<sup>74</sup> Combining conviction and sentencing review proved to provide two extraordinary benefits. First, it encouraged the analytical frame of wrongful conviction review—the *integrity* of the conviction—to be applied to sentencing. Second, it ultimately opened an otherwise unavailable avenue to freedom - clemency. The first of these will be discussed here, while clemency will be addressed in the next section.

Traditionally, sentences are subjected to scrutiny in three ways. First, the sentencing scheme is sometimes re-evaluated in whole or in part, separate from a discrete case. For example, intense focus on over-sentencing of crack cases led to a reform of those laws and guidelines at the federal level and (sometimes) with a retroactive effect which led to the release of some of those over-sentenced for their crimes.<sup>75</sup> Second, sentences can be reviewed on direct appeal or through a habeas petition. Finally, sentences are sometimes

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<sup>71</sup> Carrie Leonetti, *The Innocence Checklist*, 58 AM. CRIM. L. REV. 97, 100–101 (2021).

<sup>72</sup> Burrell Report, *supra* note 14 at 16–30.

<sup>73</sup> *Id.* at 45–48. Other experts involved included Mike Ware of Texas (who previously headed up one of the first conviction integrity units, in Dallas), David Singleton of Ohio (who serves as the Executive Director of the Ohio Justice & Policy Center), Maria Hawilo (a Distinguished Professor in Residence at Loyola Law School in Chicago), and former Ohio Attorney General James Petro. *Id.*

<sup>74</sup> *Id.* at 4–7.

<sup>75</sup> Nicholas Bogel-Burroughs, *For Inmates Released Under New Criminal Justice Reforms, 'Every Day Counts,'* N.Y. TIMES (July 21, 2019), <https://www.nytimes.com/2019/07/20/us/first-step-act-criminal-justice.html?searchResultPosition=1>.

re-considered through second-look provisions including parole, compassionate release, and clemency.

However, second-look provisions too rarely invite a hard look at the continuing integrity of a sentence in the context of a particular case. Part of the problem is that petitioners in second-look processes usually are not provided with counsel, and (being incarcerated) they don't have the ability to do much investigation or research. One exception was the Obama clemency initiative. That project focused on whether a petitioner would be subjected to the same sentence under current law, along with individualized considerations such as violence while incarcerated. In that project, pro bono counsel was obtained for many petitioners.<sup>76</sup> In the end, over 1700 commutations of sentence were granted as part of that initiative.<sup>77</sup>

By merging sentence and conviction integrity, we were able to leverage the resources and techniques used for conviction review with our normal tools for sentence review. For example, the very notion of “integrity”—whether something holds up under scrutiny—is not often used in clemency work in analyzing sentences.<sup>78</sup> But the concept works. In the Burrell panel report, the sentence was held up against the four traditional goals of sentencing—retribution, deterrence, incapacitation, and rehabilitation—and found to lack integrity at this point in time.<sup>79</sup>

No conviction integrity/review unit is known to now combine examination of both conviction and sentence, but there is great potential in this idea. Hopefully, conviction integrity and review units will look to this example as a means to expand both their work and true justice.

#### F. Clemency

Myon Burrell did not receive an exoneration or a new trial. Rather, he was released after his sentence was commuted by the Minnesota Board of

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<sup>76</sup> *Obama Administration Clemency Initiative*, U.S. DEP'T. JUST., <https://www.justice.gov/archives/pardon/obama-administration-clemency-initiative> (last updated Jan. 12, 2021).

<sup>77</sup> Gregory Korte, *Obama Grants 330 More Commutations, Bringing Total to a Record 1,715*, USA TODAY (Jan. 19, 2017), <https://www.usatoday.com/story/news/politics/2017/01/19/obama-grants-330-more-commutations-bringing-total-record-1715/96791186/>.

<sup>78</sup> This construct has been powerfully used in other contexts, such as the review of capital sentences. *See Furman v. Georgia*, 408 U.S. 238 (1972) (Opinions of Marshall, J. & Brennan, J.).

