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THE \$2 BILLION-PLUS PRICE OF INJUSTICE: A METHODOLOGICAL MAP FOR POLICE REFORM IN THE GEORGE FLOYD ERA

David Schultz†

INTRODUCTION

The death of George Floyd on May 25, 2020 under the knee of a Minneapolis police officer forced America again to confront the connection between racism and law enforcement. It also compelled the City of Minneapolis to act. Merely a few days later on June 7, 2020 a majority of Minneapolis City Council members called for a defunding of police,¹ setting off a similar set of movements nationally.² After efforts to place an initiative on the 2020 ballot to eliminate the police failed,³ and the City Charter Commission rejected the idea,⁴ on December 10, 2020 the Minneapolis City Council voted to divert \$8 million from the police budget to fund alternative programs.⁵ The Mayor subsequently approved the budget cuts.⁶

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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].

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

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

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-VZEA].

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

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

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

12. STEPHEN HAWKINS & TARAN RAGHURAM, MORE IN COMMON, AMERICAN FABRIC: IDENTITY AND BELONGING (2020), https://www.moreincommon.com/media/s5jhgp5x5/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).

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

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

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

I. WHAT IS THE INDICTMENT OF THE POLICE?

A. *The Historical Functions of the Police*

The critique of police in America is multifaceted. First, in defense of police as an institution is the argument that they perform at least two fundamental functions: the classic law and order function, and a social service function.¹⁵ In terms of law and order, criminal law serves many purposes including as a tool to secure policy goals.¹⁶ Criminal law then can

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*:

be viewed as a regulatory tool to ensure compliance of policy goals that the state seeks to secure.¹⁷

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

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

THEORIES, CONCEPTS, AND MODELS OF PUBLIC POLICY MAKING 342-72 (2019) (generally discussing how criminal sanctions are one of several tools to enforce policy goals); DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING 274-76 (2002).

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

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

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

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

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

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

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

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

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

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

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

28. KARL MENNINGER, THE CRIME OF PUNISHMENT (1968) (discussing how criminal law defines what is socially acceptable or normal behavior).

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

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

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

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

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

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

33. *Id.*

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

35. *Id.*

36. *Id.*

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

The law and order and social service functions of policing have merged.³⁸ 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.³⁹ Criminal justice, policing, and social service delivery are now often indistinguishable.⁴⁰ Police are thus asked to perform a variety of tasks, some of which they lack the requisite skills or training.⁴¹ Effectively, we have reduced all social ills and issues to matters of policing.⁴²

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

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

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] (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/2M5K-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).

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.⁴⁵ It's a self-fulfilling system.

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

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

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

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

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

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

by other non-police state actors.⁴⁹ 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.⁵⁰

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

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

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 DEPT., <https://www.stpaul.gov/departments/police/administration-office-chief/community-engagement-division/community-outreach> [perma.cc/N363-8HYT].

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

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

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

53. There is a robust literature discussing the intersectionality of policing and race in the United States. See David Schultz, *How We Got Here: Race, Police Use of Force, and the Road to George Floyd*, INEQ. INQUIRY (Apr. 2021), <https://lawandinequality.org/?s=how+we+got+here> [perma.cc/76CV-EFPN] (reviewing the research on the racialized impact of police upon people of color); MILTON HEUMANN & LANCE CASSAK, *GOOD COP, BAD COP: RACIAL PROFILING AND COMPETING VIEWS OF JUSTICE* (2007) (discussing racial profiling among police officers generally); MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* (2012) (demonstrating the

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

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

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].

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)

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

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

(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 [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.")

