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Improving Police Officer Accountability in Minnesota: Three Proposed Legislative Reforms

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IMPROVING POLICE OFFICER ACCOUNTABILITY IN MINNESOTA: THREE PROPOSED LEGISLATIVE REFORMS

Jim Hilbert[‡]

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I. INTRODUCTION

The killing of George Floyd by Minneapolis police officers in May 2020 put the issue of police reform back into the national discussion and made Minnesota,[1] at least during a brief window of time, confront its past on issues of racism and police abuse.[2] The video showing Mr. Floyd

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[1] National discussions on racism and police reform go back at least a century. As Dr. Kenneth Clark observed more than fifty years ago while testifying to the Kerner Commission:

> *I read that report . . . of the 1919 riot in Chicago, and it is as if I were reading the report of the investigating committee on the Harlem riot of 1935, the report of the investigating committee on the Harlem riot of 1943, the report of the McCone Commission on the Watts riot. I must again in candor say to you members of this Commission—it is a kind of Alice in Wonderland with the same moving picture reshown over and over again, the same analysis, the same recommendations, and the same inaction.*

U.S. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 265 (1968), https://babel.hathitrust.org/cgi/pt?id=mdp.39015000225410&view=1up&seq=287 [https://perma.cc/JKY3-8ELM].

[2] As the national press recognized, "The Twin Cities area has been an outsized part of the dialogue about the police use of force." Jelani Cobb, *The Death of George Floyd, in Context*, NEW YORKER (May 28, 2020), https://www.newyorker.com/news/daily-comment/the-death-of-george-floyd-in-context [https://perma.cc/KZW7-RBLJ] (recounting past police killings in

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pleading for his life while a Minneapolis police officer knelt on his neck became an unprecedented catalyst for outrage.[3] Even in the midst of the COVID-19 pandemic, massive protests and civil unrest spread from Minneapolis to all over the world.[4]

Nationwide demonstrations and media attention put pressure on policymakers and police departments to make substantial changes. Police reform efforts appeared at every level of government. For instance, the New York Police Department announced that it would disband its notorious plainclothes anti-crime unit.[5] Likewise, a majority of the Minneapolis City Council vowed to "begin the process of ending the Minneapolis Police Department."[6] By summer's end, Iowa, Delaware, Utah, and Nevada passed

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Minnesota); *see also infra* notes 51–64 and accompanying text (discussing two of the most significant events in Minnesota history).

[3] Within six weeks of the killing, nearly ten percent of Americans reported participating in demonstrations over the death of Mr. Floyd and others. Jugal K. Patel, Quoctrung Bui, & Larry Buchanan, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/EG7B-3E7J]. By early July 2020, more than 40% of all counties in the United States had at least one protest related to the killing. *Id.*

[4] *See generally* Borzou Daragahi, *Why the George Floyd Protests Went Global*, ATL. COUNCIL (June 10, 2020), https://www.atlanticcouncil.org/blogs/new-atlanticist/george-floyd-protests-world-racism/ [https://perma.cc/C74Y-FZRF] ("Solidarity marches and gatherings took place from Sydney to Beirut to Istanbul to London to Berlin. . . . [R]arely if ever has one incident inspired such a broad global movement. Attention has focused not just on the United States and its abuses but also on entire systems of power, racism, and oppression, which have come under scrutiny and criticism in what amounts to a global teach-in.").

[5] Ali Watkins, *N.Y.P.D. Disbands Plainclothes Units Involved in Many Shootings*, N.Y. TIMES (June 15, 2020), https://www.nytimes.com/2020/06/15/nyregion/nypd-plainclothes-cops.html [https://perma.cc/A6BH-M4LW]. As Commissioner of Police Dermot Shea acknowledged, "the anti-crime units were a vestige of the city's era of 'stop-and-frisk,' when officers routinely searched people in high-crime areas, a practice that a judge declared unconstitutional after finding it disproportionately affected [P]eople of [C]olor." *Id.*; *see also* George Joseph & Lilam Quigley, *Plainclothes NYPD Cops Are Involved in a Staggering Number of Killings*, THE INTERCEPT (May 9, 2018, 6:00 AM), https://theintercept.com/2018/05/09/saheed-vassell-nypd-plain-clothes/ [https://perma.cc/9KT6-D398] ("[P]lainclothes officers, estimated to be around 6 percent of the force, account for 31 percent of all fatal shooting incidents.").

[6] Liz Navratil, *Most of Minneapolis City Council Pledges to 'Begin the Process of Ending' Police Department*, STAR TRIB. (June 8, 2020, 5:50 PM), https://www.startribune.com/mpls-council-majority-backs-dismantling-police-department/571088302/ [https://perma.cc/4LAF-B8X8]. The Council also voted unanimously to submit a proposal to voters to abolish the police department and create a new "Department of Community Safety and Violence Prevention." Liz Navratil, *Minneapolis City Council Votes Unanimously for Proposal that Could Replace Police Department*, STAR TRIB. (June 27, 2020, 3:49 PM), https://www.startribune.com/minneapolis-city-council-votes-unanimously-for-proposal-that-could-replace-police-department/571504662/ [https://perma.cc/P5CB-B8X3]; *see also* Minneapolis, Minn., Ordinance Amending Article VII of the City Charter Relating to Administration and Article VIII of the City Charter Relating to Officers and Other Employees, Pertaining to the Creation of a New Charter Department to Provide for

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legislation banning choke holds,[7] and Colorado enacted broad changes that could serve as a model for Minnesota and other states.[8] Meanwhile, the United States House of Representatives passed a bipartisan bill that "mark[ed] one of the most comprehensive efforts in modern times to re-imagine law enforcement departments across the country."[9]

In Minnesota, Governor Tim Walz called a special session of the Minnesota Legislature less than two weeks after Mr. Floyd's killing to

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Community Safety and Violence Prevention, and the Removal of the Police Department as a Charter Department 1–2 (June 27, 2020), https://lims.minneapolismn.gov/Download/File/3882/MPD%20Charter%20Amendment%20Articles%20VII%20and%20Article%20VIII.pdf [https://perma.cc/2JMY-FLT7] (proposing the removal of the police department).

[7] *Legislative Responses for Policing–State Bill Tracking Database*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 28, 2020), https://www.ncsl.org/research/civil-and-criminal-justice/legislative-responses-for-policing.aspx [https://perma.cc/TRN4-CYUS]; Sam Metz, *Nevada Passes Policing Bills, Including a Ban on Chokeholds,* ASSOCIATED PRESS (Aug. 1, 2020), https://apnews.com/article/legislature-nevada-police-police-reform-minneapolis-4338a49fb5281132520df77392f0872f [https://perma.cc/ZP8K-DSYJ]. More than 375 bills on police reform were introduced in thirty-two states in the two months following Floyd's death. Holly Bailey & Timothy Bella, *Police Reform Bill Passed by Minnesota Legislature Doesn't Go Far Enough, Critics Say*, WASH. POST (July 22, 2020, 10:05 AM), https://www.washingtonpost.com/national/police-reform-bill-passed-by-minnesota-legislature-doesnt-go-far-enough-critics-say/2020/07/21/3d23b602-cba7-11ea-91f1-28aca4d833a0_story.html [https://perma.cc/7VU7-UJNC]. "'This kind of rapid response from legislators, on this type of issue particularly, is not something I've ever seen previously,' [said] Amber Widgery, a program principal on criminal justice issues at the National Conference of State Legislatures." Alan Suderman, *States Race to Pass Policing Reforms After George Floyd's Death*, STAR TRIB. (Aug. 8, 2020, 12:37 PM), https://www.startribune.com/states-race-to-pass-policing-reforms-after-floyd-s-death/572051772/ [https://perma.cc/6MBR-G5QA].

[8] *See* Jesse Paul & Jennifer Brown, *Colorado Governor Signs Sweeping Accountability Bill into Law. Here's How It Will Change Law Enforcement*, COLO. SUN (June 19, 2020, 9:53 AM), https://coloradosun.com/2020/06/19/colorado-police-accountability-bill-becomes-law/ [https://perma.cc/KKB5-D9SP]; *see also infra* notes 197–210 and accompanying text (describing the Colorado legislation and its potential application in Minnesota).