<sup>79</sup> Burrell Report, *supra* note 14 at 14–15.



Pardons,<sup>80</sup> which consists of the Governor, the Attorney General, and the Chief Justice of the Supreme Court.<sup>81</sup> Clemency is a process that has frequently been in the news since President Trump closed out his presidency with controversial grants.<sup>82</sup> Even with all of the attention surrounding clemency, President Biden was still left with a pile of 14,000 undecided petitions to deal with.<sup>83</sup> Within Minnesota, the Burrell case broke new ground in the use of clemency and offers a window into the opportunities and hurdles advocates see now.

Minnesota's clemency process, like those of too many other American jurisdictions (including the federal government),<sup>84</sup> has been unproductive and sometimes unfair.<sup>85</sup> The Minnesota process is unusual. Petitioners for pardon<sup>86</sup> or commutation<sup>87</sup> submit their cases to the Department of Corrections and appear personally before a Pardon Board that consists of the Governor, the Attorney General, and the Chief Justice of the Minnesota Supreme Court.<sup>88</sup> State law requires that the vote among the Board be unanimous.<sup>89</sup> The statute also creates three primary types of clemency: pardon, commutation, and "pardon extraordinary," which (somewhat

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<sup>80</sup> Chao Xiong & Liz Sawyer, *Board of Pardons Commutes Myon Burrell's Sentence*, MINNEAPOLIS STAR TRIB.: LOCAL (Dec. 16, 2020, 4:52 AM), <https://www.startribune.com/board-of-pardons-commutes-myon-burrell-sentence-calls-for-immediate-release-from-prison/573399171/>.

<sup>81</sup> *Id.* (the Chief Justice, Lori Gildea, was recused from this decision due to a conflict).

<sup>82</sup> Rosalind S. Helderman, Josh Dawsey & Beth Reinhard, *Trump Grants Clemency to 143 People in Late-Night Pardon Blast*, WASH. POST (Jan. 20, 2021, 12:42 PM), [https://www.washingtonpost.com/politics/trump-pardons/2021/01/20/7653bd12-59a2-11eb-8bcf-3877871c819d\\_story.html](https://www.washingtonpost.com/politics/trump-pardons/2021/01/20/7653bd12-59a2-11eb-8bcf-3877871c819d_story.html).

<sup>83</sup> Anita Kumar, *Trump Left Behind a Clemency Mess. The Clock's Ticking for Biden to Solve It.*, POLITICO (Feb. 11, 2021, 4:30 AM), <https://www.politico.com/news/2021/02/11/biden-clemency-criminal-justice-468539>.

<sup>84</sup> Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 VT. L. REV. 465, 477–485 (2017).

<sup>85</sup> *Id.* 491–493.

<sup>86</sup> A pardon affects the underlying conviction, and usually (but not always) is granted to those who have completed their sentence.

<sup>87</sup> Unlike a pardon, a commutation leaves the conviction and its other effects intact but shortens the sentence.

<sup>88</sup> MINN. CONST., art. V, § 7.

<sup>89</sup> MINN. STAT. § 638.02(1) (2020).

ironically) is a pardon whose availability is restricted to those whose sentence has been completely served for at least five years, or ten years for a violent offense.<sup>90</sup>

Over the past 30 years, clemency had atrophied in Minnesota. Typically, after 1990 only 7 to 25 pardon extraordinaries were granted per year.<sup>91</sup> The Board granted its first commutation of sentence in 28 years (Burrell's was the second) earlier in 2020,<sup>92</sup> and its first full pardon (as opposed to a pardon extraordinary) in over 35 years was granted to a woman whose initial hearing was held only minutes before Burrell's.<sup>93</sup> The reasons for this drop-off were legion: political disinterest, the requirement of unanimity, recalcitrance by the Department of Corrections, and other factors all played a role.<sup>94</sup>

In the unusual year of 2020, this disfunction mattered more than usual. At the time of Burrell's clemency hearing on December 15, 2020, Minnesota prisons were in crisis. Despite plenty of warning that COVID-19 would hit prisons hard,<sup>95</sup> by the time of the hearing nearly half of Minnesota's prison population had contracted the disease and six incarcerated people had died.<sup>96</sup> It was an abject failure. In other states clemency was used on an

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<sup>90</sup> MINN. STAT. § 638.02(2) (2020).