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/usa/2020/12/10/six-months-after-mass-protests-began-what-is-the-future-of-blm> (discussing how the Black

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.⁶⁵ Two, it focuses in on appropriate remedies to address the problem. By that, assume that the source of the problem is that racism is a consequence of hiring racist police officers or individuals—then the remedy would either be better screening and hiring procedures to root out racists,⁶⁶ or developing individual educational programs that seek to train individual officers to handle matters differently.⁶⁷ If racial profiling is, for example, choices individual officers make, then better training, education, or discipline are possible solutions, and individual lawsuits or criminal prosecutions are options.⁶⁸ If the problem is departmental or city-wide, then the choice of remedy may be directed at replacing leaders, changing city-wide policies, initiating receiverships to change control of the police, or perhaps other administrative or governance options within a city.⁶⁹ Finally, if the issue is societal-wide racism, the problem is far more complex. Changing policing is altering the background social values or institutions that drive American politics.⁷⁰ This may include changes in educational policies,

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

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

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

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

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

70. DESANTE & SMITH, *supra* note 66, at 10 (defining structural racism as a “feature of society whereby patterns of public policy, institutions, dominant ideologies, and popular representations serve to perpetuate social, political, and economic inequities along racial

health care, anti-discrimination laws, or even constitutional changes.⁷¹ 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.⁷² Disparate impact is when there is no explicit or intentional bias, but outcomes vary based on race.⁷³ For example, individuals may be affected disproportionately or hurt when certain facially-neutral employment practices are used, but the practices themselves are not intentionally targeting or discriminating against people of color.⁷⁴

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

The micro, meso, and macro versus intentional and disparate impact distinctions provide a sixfold way of classifying the problem of race and

lines.”). This definition points to how the police are embedded into a larger fabric of racist policies in a society, whereby reforming them is a prerequisite to addressing racism in law enforcement.

71. Jules Holroyd, *Implicit Racial Bias and the Anatomy of Institutional Racism*, CTR. FOR CRIME & JUST. STUD. (2015), https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/09627251.2015.1080943_1.pdf [perma.cc/48BE-9F2C] (reviewing the linkages between societal racism and crime); BONILLA-SILVA, *supra* note 61.

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

73. *Id.*

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

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

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

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.⁷⁷ Nothing here suggests that there has to be one identified problem or that the issues are confined to one level or type of analysis. Racism and policing are polycentric issues that need to be addressed across a range of levels. Reformers seeking to change policing need to think across these three levels and the type of discrimination in order to both identify the source or sources of problems, as well as craft reform solutions. Some are doing that.⁷⁸ This classification of the nature of the problem, by looking at intentionality or impact, also provides a focus for deciding if and when a litigation strategy to affect reform might be appropriate.

Second, classic approaches to risk and strategic management have developed well-established models and processes.⁷⁹ They often 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://d3n8a8pro7vhnmx.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

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 | Goal | Who Is Responsible | How Is the Problem to | When (Innate/able) |
|------------------------|---------------------|------|--------------------|-----------------------|--------------------|
| Use of Force | 1. 2. 3. | | | | |
| Profiling | 1. 2. 3. | | | | |
| Sentencing | 1. 2. 3. | | | | |
| Incarceration | 1. 2. 3. | | | | |
| Staffing | 1. 2. 3. | | | | |

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 is Now a Necessity*, 33 INT'L J. PROJ. MGMT. 291 (2015) (offering various methods for decision-making, planning, or risk management).

| | | | | | |
|--|--|--|--|--|------------------------|
| | | | | | Measurement of Success |
|--|--|--|--|--|------------------------|

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

II. WHAT HAS FAILED AND WHY

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

To begin, we have little idea on the scope of the problem,⁸¹ which is critical to fashioning solutions. Under the original 1994 Crime Bill, local governments were encouraged to create a database of statistics regarding use of force.⁸² Largely, that data-gathering never happened. We do not have good data on what is considered force, how often it is used, the type of force employed, the reason for its use, against whom the force was employed, or the outcome of that use—death, injury, etc. There are numerous anecdotal

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).

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.

A. The Scope of Excessive Use of Force

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

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

However, that change was forestalled by decisions such as *Tennessee v. Garner*⁸⁶ and *Graham v. Connor*⁸⁷ where the Supreme Court created a

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

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

B. Estimating the Price of Injustice

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

‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”).

88. *Id.* at 396.

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

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

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

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

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

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-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/HIS79-GVY7]. Since this data was compiled in 2020, the total payout for Minneapolis does not include the \$27 million George Floyd settlement.

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 2015.⁹³

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

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

Third, the promise of *Monell* has failed. By that, holding cities legally and financially responsible for the conduct of their police departments and

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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.