[9] Claudia Grisales, *House Approves Police Reform Bill, but Issue Stalled Amid Partisan Standoff*, NAT'L PUB. RADIO (June 25, 2020, 8:44 AM), https://www.npr.org/2020/06/25/883263263/house-approves-police-reform-bill-but-issue-stalled-amid-partisan-standoff [https://perma.cc/95PJ-TVLB]. The media considered the House bill "the most sweeping federal intervention into law enforcement in years." Cate Edmondson, *House Passes Sweeping Policing Bill Targeting Racial Bias and Use of Force*, N.Y. TIMES (June 25, 2020), https://www.nytimes.com/2020/06/25/us/politics/house-police-overhaul-bill.html [https://perma.cc/PMA6-CY8Z]. Unfortunately, and not surprisingly, the Senate did not accept the House bill, and instead proposed its own bill that Democrats found "so threadbare and lacking in substance that it does not even provide a proper baseline for negotiations." Letter from Cory A. Booker, U.S. Sen., Kamala D. Harris, U.S. Sen., and Charles E. Schumer, U.S. Sen., to Mitch McConnell, U.S. Sen. Majority Leader 1 (June 23, 2020), https://www.booker.senate.gov/imo/media/doc/Booker,%20Harris,%20Schumer%20Letter%20to%20McConnell.pdf [https://perma.cc/BX3P-J8WU].

address "the need for systemic police accountability and reform in Minnesota."[10] However, despite promises for "sweeping changes," the legislature failed to reach an agreement during the first special session.[11] During the second special session, however, approximately one month later, legislators found more success. After weeks of negotiations, the legislature overwhelmingly passed perhaps the most expansive police reforms in the state's history and substantially more than any other state had accomplished up to that point, other than Colorado.[12] The new legislation included: a statewide ban on choke holds; including the kind of neck restraint used on Mr. Floyd; a prohibition on warrior-style training for officers; enhanced data collection around deadly force encounters; a requirement that officers intervene when witnessing excessive force by other officers; and the creation of a new state unit to investigate police killings, among other changes.[13]

The final reform bill, however, left considerable work to be done, particularly given the depth of policing problems in Minnesota. Governor Walz acknowledged that the law was "only the beginning" and that "[t]he work

[10] TIM WALZ, GOV. OF MINN., PROCLAMATION FOR SPECIAL SESSION 2020 (June 10, 2020), https://mn.gov/governor/assets/06.10.2020%20Special%20Session%20Proclamation%20final_tcm1055-435510.pdf [https://perma.cc/D534-KMLD].

[11] Nicholas Bogel-Burroughs & Jack Healy, *Minnesota Lawmakers Vowed Police Reform. They Couldn't Agree on Any*, N.Y. TIMES (June 20, 2020), https://www.nytimes.com/2020/06/20/us/minnesota-police-george-floyd.html [https://perma.cc/A9F7-LD9P]. Not only was Minnesota the "focal point for nationwide fury and grief over police killings and racism," it was also the only one in the country where Democrats control one chamber and Republicans the other. *Id.* "State lawmakers' initial efforts to pass police reform collapsed weeks earlier amid partisan bickering between Democrats who called on lawmakers to embrace the urgency of the moment vs. Republicans who accused them of trying to defund the police." Bailey & Bella, *supra* note 7.

[12] Briana Bierschbach, *Minnesota Lawmakers Pass Sweeping Package of Police Accountability Measures*, STAR TRIB. (July 21, 2020, 4:18 PM), https://www.startribune.com/state-lawmakers-strike-deal-on-police-reform-proposals/571833891/ [https://perma.cc/Z4AZ-RFFT] (reporting the House approved the measure 102 to 29, and the Senate passed it 60 to 7); *see also* Bailey & Bella, *supra* note 7 ("Supporters described the legislation that was passed as the most expansive criminal justice reforms in the state's history."). As Minnesota Public Safety Commissioner John Harrington said, "When I look at the laws that have been passed in other states for police reform, most of it comes down to banning chokeholds and some duty to intervene . . . I think this is far broader and goes far deeper than that. I think we did really good work." Jennifer Bjorhus & Torey Van Oot, *Responses to Minnesota's Police Reforms Range from Lukewarm to 'Slap in the Face'*, STAR TRIB. (July 22, 2020, 12:34 AM), https://www.startribune.com/reactions-to-police-reforms-go-from-lukewarm-to-slap-in-face/571853831/ [https://perma.cc/K324-5FFP].

[13] *See* Bierschbach, *supra* note 12 (detailing the bill's provisions). The new legislation also "boosts funding for crisis intervention training, creates a panel of expert arbitrators to handle police misconduct cases, and establishes incentives for officers to live in the communities they police." *Id.*

does not end today."[14] Many legislators considered the bill only a first step.[15] Indeed, the final bill represented significant compromises from the initial proposals considered by the House of Representatives.[16] Several lawmakers publicly declared that the bill was "insufficient" but voted for it anyway.[17] Others raised concern about the lack of public input and the nature of the final negotiations.[18] Many community leaders criticized the legislation and spoke out for further action.[19]

The legislation passed last summer reflects both the speed with which legislators acted and the substantial amount of work still left to be done. In the past, Minnesota has shown its capacity to respond to shocking acts of violence with strong legislation. Almost exactly one hundred years before Mr. Floyd's killing, three African American men, Elias Clayton, Elmer Jackson, and Isaac McGhie, were lynched by a mob of thousands of White people in Duluth while police stood by and failed to do anything to stop them, having ignored clear warnings of the planned lynchings from earlier in the day.[20] Within one year, the Minnesota Legislature responded with arguably the strongest anti-lynching legislation in the United States at the time, becoming one of the first states to ban lynching altogether.[21] Now,

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[14] Bailey & Bella, *supra* note 7.

[15] State Rep. Rena Moran, the DFL co-chairwoman of the People of Color and Indigenous (POCI) Caucus at the Legislature promised, "It is only the beginning." Bjorhus & Van Oot, *supra* note 12.

[16] Bailey & Bella, *supra* note 7 ("Democrats dropped several items they had pursued, including the restoration of voting rights to felons and a measure that would have put the state attorney general in charge of prosecuting police killings.").

[17] *Id.* According to State Sen. Jeff Hayden, "'While this bill sets the groundwork for the work that we know needs to continue after this, the conversation cannot and will not end there with the passage of this bill . . . There's a lot of work to protect [B]lack bodies.'" *Id.*

[18] Sen. Hayden also raised concerns about how the final bill was negotiated, stating that there could have been more conversation on policing legislation: "'Instead we got a closed-door deal in the middle of the night with no public input,' he said." Walker Orenstein & Peter Callaghan, *The Legislature Just Passed a Police Reform Bill. What It Does—and Doesn't Do—to Reshape Law Enforcement in Minnesota*, MINNPOST (July 21, 2020), https://www.minnpost.com/state-government/2020/07/the-legislature-just-passed-a-police-reform-bill-what-it-does-and-doesnt-do-to-reshape-law-enforcement-in-minnesota/ [https://perma.cc/K9MM-5GA2].

[19] Steven Belton, President and CEO of the Urban League Twin Cities, felt that "this legislation represents the low-hanging fruit, . . . [but we have] richer, higher fruit that needs to be harvested." Bjorhus & Van Oot, *supra* note 12. Local civil rights leader and President of Communities United Against Police Brutality Michelle Gross called the bill "mediocre" with "a lot of extra garbage that we don't need." *Id.*

[20] The Executive Committee, *NAACP Stands for Justice*, NAACP DULUTH, MN BRANCH (June 4, 2020, 5:01 PM), https://duluthnaacp.org/news/9016060 [https://perma.cc/7NE6-VH6M]; *see also* Ann Juergens, *Lena Olive Smith: A Minnesota Civil Rights Pioneer*, 28 WM. MITCHELL L. REV. 397, 417 (2001).

[21] *See* Juergens, *supra* note 20, at 417; *see also* Meagan Flynn, *Century after Minnesota Lynchings, Black Man Convicted of Rape 'Because of His Race' up for Pardon*, WASH.

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the State of Minnesota must answer the call again to confront what has happened in the hundred years since then.

The century between the anti-lynching bill and last summer's legislation was largely marked by decades of inaction, while police violence and abuse of power went largely unabated.[22] In fact, over the past several years, being killed by the police has become a leading cause of death amongst young men of color.[23] Nearly 200 people in Minnesota were killed by the police between 2000 and 2020.[24] And yet, "the cycle of police brutality and racism has been met with cosmetic tinkering instead of substantive structural change."[25] The public protests in Minnesota and nationwide were a response not only to unjust policing of marginalized communities in particular, they "are a cry for action to public officials for real change, writ large."[26]

POST. (June 12, 2020), https://www.washingtonpost.com/nation/2020/06/12/duluth-lynchings-mason-pardon/ [https://perma.cc/N6SS-8F9V] (exploring the history of the Duluth lynchings and their aftermath, including the NAACP Duluth office and anti-lynching legislation); Michael J. Nolan, *Defendant, Lynch Thyself: A California Appellate Court Goes from the Sublime to the Ridiculous in* People v. Anthony J., 4 HOW. SCROLL: SOC. JUST. L. REV. 53, 69–70 (2001) (providing a historical review of state anti-lynching legislation).