<sup>91</sup> Andy Mannix & Briana Birschbach, *Far From Grace: How Minnesota Radically Changed the Way it Forgives Criminals*, MINNPOST: NEWS, POLITICS & POLICY (July 30, 2015), <https://www.minnpost.com/politics-policy/2015/07/far-grace-how-minnesota-radically-changed-way-it-forgives-criminals/>.

<sup>92</sup> Kevin Featherly, *Woman Receives Rare Commutation of Sentence*, MINN. LAWYER (June 18, 2020), <https://minnlawyer.com/2020/06/18/woman-receives-rare-commutation-of-sentence/>.

<sup>93</sup> Charmaine Nero, *Board of Pardons Votes to Grant Minnesota's 'First and Absolute' Pardon in Over 35 Years*, KARE 11 (Jan. 26, 2021, 7:05 PM), <https://www.kare11.com/article/news/local/board-of-pardons-votes-to-grant-minnesotas-first-and-absolute-pardon-in-over-35-years/89-313922a7-7a73-425d-9f3d-3ad87840961e>.

<sup>94</sup> Mannix & Birschbach, *supra* note 91.

<sup>95</sup> Mark Osler, *We Must Thin the Prison Population Before Pandemic Hits Them*, MINNEAPOLIS STAR TRIB. (Mar. 27, 2020, 5:43 PM), <https://www.startribune.com/we-must-thin-the-prison-populations-before-pandemic-hits-them/569174562/>.

<sup>96</sup> Randy Furst, *Judge Rips Minnesota Corrections Department for Failing to Stem the Surge in COVID-19 Cases*, MINNEAPOLIS STAR TRIB. (Dec. 11, 2020, 8:32 PM), <https://www.startribune.com/judge-rips-minnesota-corrections-department-for-failing-to-stem-the-surge-in-covid-19-cases/573374361/>.

emergency basis to reduce prison populations,<sup>97</sup> but Minnesota's process was too unwieldy to handle such a task.

With Myon Burrell's case, clemency had a breakthrough in Minnesota—a high-profile, challenging case that broadcast the possibilities of this institution. The Governor and Attorney General were public in heralding the breakthrough, with Governor Tim Walz saying, "It shows what this board can do; it can bring justice and mercy."<sup>98</sup>

And so it has. The trick now will be to leverage this breakthrough to further advance mercy and justice. Three avenues offer the possibility of lasting change. First, there seems to be a new will—evidenced by the breakthroughs in 2020—for the members of the Board itself to use the clemency power more vigorously. Second, a court challenge to the unanimity rule is now making its way through the Minnesota courts and may result in that limiting factor being struck down as unconstitutional. And finally, legislation has been advanced, with the support of the governor, that would thoroughly restructure of the clemency process.<sup>99</sup>

Myon Burrell forged a path to freedom through clemency. Hopefully, that path will remain open for others in Minnesota. Governor Walz properly described the potential of clemency; the challenge now will be living that out.

### G. *The Necessity of Multiple Second-Look Mechanisms*

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<sup>97</sup> Kenny Lo, Betsy Pearl & Akua Amaning, *Clemency 101*, CTR. FOR AM. PROGRESS: CRIM. JUST. (May 1, 2020), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/05/01/484300/clemency-101/> (Oklahoma, for example, released 450 prisoners through clemency, Washington State released about 1100, and Kentucky released over 500 through clemency to avoid the effects of COVID-19); Christy Gutowski, *Gov. J.B. Pritzker Quietly Grants Clemency Requests to Illinois Prisoners Amid Coronavirus Pandemic, Including One Released Thursday Who Had Been Serving Life*, CHI. TRIB. (Apr. 9, 2020), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-pritzker-inmate-commutations-20200409-ql323nt4azfitagdeon5gswn2q-story.html> (other states used clemency in less publicized but still significant ways during the crisis).

<sup>98</sup> Xiong & Sawyer, *supra* note 80.

<sup>99</sup> Stephen Montemayor, *Gov. Tim Walz Weighs Changes to State Pardon System*, MINNEAPOLIS STAR TRIB. POLITICS (Mar. 31, 2020, 9:52 PM), <https://www.startribune.com/gov-tim-walz-weighs-changes-to-state-pardon-system/569270562/>.

It is the tendency of government to use the tools of oppression robustly and the tools of freedom and equity with great reluctance. In criminal law, that means mechanisms like mandatory minimums, aggressive charging, and treating kids like adults come easy, but opening avenues to mitigating harsh sentences is hard. Yet the fight is worth it. Because there are so many avenues to over-sentencing, there needs to be multiple second-look mechanisms that offer a real chance for mitigating harshness.

Consider, as an example, the changes to federal law in just the mid-1980's (which, as we will see, impacted the options available to Myon Burrell). A series of provisions, supported by a bipartisan coalition, jacked up sentences. 1984 saw Congress create a commission to draft mandatory sentencing guidelines,<sup>100</sup> bolster and extend the federal death penalty,<sup>101</sup> and amend the bail laws by creating broad presumptions of detention in drug trafficking and other cases.<sup>102</sup> In 1986, Congress passed the Anti-Drug Abuse Act (which included punitive mandatory minimums)<sup>103</sup> and 1987 saw the arrival of the new, and remarkably harsh, mandatory sentencing guidelines. Finally, Congress kept it up by passing *another* Anti-Drug Abuse Act, which (among other provisions) applied the mandatory minimums in drug cases to co-conspirators.<sup>104</sup>

While piling all of these provisions on the backs of criminal defendants, Congress simultaneously hobbled the second-chance provisions that might mitigate all of this retributive legislation. In 1987, Congress completely eliminated parole from the federal system,<sup>105</sup> thus taking away the primary mechanism for the review and amendment of lengthy sentences. A decade later, in 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act (AEDPA).<sup>106</sup> The AEDPA codified and

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<sup>100</sup> Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

<sup>101</sup> *Id.*

<sup>102</sup> See Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3150 (1986); *United States v. Salerno*, 481 U.S. 739 (1987) (deeming the statute constitutional—despite the plain threat to the presumption of innocence).

<sup>103</sup> Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570 (1986).

<sup>104</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 (1988).

<sup>105</sup> Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (that legislation tied the end of parole with the forthcoming institution of mandatory guidelines on Nov. 1, 1987).

<sup>106</sup> Act of Apr. 24, 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in part at 28 U.S.C. §§ 2244–2267).

extended restrictions on habeas corpus already imposed by the judiciary.<sup>107</sup> Because of the AEDPA, federal habeas relief is available to both federal and state petitioners, and state inmates like Burrell are able to file habeas petitions rooted in the United States Constitution or federal law—for example, challenging a sentence that violates the Eighth Amendment’s ban on cruel and unusual punishment. However, the AEDPA restricts state prisoners such that they can only file a federal habeas petition if they have exhausted all remedies in the state.<sup>108</sup> Simultaneously, the AEDPA also bars habeas claims which *have* been adjudicated by the state,<sup>109</sup> with key exceptions.<sup>110</sup> People held in state prisons have only one year from completion of appeals to file federal habeas<sup>111</sup> and late or subsequent petitions are accepted only in extraordinary circumstances.<sup>112</sup>

Myon Burrell did file unsuccessful appeals and an equally unsuccessful post-conviction petition for a new trial in state court.<sup>113</sup> He would not have been eligible for parole consideration for another two decades. It was not until the interventions described above, which are nearly unique to this case, that a comprehensive review took place.