[22] *See infra* notes 65–87 and accompanying text (describing the past several decades of multiple studies and little actual reform).

[23] Frank Edwards, Hedwig Lee, & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. OF THE NAT'L ACAD. OF SCI. 16793, 16796 (Aug. 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6708348/ [https://perma.cc/99P7-78DV] ("Police violence is a leading cause of death for young men, and young Men of Color face exceptionally high risk of being killed by police."); *see also* Amina Khan, *Getting Killed by Police Is a Leading Cause of Death for Young Black Men in America*, L.A. TIMES (Aug. 16, 2019), https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-for-black-men [https://perma.cc/8P4Y-87NA] (reporting that Black men and boys are 2.5 times more likely than White men and boys to die during an encounter with police officers).

[24] Jeff Hargarten, Jennifer Bjorhus, MaryJo Webster, & Kelly Smith, *Every Police-Involved Death in Minnesota Since 2000*, STAR TRIB. (updated Oct. 2, 2020), https://www.startribune.com/fatal-police-encounters-since-2000/502088871/ [https://perma.cc/AMQ3-7FY9] (database of all who have "died after a physical confrontation with law enforcement in Minnesota since January 2000" through October 2, 2020).

[25] Letter from Leadership Conf. on Civ. & Hum. Rts. to U.S. House of Rep. and U.S. Sen. Leaders 1 (June 1, 2020), http://civilrightsdocs.info/pdf/policy/letters/2020/Coalition_Letter_to_House_and_Senate_Leadership_on_Federal_Policing_Priorites_Final_6.1.20.pdf [https://perma.cc/U7XA-TWBU].

[26] *Id.* (including nearly 500 national organizations' signatures, along with the NAACP).

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While there are many tools available for police reform,[27] this article focuses on options available to the Minnesota State Legislature.[28] The legal system, in general, has fallen short of its obligations to curb police violence in three ways. First, federal civil rights laws designed to incentivize better police behavior and provide remedies to victims of police abuse have been deeply undermined by the United States Supreme Court.[29] In particular, 42 U.S.C. § 1983 (hereinafter "§ 1983"),[30] "the primary weapon used by civil

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[27] Other options could include political structures, such as civilian review boards; technological advances, like body cameras; and structural reforms, such as recalibrating police budgets to provide more social workers. *See generally* PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 1 (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [https://perma.cc/DM6R-FEZZ] [hereafter PRESIDENT OBAMA'S TASK FORCE ON 21ST CENTURY POLICING] (explaining how President Obama charged the task force with "identifying best practices and offering recommendations on how policing practices can promote effective crime reduction while building public trust"); POLICE EXEC. RSCH. F., GUIDING PRINCIPLES ON USE OF FORCE 5 (2016), https://www.policeforum.org/assets/30%20guiding%20principles.pdf [https://perma.cc/WJ5V-VJMU] [hereafter PERF GUIDING PRINCIPLES] (compiling the "latest thinking on police use-of-force issues from the perspective of many of the nation's leading police executives"); LEADERSHIP CONF. ON CIV. & HUM. RTS., NEW ERA OF PUBLIC SAFETY: A GUIDE TO FAIR, SAFE, AND EFFECTIVE COMMUNITY POLICING, at xvii (2019), https://civilrights.org/wp-content/uploads/Policing_Full_Report.pdf [https://perma.cc/T27Y-VX4X] (explaining that the report "draws from the policies and practices of departments across the country that have adopted innovative reforms, informed by experience, community feedback, and expert advice, to address long-standing challenges").

[28] Reform at the police department level can be important, but state-wide change is necessary. The issues are not just about the Minneapolis Police or the metropolitan area. Over the past five years, sixty percent of more than 100 cases regarding excessive use of force that resulted in death or injury took place outside the metro area. *See* Briana Bierschbach, *George Floyd Killing Triggers Examination of Minnesota Law on Police Deadly Force*, STAR TRIB. (June 17, 2020, 10:24 PM), https://www.startribune.com/floyd-killing-triggers-examination-of-minnesota-law-on-police-deadly-force/571329622/ [https://perma.cc/7K83-JW8R] (citing Department of Public Safety Commissioner John Harrington). From 2007 to 2017, Minnesota jurisdictions across the State made over 900 payouts to citizens for alleged misconduct totaling over $60 million, and the number is increasing from an average of fifty payouts per year to nearly 100 payouts per year. Randy Furst & MaryJo Webster, *Minnesota Cities, Counties Paid $60.8 Million in Police Misconduct Claims in Past Decade*, STAR TRIB. (April 15, 2018, 7:43 AM), https://www.startribune.com/minnesota-cities-counties-paid-60-8m-in-police-misconduct-claims-in-past-decade/479781413/ [https://perma.cc/728V-BBEB].

[29] *See infra* notes 158–85 and accompanying text (describing the Supreme Court's efforts undermining § 1983); *see also* Hon. Lynn Adelman, *The Erosion of Civil Rights and What to Do About it*, 2018 WIS. L. REV. 1, 4 (2018) ("The Supreme Court, however, under Chief Justices Warren Burger, William Rehnquist, and John Roberts, has been dominated by conservatives for almost half a century and, since *Monroe*, the Court has been hostile to the statute, continuously narrowing it and imposing restrictions on civil rights plaintiffs.").

[30] Section 1983 provides in relevant part,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

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rights lawyers to remedy police abuse,"[31] has been the subject of incremental attacks from the Court for sixty years. Specifically, the judicially-constructed doctrine of "qualified immunity"—a concept not specifically mentioned in the text of § 1983[32]—has expanded to the point of nearly swallowing whole any chances plaintiffs once had of vindicating rights under § 1983.[33]

Second, in those cases that actually impose civil liability on officers who abuse their power, the deterrent effects of § 1983 have been undercut by a second development: the near-universal indemnification of police officers by taxpayers.[34] Even if officers are found guilty of § 1983 violations in civil court and ordered to pay damages, the officers often pay nothing at all.[35] Regardless of how egregious their violations of constitutional law, officers face little or no financial consequence whatsoever.[36]

Third, hardly any officers are ever charged, much less convicted, in cases of police-involved killings.[37] State criminal laws still lag behind what

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> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C.A. § 1983 (1996).

[31] Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1504 (1993).

[32] The Court itself acknowledged that the text of § 1983 has no explicit mention of any immunities. *See* Wyatt v. Cole, 504 U.S. 158, 163 (1992) ("§ 1983 creates a species of tort liability that on its face admits of no immunities."); *see also infra* notes 164–85 and accompanying text (explaining the origin and development of qualified immunity in § 1983 jurisprudence).

[33] Erwin Chemerinsky, Opinion, *How the Supreme Court Protects Bad Cops,* N.Y. TIMES (Aug. 27, 2014), https://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html [https://perma.cc/9PDY-5VSE] ("[T]he [C]ourt has made it very difficult, and often impossible, to hold police officers and the governments that employ them accountable for civil rights violations. This undermines the ability to deter illegal police behavior and leaves victims without compensation. When the police kill or injure innocent people, the victims rarely have recourse.").

[34] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 961 (2014) (reporting the results of her nationwide study of police departments and concluding that "officers are virtually always indemnified" for judgments and settlements).

[35] *Id.* at 890 (finding that "governments satisfied settlements and judgments in full even when officers were disciplined or terminated by the department or criminally prosecuted for their conduct").

[36] *Id.* at 923. One example is particularly telling. The City of Denver paid $885,000 to settle a lawsuit where one of its officers stomped on the back of a teenage boy while using a fence for leverage, breaking his ribs and causing him to suffer kidney damage and a lacerated liver. *Id.* Although the officer was criminally charged (and acquitted), the city covered the entire settlement. *Id.*

[37] Shalia Dewan, *Few Police Officers Who Cause Death Are Charged or Convicted*, N.Y. TIMES (Sept. 24, 2020), https://www.nytimes.com/2020/09/24/us/police-killings-prosecution-charges.html [https://perma.cc/6LH7-W7PM] ("Union protections that shield police officers

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many police departments already require.[38] Statutes defining deadly use of force focus exclusively on the officer's state of mind and neglect the officer's conduct during the situation that led to the use of deadly force.[39] While Minnesota actually included some improvements to its deadly use-of-force statute last summer, the law in Minnesota still focuses entirely on the moment that deadly force was used rather than what officers could have done to prevent the situation from arising at all.[40]

This article responds to each of these problems with three specific legislative proposals based on similar ideas from community activists, academics, legislators, and other states. For example, in response to the limited effectiveness of § 1983, Colorado recently enacted a state-based equivalent.[41] Its new law explicitly denies accused officers the protection of qualified immunity while providing the benefits afforded plaintiffs under the federal act, including attorney's fees.[42] In response to the near-universal indemnification of officers, community activists have been pushing the idea

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from timely investigation, legal standards that give them the benefit of the doubt, and a tendency to take officers at their word have added up to few convictions and little prison time for officers who kill.").

[38] For example, Minnesota's state statutory standards for deadly use of force are less restrictive than those of local law enforcement. *See, e.g.*, MINNEAPOLIS POLICE DEPARTMENT, POLICY MANUAL § 5-301, at III.B.3 (2020) ("Officers shall not use deadly force except in accordance with MN Statute § 609.066, and [adding] even in those circumstances officers shall first consider all reasonable alternatives including less lethal measures, before using deadly force."). St. Paul requires its officers to first try to de-escalate the conflict and limits authorized use of force to situations involving an "imminent" threat. ST. PAUL POLICE DEP'T, POLICY MANUAL § 246.01, at IV (de-escalation), § 246.00, at VII.B (2020).

[39] *See* Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 637 (2018) ("Existing statutes on police use of deadly force tend to focus on the reasonableness of the officer's belief in the need to use force.").

[40] *See* MINN. STAT. § 609.066, subdiv. 2(b) (effective March 1, 2021) (authorizing deadly use of force only "if an objectively reasonable officer would believe, based on the totality of the circumstances known to the officer at the time and without the benefit of hindsight, that such force is necessary . . . to protect the peace officer or another from death or great bodily harm").

[41] COLO. REV. STAT. ANN. § 13-21-131 (2020) (stating that a police officer who "under color of law" deprives any person of rights protected under Article II of the Colorado State Constitution "is liable to the injured party for legal or equitable or any other appropriate relief"); *see also* Russell Berman, *The State Where Protests Have Already Forced Major Police Reform*, THE ATLANTIC (July 17, 2020), https://www.theatlantic.com/politics/archive/2020/07/police-reform-law-colorado/614269/ [https://perma.cc/9P8T-GGD2] (reporting how, after gunshots had been fired into the crowd during a protest just outside the state capitol, State Rep. Leslie Herod told her fellow Democrats, "I don't want a card. I don't want any niceties. I want a bill, and I need your support to get a bill introduced that addresses these concerns.").

[42] COLO. REV. STAT. ANN. § 13-21-131 (2)(b) & (4) (2020). The Act also limits liability caps and other immunities. *See id.* at (2)(a) ("Statutory immunities and statutory limitations on liability, damages, or attorney feeds do not apply to claims brought pursuant to this section.").

of professional liability insurance for officers for years. Last summer, several state representatives drafted actual legislation.[43] While that bill did not pass, it is at least a template for future legislation.[44] Lastly, Professor Cynthia Lee drafted a model use of force statute with provisions that address many gaps that persist within Minnesota's deadly use of force statute after the police reform bill passed last summer, namely covering pre-seizure conduct and whether officers attempted to de-escalate the situation before using deadly force.[45]

Minnesota can build on each of these three ideas to create legislative reforms targeting current weaknesses in the law around police accountability. Minnesota's past provides important context for the urgency of additional reform in this area.[46] Part II of this article provides background on the racist and problematic history of policing in Minnesota and the many reports and studies that have both condemned the State's lack of action and proposed specific steps that could have helped, but were never taken.[47]

Part III of this article details the three specific legislative proposals recommended to address the problems discussed above. First, Minnesota should enact a state-based civil rights statute modeled on federal § 1983, but with explicit restrictions on qualified immunity.[48] Second, Minnesota should enact a complete change to the current model of officer indemnification and require that officers carry their own professional liability insurance, just like lawyers and doctors do, to leverage market-based accountability forces.[49] Third, Minnesota should amend its current statute on police use of deadly force to include consideration of what an officer does or does not do that contributes to the circumstances leading to the deadly use of force.[50]

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[43] *H.R. 87,* 2020 Leg., *2d Spec. Sess., at 1–3 (Minn. 2020), http://wdoc.house.leg.state.mn.us/leg/LS91/2_2020/HF0087.0.pdf [https://perma.cc/X3MR-46RB].*

[44] *See generally* Judy Greenwald, *Group Presses for Police Insurance Reform; Minneapolis Self-Insured*, BUS. INS.: RISK MGMT. (June 10, 2020), https://www.businessinsurance.com/article/20200610/NEWS06/912335052/Group-presses-for-police-insurance-reform-Minneapolis-self-insured# [https://perma.cc/CC68-XTU8] (providing background on the discussions about policies that would require police officers to carry liability insurance).

[45] *See* Lee, *supra* note 39, at 664–65 (detailing model statute provisions on police officers' use of deadly force). Professor Lee hopes that such changes may encourage police "to act with more care before using deadly force." *See id.* at 638 ("Reforming the law in a way that encourages the use of deadly force only when it is proportionate and necessary can provide a useful counter to [officers' natural] self-preservation instinct.").

[46] JOHN D. BESSLER, LEGACY OF VIOLENCE: LYNCH MOBS AND EXECUTIONS IN MINNESOTA 229 (2003) ("[T]he violent legacy left behind by state-sanctioned and extrajudicial killings in Minnesota must never be forgotten.").

[47] *See infra* Part II.

[48] *See infra* Section III.A.

[49] *See infra* Section III.B.

[50] *See infra* Section III.C.

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II. MINNESOTA'S PAST AND PRESENT: RACISM AND POLICE ABUSE FOLLOWED BY STUDIES AND INACTION

A. *Minnesota History*

Despite its progressive image,[51] Minnesota has a long history of racial oppression and police violence.[52] Two examples illustrate this point: the largest mass execution in American history and the northernmost lynching on record both occurred in Minnesota.[53]

1. *The Largest Mass Execution in the Country*

As far back as its inception, Minnesota used its military power and the criminal justice system to remove, exclude, and in many cases, murder the populations of Indigenous communities that were already living in Minnesota when Europeans first arrived.[54] Governor Alexander Ramsey

[51] Minnesota was recently rated as the second most liberal state in the country. The Hill Staff, *How Red or Blue is Your State?*, THE HILL (Oct. 24, 2014, 6:00 AM), https://thehill.com/blogs/ballot-box/house-races/221721-how-red-or-blue-is-your-state [https://perma.cc/EMD8-55EA]. The Democratic candidate has won Minnesota in eleven straight presidential elections making it the longest active Democratic streak in the country for any state, whereas no Republican has won any statewide election in Minnesota since 2006 (including senator, governor, and even state auditor). Nathaniel Rakich, *Why Minnesota Could Be the Next Midwestern State to Go Red*, FIVETHIRTYEIGHT (Aug. 31, 2020, 7:00 AM), https://fivethirtyeight.com/features/why-minnesota-could-be-the-next-midwestern-state-to-go-red/ [https://perma.cc/VHZ2-JZ9V]; *see also* Briana Bierschbach, *Why Is Minnesota More Liberal Than Its Neighboring States?*, STAR TRIB. (Apr. 17, 2020, 8:00 AM), https://www.startribune.com/why-is-minnesota-more-liberal-than-its-neighboring-states/569326221/ [https://perma.cc/GTQ5-HE24] (noting that "the merger between the Democratic Party and the more left-wing Farmer-Labor Party created the Democratic-Farmer-Labor Party (DFL) in 1944, giving a home to liberal voters and helping to solidify a progressive streak in the state").

[52] *See infra* notes 67–87 and accompanying text (reporting on studies conducted over the past five decades).