Certainly, each second-look mechanism has drawbacks. Clemency is subject to the political whims of the moment and is dependent on the philosophies of those in power. Allowing judges to review cases and amend sentences can be broadly productive (as it was with the federal First Step Act),<sup>114</sup> but creates disparities between those judges willing to adjust

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<sup>107</sup> Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 448 (2007).

<sup>108</sup> 28 U.S.C. § 2254(b)(1)(A); 28 U.S.C. § 2254(b)(1)(B) (Exceptions exist if there is no state corrective process or circumstances exist that render such process ineffective.).

<sup>109</sup> 28 U.S.C. § 2254(d).

<sup>110</sup> 28 U.S.C. § 2254(d)(1) (Those exceptions are cases where the state court has issued a decision that is “contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States”, 28 U.S.C. § 2254(d)(1), or was based on “an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2).)

<sup>111</sup> 28 U.S.C. § 2244(d).

<sup>112</sup> See 28 U.S.C. § 2244(b); 28 U.S.C. § 2244(d)(1)(C); 28 U.S.C. § 2244(d)(1)(D).

<sup>113</sup> *Burrell v. State*, 858 N.W.2d 779 (Minn. 2015).

<sup>114</sup> *The First Step Act of 2018: One Year of Implementation*, U.S. SENT’G. COMM’N. (Aug. 2020), [https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831\\_First-Step-Report.pdf](https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf).

sentences and those who refuse. Parole is sadly opaque and suffers from both political sway and uneven application.

In other words, each of the second-look mechanisms creates a gap. That means that to allow worthwhile cases to receive second-look reviews, we need multiple and overlapping processes. That, after all, would be nothing more than what legislatures have done to create over-sentencing in the first place: enable overlapping processes that move towards a common goal. If we are to have several in the service of retribution, we will need several in the service of justice and mercy as well.

#### IV. CONCLUSION

Rev. Dr. Martin Luther King Jr. reminded us that “the arc of the moral universe is long, but it bends toward justice.”<sup>115</sup> That arc, however, must be co-created by those of us who care about justice. Myon Burrell’s case reveals the critical role lawyers, politicians, and community activists play in ensuring justice is truly served and accessible to all. Our legal system is not blind and has negatively impacted Black and Brown communities.

The death of George Floyd in 2020 inspired a broad and worthy discussion of race, justice, and the relationship between the state and the people. Sadly, that focus faded within a few months among White Americans.<sup>116</sup> We drop the subject at our own peril; the toxic swamp of injustice will result in more tragedy unless drained. The carceral state and its disparate impact on Black Americans built up through intentional actions over decades. The dismantling of that structure will take even more sustained focus over time. The Myon Burrell case shows us some of the outlines of that project, and what needs to be done has become increasingly clear. The key question remains: Are we a nation of sufficient humility to truly pursue justice and mercy?

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<sup>115</sup> This famous truism was used by King in an address at the National Cathedral on March 31, 1968. SMITHSONIAN INSTITUTION, “Martin Luther King, Jr.” Some argue that it represents a spiritual value more than a political one. Matt Lewis, *Obama Loves Martin Luther King’s Great Quote—But He Uses it Incorrectly*, DAILY BEAST, (Apr. 11, 2017), <https://www.thedailybeast.com/obama-loves-martin-luther-kings-great-quote-but-he-uses-it-incorrectly>

<sup>116</sup> Michael Tesler, *Support for Black Lives Matter Surged During Protests, but is Waning Among White Americans*, FIVETHIRTYEIGHT, (Aug. 19, 2020), <https://fivethirtyeight.com/features/support-for-black-lives-matter-surged-during-protests-but-is-waning-among-white-americans/>.