[53] Another stain on Minnesota's history is its role in slavery and slavery's role in the early financial enterprises of the new state. *See generally* CHRISTOPHER P. LEHMAN, SLAVERY'S REACH: SOUTHERN SLAVEHOLDERS IN THE NORTH STAR STATE 6 (explaining how "Minnesotans allowed illegal slaveholding in their communities and benefited from it. . . . Southern dollars from slave plantations helped Minnesota's businesses, communities, and institutions to develop, and Minnesotans disregarded federal law in order to keep the money flowing."); *see also* John D. Bessler, *What I Think About When I Think About the Death Penalty*, 62 ST. LOUIS U. L.J. 781, 784 (2018) (writing about Minnesota, "Examples of miscarriages of justice are, in reality, incredibly easy to find—and they can often be found close to home.").

[54] Waziyatawin, Ph.D., *Colonial Calibrations: The Expendability of Minnesota's Original People*, 39 WM. MITCHELL L. REV. 450, 455 (2013) ("The United States unilaterally abrogated our treaties, stole our Minnesota homeland, imprisoned our people in concentration camps, force-marched our women and children, mass-lynched our warriors, mass-incarcerated our able-bodied men, ethnically-cleansed us from Minnesota, and then

made clear his intentions in an appearance before the Minnesota State Legislature in the fall of 1862, stating that the Dakota peoples "must be exterminated or driven forever beyond the borders of the State."[55] Later that year, on December 26, at the conclusion of the U.S.-Dakota War of 1862, and at the direction of state leaders, thirty-eight Dakota men were hanged simultaneously from a massive scaffold that had been constructed expressly for the mass execution.[56] Minnesota had initially wanted to hang more than 300 men, but President Lincoln decided to reduce the number.[57] Despite the "highly suspect" circumstances under which most of those sentenced to death had been convicted, President Lincoln decided to carry out the mass execution of the thirty-eight men.[58]

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instituted further policies of genocide, including a bounty system on Dakota scalps."); *see also* Colette Routel, *Minnesota Bounties on Dakota Men During the U.S.-Dakota War of 1862*, 40 WM. MITCHELL L. REV. 1, 4 (2013) (chronicling the state-ordered bounty system "as part of a much broader extermination program that was at the heart of federal Indian policy during this time period").

[55] Waziyatawin, *supra* note 54, at 459.

[56] Angelique EagleWoman (Wambdi A. Was'teWinyan), *Wintertime for the Sisseton-Wahpeton Oyate: Over One Hundred Fifty Years of Human Rights Violations by the United States and the Need for a Reconciliation Involving International Indigenous Human Rights Norms*, 39 WM. MITCHELL L. REV. 486, 517 (2013). For a detailed recounting of the events leading up to the war and the atrocities committed against the Dakota peoples during and after the war, see *id.* at 506–19.

[57] Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 32 (1990). Lincoln faced strong resistance from many Minnesotans who were outraged that he was reducing the number to be hanged. *See, e.g.*, *id.* at 29–30 (describing newspaper headlines and an open letter to the President from "the citizens of St. Paul" predicting vengeance by the settlers).

[58] Lenor A. Scheffler, *Reflections of a Contemporary Minnesota Dakota Lawyer: Dakota Identity and Its Impacts in 1862 and 2012*, 39 WM. MITCHELL L. REV. 582, 602 (2013); *see also* Chomsky, *supra* note 57, at 14 (detailing the unusual features of the executions, including the review of the sentences "not by an appellate court, but by the President of the United States"). In all the wars that took place between European settlers and members of the Indigenous nations, "in no others did the United States apply criminal sanctions to punish those defeated in war." *Id.* Professor EagleWoman has criticized President Lincoln for not following the "general military practice at the time." Vincent Schilling, *The Traumatic True History and Name List of the Dakota 38*, INDIAN COUNTRY TODAY (December 27, 2017), https://indiancountrytoday.com/archive/the-traumatic-true-history-and-name-list-of-the-dakota-38-3awsx1BAdU2v_KWM81RomQ [https://perma.cc/U895-JKGE]. "They should have been released. He made a political decision . . . based on the racial hatred . . . Lincoln was a lawyer [and] knew that this was improper." *Id.*; *see also* Paul Finkelman, *U.S.-Dakota War of 1862: "I Could Not Afford to Hang Men for Votes." Lincoln the Lawyer, Humanitarian Concerns, and the Dakota Pardons*, 39 WM. MITCHELL L. REV. 405, 412 (2013) (detailing Lincoln's many "strong political reasons for supporting the executions" and explaining how "Lincoln could hardly afford to risk alienating voters in Minnesota").

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2. The Northernmost Lynching on Record

Minnesota was also the site of the northernmost lynching recorded in the country.[59] On June 15, 1920, nearly one hundred years to the day before George Floyd was killed, three African American men, Elias Clayton, Elmer Jackson, and Isaac McGhie, were lynched by a mob of thousands of White people in Duluth.[60] The police ignored clear warnings that afternoon of a planned lynching.[61] After being wrenched out of their jail cells by force, beaten, and subjected to a mock trial, the three men were hung from lampposts one block away while an estimated 10,000 White people watched.[62] Many of the White people participated in the lynching

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[59] Oswald G. Villard et al., *Editorial Paragraphs*, 110 THE NATION 839, 841 (June 26, 1920), https://www.unz.com/print/Nation-1920jun26-00839/ [https://perma.cc/N6QR-JEBJ] (describing the lynching as presenting "no unusual circumstances" except for "establishing a new farthest north of the tide of race hatred") (on file with author). Racial violence and murder was at a high point in the North during this time. *See, e.g.*, Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557, 611 (2003) ("In the summer of 1919, there were twenty-three race riots, primarily in northern cities.").

[60] Tina Burnside, *On June 15, 1920, A Duluth Mob Lynched Three Black Men*, MINNPOST (June 29, 2019), https://www.minnpost.com/mnopedia/2019/07/on-june-15-1920-a-duluth-mob-lynched-three-black-men/ [https://perma.cc/NE7H-MT54]. The details of how the three men died are particularly chilling. *See id.* ("When McGhie's rope broke, they hung him a second time. A man sitting on a lamppost [being used for the lynching] repeatedly kicked Clayton in the face as he suffocated [from the hanging].").

[61] *See* NAACP, DULUTH, MN BRANCH, *supra* note 20; *see also* Juergens, *supra* note 20, at 413 (citing *Plan to Hang Negroes Bared to Police Tuesday Afternoon*, DULUTH NEWS TRIB. June 18, 1920, at 1). Despite being specifically warned that a mob "was planning to dynamite the jail and kill the suspects," the police "did little to head off the evening's attack." *Id.*; *see also* Burnside, *supra* note 60 ("Duluth Commissioner of Public Safety William F. Murnian failed to instruct his officers to stop the rioters forcefully, allowing them to enter the jail."). "In his 1933 book, 'The Tragedy of Lynching,' the sociologist Arthur F. Raper estimated that, based on his study of 100 lynchings, white police officers participated in at least half of all lynchings and that in 90 percent of others law-enforcement officers 'either condone or wink at the mob action.'" Nikole Hannah-Jones, *What Is Owned*, N.Y. TIMES MAG. (June 30, 2020), https://www.nytimes.com/interactive/2020/06/24/magazine/reparations-slavery.html [https://perma.cc/RA34-J4C6].

[62] Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. 263, 266 (2003). As in so many lynchings, the Black victims had been falsely accused by a White woman of sexual assault. Tom Nelson, *Our Duluth Lynchings*, 77 BENCH & BAR MINN. 4, 4 (2020). Ida B. Wells long ago pointed out that lynching linked the violent murder of Black men with the reinforcement of the sexual taboo against relations between Black men and White women. *See* Ida B. Wells-Barnett, *Lynch Law in America*, 23 THE ARENA 15, 18 (Jan. 1900), https://archive.org/details/ArenaMagazine-Volume23a/page/n29/mode/2up?q=lynch+law [https://perma.cc/FLZ3-NEFF].

> [M]any men have been put to death whose innocence was afterward established; and to-day, under this reign of the "unwritten law," no colored man, no matter what his reputation, is safe from lynching if a white woman, no matter what her standing or motive, cares to charge him with insult or assault.

and posed with the dead bodies, joking about sending the picture to the South as a message.[63] Historian Bill Green described the scene as "White men mugging for the camera like fishermen displaying their prize catches."[64]

B. Decades of Studies and Reports with the Same Conclusions (and the Same Inaction)

Racism and police abuse are not merely relics of Minnesota's past. In what he termed the Minnesota Paradox, Dr. Sam Myers documented how, although Minnesota is considered "a great place to live,"[65] the state has the largest disparities between White residents and Black residents in nearly every major facet of life:

> Measured by racial gaps in unemployment rates, wage and salary incomes, incarceration rates, arrest rates, home ownership rates, mortgage lending rates, test scores, reported child maltreatment rates, school disciplinary and suspension rates, and even drowning rates, African Americans are worse off in Minnesota than they are in virtually every other state in the nation.[66]

Id.

[63] BESSLER, *supra* note 46, at 196–97; *see also* Nelson, *supra* note 62, at 4 (explaining how postcards from the lynching "flew off the shelves of Duluth merchants at fifty cents each").

[64] William D. Green, *Thoughts About Commemorating the Duluth Lynchings*, 77 BENCH & BAR MINN. 12, 13 (May/June 2020).

[65] Heather Brown, *The 'Minnesota Paradox': Why the State Has One of the Largest Racial Disparities*, CBS NEWS (June 23, 2020), https://minnesota.cbslocal.com/2020/06/23/the-minnesota-paradox-why-the-land-of-10000-lakes-has-one-of-the-largest-racial-disparities/ [https://perma.cc/T2KJ-4HBQ] ("Survey after survey have stated that Minnesota is a great place to live."); *see also* David Leonhardt, *'The Minnesota Paradox'*, N.Y. TIMES (June 1, 2020), https://www.nytimes.com/2020/06/01/briefing/minneapolis-coronavirus-tara-reader-your-monday-briefing.html [https://perma.cc/73X4-V64K] ("Minnesota's Twin Cities metro area has one of the country's highest standards of living by many measures: high incomes, long life expectancy, a large number of corporate headquarters and a rich cultural scene.").

[66] Dr. Samuel Myers, *The Minnesota Paradox*, U. MINN.: HUBERT H. HUMPHREY SCH. OF PUB. AFFS. (June 5, 2020), https://www.hhh.umn.edu/roy-wilkins-center-human-relations-and-social-justice/minnesota-paradox, [https://perma.cc/KL4P-56S4]; *see also* Taylor Gee, *Something Is Rotten in the State of Minnesota*, POLITICO MAG. (June 16, 2016), https://www.politico.com/magazine/story/2016/07/minnesota-race-inequality-philando-castile-214053 [https://perma.cc/T6EJ-A8XE] (confirming Dr. Myers' assessment: "In metrics across the board—household income, unemployment rates, poverty rates and education attainment—the gap between white people and people of color is significantly larger in Minnesota than it is most everywhere else."); Jeff Wagner, *Minnesota Ranked 2nd-Worst in U.S. For Racial Equality*, CBS MINN. (August 22, 2017, 10:15 PM), https://minnesota.cbslocal.com/2017/08/22/minnesota-racial-inequality/ [https://perma.cc/3EJB-UKEM] ("[B]lack people in Minnesota are ten times more likely to end up in jail or prison than [W]hite people."); Randy Furst & MaryJo Webster, *How Did Minnesota Become One of the Most Racially Inequitable States?*, STAR TRIB. (September 6, 2019, 10:52 AM), https://www.startribune.com/how-did-minnesota-become-one-of-the-

The killing of George Floyd was not an anomaly. Decades of studies and reports have documented the same thing: police abuse and racism toward racially marginalized communities. In 1993, the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System found that in Hennepin County, People of Color and Whites were arrested and charged at vastly disproportionate rates.[67] As the task force observed, "One glaring signpost of the specter of racism in the disposition of criminal cases is the fact that although people of color comprise 6% of the state's population, they comprise 45% of the prison population."[68] The task force also found that, "although the justice system is no longer made to enforce the ultimate social control of slavery or the complex codes of legal segregation that took its place, the justice system still finds itself being used as a powerful tool of the pervasive prejudice and the subtle, often elaborately camouflaged discrimination that still deeply scars our national life."[69] Not surprisingly, the task force concluded that "Nowhere in the system is this 'control' dynamic more in evidence than in the interaction of communities of color with the police."[70]

In 2003, the Council on Crime and Justice and Institute on Race and Poverty conducted a study on traffic stop arrest rates. They jointly reported to the legislature that police stopped and searched Black, Latinx, and Native American drivers at greater rates than White drivers.[71] Importantly, the researchers also determined that officers had "found contraband as a result of searches of [Black, Latinx, and Native American drivers] at lower rates than in searches of White drivers."[72] Racial profiling in arrests was found statewide.[73] The disparities "existed in nearly every

most-racially-inequitable-states/547537761/ [https://perma.cc/DD6L-JG97] ("By almost any measurement, Minnesota is plagued by racial disparities. In unemployment statistics. In the percentage of people in poverty. In homeownership. And in other areas as well.").

[67] MINN. SUP. CT. TASK FORCE ON RACIAL BIAS IN THE JUD. SYS., FINAL REPORT 14 (1993), https://www.mncourts.gov/mncourtsgov/media/scao_library/CEJ/1993-Minnesota-Supreme-Court-Task-Force-on-Racial-Bias-in-the-Judicial-System-Final-Report.pdf [https://perma.cc/9M62-9QPV].

[68] *Id.* at S-3.

[69] *Id.* at 5.

[70] *Id.* The task force detailed "a pattern of racial bias . . . throughout the justice system." *Id.* at 7. Reporting data from the early 1990s, the task force found that "[a]lmost 15 years after the passage of the Indian Child Welfare Act, Native American children are still being removed from their homes at approximately *10 times* the rate that [W]hite children are removed." *Id.*

[71] COUNCIL ON CRIME & JUST. & INST. ON RACE & POVERTY, MINNESOTA RACIAL PROFILING STUDY: ALL JURISDICTIONS REPORT, SUMMARY OF FINDINGS 2 (2003), https://www.leg.mn.gov/docs/2004/mandated/040199.pdf [https://perma.cc/BKB4-VWB6].

[72] *Id.*

[73] *Id.*

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participating jurisdiction" across the state.[74] The researchers concluded that "[t]hese patterns suggest a strong likelihood that racial/ethnic bias plays a role in traffic stop policies and practices in Minnesota."[75]

In 2009, there were two major investigations of the Metro Gang Strike Force, a multi-jurisdictional police task force commissioned to fight drug trade and violent crime throughout Minnesota.[76] An investigation revealed that since its inception in 1997, officers were improperly seizing money and property and often brutalizing innocent victims, many of whom were People of Color.[77] As one investigation found, "It is difficult to classify, in terms of severity, the areas of misconduct revealed by this investigation."[78] Some allegations were found "to be shocking."[79] Racial profiling by the Strike Force included "shakedowns" that targeted undocumented immigrants.[80]

Between 2006 and 2012, the City of Minneapolis paid out $14 million for alleged police misconduct, though very few of these cases resulted in disciplinary action for officers.[81] In addition to instances of police misconduct and use of force, arrest data from the Minneapolis Police Department suggests a disparate impact in the enforcement of low-level offenses against People of Color. Of the nearly 100,000 arrests for low-level offenses made by Minneapolis police officers between 2012 and 2014,

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[74] *Id.* at 3.

[75] *Id.*

[76] The initial investigation was conducted by the Office of the Legislative Auditor. METRO GANG STRIKE FORCE REV. PANEL, REPORT 1–2 (Aug. 20, 2009), https://dps.mn.gov/divisions/co/about/Documents/final_report_mgsf_review_panel.pdf [https://perma.cc/9ZVP-G67T] [hereinafter METRO GANG STRIKE FORCE REPORT]. On the night after the Legislative Auditor's report was issued, "a number of Strike Force officers were observed shredding documents at the Strike Force offices." *Id.* at 2.

[77] *See id.* at 22–23. The report noted that "these encounters almost always involved a [P]erson of [C]olor." *Id.* at 22; *see also* Randy Furst, *Payouts Reveal Brutal, Rogue Metro Gang Strike Force*, STAR TRIB. (Aug 5, 2012, 5:15 PM), https://www.startribune.com/payouts-reveal-brutal-rogue-metro-gang-strike-force/165028086/ [https://perma.cc/7U33-WHNS] ("The stories and payouts to 96 victims of the now-defunct Strike Force . . . provide the most detailed picture yet of an out-of-control police squad.").

[78] METRO GANG STRIKE FORCE REPORT, *supra* note 76, at 14.

[79] *Id.*

[80] Virgil Wiebe, *Immigration Federalism in Minnesota: What Does Sanctuary Mean in Practice?*, 13 U. ST. THOMAS L.J. 581, 626 (2017) (describing how the Strike Force "ran off the rails in the mid-2000s"); *see also* METRO GANG STRIKE FORCE REPORT, *supra* note 76, at 11 ("The Strike Force's mission does not support the creation of roving 'saturation' details that stop people for traffic violations or seize the funds of an undocumented alien who has committed no other offense. Yet this is what we found, many times over.").

[81] Alejandra Matos & Randy Furst, *Minneapolis Cops Rarely Disciplined in Big-Payout Cases*, STAR TRIB. (June 3, 2013, 2:06 PM), https://www.startribune.com/minneapolis-cops-rarely-disciplined-in-big-payout-cases/209811991/ [https://perma.cc/D2Z6-BQ4C].

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African Americans accounted for 59%, despite representing only 19% of the city's population.[82]

A recent report by the Minnesota Advisory Committee to the U.S. Commission on Civil Rights found selective enforcement of nonviolent offenses contributes to higher rates of incarceration for People of Color.[83] Statewide, African Americans represent 6% of the population, yet as of January 2016, they made up 35% of the state's prison population.[84] For Native Americans, "the disparity is even starker."[85] Despite only representing 1% of the population, Native Americans account for 10% of the state's prison population.[86]

Most recently, Minnesota Attorney General Keith Ellison and Department of Public Safety Commissioner John Harrington convened a working group on police-involved killings in the spring of 2020 and produced a wide range of recommendations. The Working Group summarized the results of decades of inaction:

> There have been many firm opinions over the years about why police-involved deadly force encounters persist, and those opinions have grown more intense and more polarized as people's and communities' frustration, grief, and anger has grown. This has also made practical solutions for reducing them that can be effectively implemented and widely adopted harder and harder to agree on. In the meantime, people continue losing their lives, survivors' lives continue being changed forever, communities continue being torn apart, and trust between community and law enforcement continues to fray.[87]

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[82] *Picking up the Pieces: A Minneapolis Case Study*, ACLU (2015), https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/picking-pieces [https://perma.cc/QDU2-CS7J]. According to the research, African Americans were 8.7 times more likely and Native Americans were 8.6 times more likely to be arrested for a low-level offense than White people. *Id.* Racial profiling seems even more obvious when looking at disparities between nighttime and daytime stops. As the ACLU study found, at 3:00 AM, Black drivers in Minneapolis are two times more likely than White drivers to be pulled over and arrested for an active driving violation, but at 2:00 PM, when officers presumably can better identify the driver's race, Black drivers are nine times more likely to be stopped. *Id.*

[83] MINN. ADVISORY COMM. TO U.S. COMM'N ON C.R., CIVIL RIGHTS AND POLICING PRACTICES IN MINNESOTA 9 (2018), https://www.usccr.gov/pubs/2018/03-22-MN-Civil-Rights.pdf [https://perma.cc/C6XK-GLRN].

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] STATE OF MINN. DEP'T OF PUB. SAFETY WORKING GROUP, POLICE-INVOLVED DEADLY FORCE ENCOUNTERS 1 (Feb. 2020), https://dps.mn.gov/divisions/co/working-group/Documents/police-involved-deadly-force-encounters-recommendations.pdf [https://perma.cc/49CM-5FPF] [hereinafter STATE OF MINN. WORKING GROUP].

C. Past Signs of Progress

While Minnesota has a history of racial violence, it has a track record of responding as well. In the wake of the lynchings in Duluth, Governor J.A.A. Burnquist, who was also president of the St. Paul NAACP at the time, immediately called in the National Guard later that night to disperse the mob.[88] Troops were stationed in Black neighborhoods to protect Black citizens.[89] The St. Paul NAACP initiated and funded an outside investigation.[90] And in time, Duluth became the first city in America to create a public memorial to lynching victims.[91]

The Minnesota Legislature also responded to the lynchings. Pushed hard by lobbying from the NAACP and, in particular, activist Nellie Francis,[92] the Minnesota Legislature passed arguably the strongest anti-lynching legislation at the time,[93] and it became one of the first states to ban lynching altogether.[94] Drafted by Francis, the legislation sailed through both the House and the Senate with a nearly unanimous vote and was signed into law in April 1921, less than one year after the lynchings.[95] With a sharp eye towards the complicity of the police in the Duluth lynchings, the new law

[88] BESSLER, *supra* note 46, at 197.

[89] *Id.* at 201.

[90] *Id.* at 197.

[91] *See* Nelson, *supra* note 62, at 4 ("Duluth was the very first community in our nation to build a monument to honor its lynching victims.").

[92] BESSLER, *supra* note 46, at 216. W.E.B. DuBois even paid visits to both Duluth and St. Paul to support the effort. *Id.* at 217. The National NAACP sent Francis and local NAACP leaders various supporting materials, including a copy of the anti-lynching legislation from Kentucky. *Id.* at 217. The NAACP was founded in 1909 largely to confront the issue of lynching and racist mob violence against Black communities. *See* LANGSTON HUGHES, FIGHT FOR FREEDOM: THE STORY OF THE NAACP 20–23 (1962) (describing founding of NAACP in response to a 1908 Springfield, Illinois riot in which African Americans were lynched, injured, and driven from the city, and their homes and businesses destroyed); *see also* James W. Fox Jr., *Intimations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 HOW. L.J. 113, 163 (2006) (noting how, along with Ida B. Wells, the NAACP "devoted significant efforts to persuade both state and federal White legislators to pass anti-lynching bills").

[93] *See* Nolan, *supra* note 21, at 69–70 (providing a historical review of state anti-lynching legislation).

[94] Juergens, *supra* note 20, at 417; *see also* Act approved Apr. 20, 1921, ch. 401, 1921 Minn. Laws 612 (codified at MINN. STAT. § 373.28 (1974)) ("An act to prevent lynching; to fix indemnity for the dependents of any person lynched, and to provide for the removal from office of the Sheriff and Deputy Sheriffs having charge of any person lynched."). The anti-lynching statute, unfortunately, was quietly repealed in 1984. *See* MINN. STAT. § 373.28 (1974), *repealed by* Act approved May 2, 1984, ch. 629, § 4, 1984 Minn. Laws 1713, 1763.

[95] BESSLER, *supra* note 46, at 217; *see also Mrs. W.T. Francis Author of Anti-Lynching Bill*, NW. BULL., at 1, 4, (May 12, 1923), https://www.mnhs.org/duluthlynchings/documents/Mrs_WT_Francis_Author_of_AntiLynching_Bill-831.001.php [https://perma.cc/N4WM-WD3N] (identifying Francis with the "high distinct honor" of being the "Mother" of the anti-lynching legislation).

imposed liability on counties for lynching victims murdered in their county and made failure to use all reasonable means to prevent a lynching a fireable offense for law enforcement officers.[96] The state also put pressure on the federal government. Over the next sixteen years, the Minnesota Legislature would twice approve joint resolutions calling on the U.S. Congress to enact a federal anti-lynching bill.[97]

III. THREE LEGISLATIVE PROPOSALS TO IMPROVE ACCOUNTABILITY FOR MINNESOTA POLICE

A Proposal No. 1: Enact a State-based Equivalent to § 1983

Section 1983 is considered "the most important legal vehicle for holding police and other government officials accountable for misconduct."[98] The law was written specifically "to interpose the federal courts between the States and the people . . . to protect the people from unconstitutional action under color of state law."[99] The Supreme Court once believed that the purpose of § 1983 was to establish "the role of the Federal Government as a guarantor of basic federal rights against state power."[100] As the Court explained, § 1983 "was intended not only to provide

[96] Act approved Apr. 20, 1921 §§1–4. For example, the civil cap on damages against a county was $7,500, the same amount sought by one of the lynching victim's fathers. BESSLER, *supra* note 46, at 220.

[97] *See* S. Con. Res. 14, 1935 Leg., Reg. Sess. (Minn. 1935) ("BE IT RESOLVED, by the Senate of the State of Minnesota, the House of Representatives concurring therein, that the Congress of the United States be and is hereby memorialized to enact a Federal Anti-Lynching law at the present session."); H.R. Con. Res. 16, 1937 Leg., Reg. Sess. (Minn. 1937) (same).

[98] *See* Hon. Adelman, *supra* note 29, at 2; *see also* Mitchum v. Foster, 407 U.S. 225, 239 (1972) ("Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."). The Supreme Court also recognized the important role of § 1983 in *Gomez v. Toledo*, 446 U.S. 635, 638–39 (1980) ("This statute, enacted to aid in the preservation of human liberty and human rights reflects a congressional judgment that a damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees.") (internal citations omitted).

[99] *Mitchum*, 407 U.S. at 242.

[100] *Id.* at 239. The federal legislation was necessary because "state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Id.* at 240. Section 1983 was crafted to "alter[] the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." *Id.* at 242.

compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well."[101]

However, the Court has incrementally disabled § 1983.[102] As a result, § 1983 has "failed to live up to its promise of eradicating widespread and pernicious practices of rank and file officers."[103] Instead of preserving § 1983's original purpose as a "guarantor of basic federal rights against state power," the Court has reversed course and worries instead about the "potential costs that § 1983 imposes on government."[104] While protecting government officials, the Court "has consistently narrowed the statute and made it more difficult for plaintiffs to vindicate violations of their rights."[105]

1. The Unfulfilled Promise of § 1983

a. The Complicated History of § 1983

Section 1983 was originally enacted as Section 1 of the Ku Klux Klan Act of 1871,[106] in response to some of the most violent racial hostility

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[101] Owen v. City of Independence, 445 U.S. 622, 651 (1980).

[102] *See* Gary S. Gildin, *Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court's Constitutional Remedies Jurisprudence*, 115 PENN ST. L. REV. 877, 889–90 (2011) (explaining how the Court's more recent interpretation of § 1983 "has erected three often insurmountable obstacles to recovering damages caused by the violation of federal constitutional rights (qualified immunity, no vicarious liability, and absolute immunity for state government entities)"); Hon. Adelman, *supra* note 29, at 4 (2018) ("[T]he Court has been hostile to the statute, continuously narrowing it and imposing restrictions on civil rights plaintiffs."); Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1751 (1989) ("[T]he Supreme Court has increasingly undermined and demeaned § 1983 with a tort rhetoric strategy designed to control the statute's text and interpretation."); *see also infra* notes 164–85 and accompanying text (detailing the impact of qualified immunity on § 1983 interpretation).

[103] Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 20 (2000).

[104] *Compare* Mitchum v. Foster, 407 U.S. 225, 239 (1972) (citing Monroe v. Pape, 365 U.S. 167 (1961)), *with* Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 95 (1989). *See also* Thompson v. Clark, No. 14-CV-7349, 2018 WL 3128975, at *9–10 (E.D.N.Y. June 26, 2018) (describing the Court's policy justifications for limiting § 1983's reach and concluding that "consistently lurking in the background is the threat of financial cost to government officials").

[105] Hon. Adelman, *supra* note 29, at 12.

[106] Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, § 1 (codified at 42 U.S.C. § 1983). In relevant part, the Ku Klux Klan Act, which is substantively similar to the current language of § 1983, provided as follows:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the

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in the country's history.[107] Congress rushed through passage of the Act "in a highly inflamed atmosphere."[108] With a certain degree of understatement, the Supreme Court explained in 1985 that the "specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights."[109] But the true scale of the dire circumstances surrounding passage of the Act provides important context to its purpose, as the Court acknowledged just twelve years earlier: "Any analysis of the purposes and scope of § 1983 must take cognizance of the events and passions of the time at which it was enacted."[110]

As soon as the Civil War ended, White Southerners organized the Ku Klux Klan, and "a wave of murders and assaults was launched against both African Americans and Union sympathizers."[111] The Ku Klux Klan and other various white supremacist groups intended to restore the racial hierarchy of the pre-war South by all means available, including murder, threats, intimidation, and the essential takeover of the local legal system,

> party injured in, any action at law, suit in equity, or other proper proceeding for redress[.]

Id. The provision was patterned after a criminal provision in the Civil Rights Act of 1866, but that act was vetoed by President Andrew Johnson. Gene R. Nichol, Jr., *Federalism, State Courts, and § 1983*, 73 VA. L. REV. 959, 972 (1987).

[107] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 425–26 (1988). On the House floor, Congressman Joseph Hayne Rainey, the first African American to serve in the House of the Representatives, stated that the "enormity of the crimes constantly perpetrated there finds no parallel in the history of this Republic in her very darkest days." CONG. GLOBE, 42nd Cong., 1st Sess. 393–95 (1871).

[108] Collins v. Hardyman, 341 U.S. 651, 657 (1951). The Act was "rushed through a deeply troubled Republican Congress." Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. § 1985(3)*, 64 TEX. L. REV. 527, 530 (1985); *see also* Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658, 665 (1978) ("Section 1, now codified as 42 U.S.C. § 1983, was the subject of only limited debate and was passed without amendment.").

[109] Wilson v. Garcia, 471 U.S. 261, 276 (1985). Two years before he wrote those words, Justice Stevens was a little more descriptive about the history that led to the Act's passage:

> The Ku Klux Act . . . was enacted on April 20, 1871, less than a month after President Grant sent a dramatic message to Congress describing the breakdown of law and order in the Southern states. During the debates, supporters of the bill repeatedly described the reign of terror imposed by the Klan upon Black citizens and their White sympathizers in the Southern states. Hours of oratory were devoted to the details of Klan outrages—arson, robbery, whippings, shootings, murders, and other forms of violence and intimidation—often committed in disguise and under cover of night. These acts of lawlessness went unpunished, legislators asserted, because Klan members and sympathizers controlled or influenced the administration of state criminal justice.

Briscoe v. LaHue, 460 U.S. 325, 337 (1983) (citation omitted).

[110] District of Columbia v. Carter, 409 U.S. 418, 425 (1973).

[111] *Id.*

including the state courts and local police.[112] As a result, "Congress faced, just years after the close of an actual civil war, the threat of increasing violence by those who were defeated on the battlefield and who, some feared, sought to resurrect that system of political, economic, and social organization that sparked the war."[113] Similarly disturbing, local authorities either "did nothing to protect the freedmen or actively participated in the assaults."[114]

Congress responded by making certain acts punishable under federal law because of the inability (and unwillingness) of the state courts at that time to "enforce their own laws against those violating the civil rights of others."[115] As the Court famously explained

> It is abundantly clear that one reason [§ 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and

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[112] *See generally* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 199 (1980) ("The violence mounted through the late 1860s and early 1870s as the Ku Klux Klan organized raids, lynchings, beatings, burnings."); W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 1860–1880, 670 (1935) (detailing the strategic use of atrocities during this period by "secret organizations and the rise of a new doctrine of race hatred"); FONER, *supra* note 107, at 425 ("In effect, the Klan was a military force serving . . . all those who desired the restoration of white supremacy.").

[113] Michael F. Roessler, *Mistaking Doubts and Qualms for Constitutional Law: Against the Rejection of Legislative History as A Tool of Legal Interpretation*, 39 SW. L. REV. 103, 121 (2009). "The South had lost the war, but it appeared to some in Congress that, even in defeat, elements of the rebellion would attempt to impose by violence in a time of ostensible peace that which could not be won on the battlefields during a time of actual war." *Id.* As Justice Brennan put it, "It was fighting to save the Union." Will v. Mich. Dep't of State Police, 491 U.S. 58, 85 (1989) (Brennan, J., dissenting). Of course, racially marginalized communities and individuals were still subject to racist murder and other violence well into the twentieth century (and to a lesser degree even today). *See generally* MANNING MARABLE, RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION OF BLACK AMERICA, 1945–1990, at 174–78 (1991) (detailing acts of violence by the Ku Klux Klan in the twentieth century); *see also* TIMOTHY TYSON, THE BLOOD OF EMMETT TILL 214 (2017) ("A white supremacist gunman slaughtering nine Black churchgoers in a prayer meeting in Charleston, South Carolina, in 2014, however, reminds us that the ideology of white supremacy remains with us in its most brutal and overt forms.").

[114] *See* Gilles, *supra* note 103, at 55–56 ("Sheriffs refused to investigate or arrest [White people] suspected of crimes against [African Americans], district attorneys refused to prosecute, and courts refused to entertain civil cases brought by the freedmen against their [W]hite persecutors.").

[115] *Carter*, 409 U.S. at 426; *see also* CONG. GLOBE, 42nd Cong., 1st Sess., App. 252 (1871) (statement of Sen. Oliver H.P.T. Morton of Ind.) ("But it is said that these crimes [established by the Ku Klux Klan Act] should be punished by the States; that they are already offenses against the laws of the States, and the matter should be left to the States. The answer to that is, that the States do not punish them; the States do not protect the rights of the people; the State courts are powerless to redress these wrongs.").

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> immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.[116]

The Court cited the extensive legislative history of the Act, including the forceful remarks of Representative David Lowe who explained, "While murder is stalking in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective."[117]

Given the depth of the problem, it was clear from the onset that the application of § 1983 would have to be broad.[118] The chief author of the Act, Representative Samuel Shellabarger, advised that § 1983 was to be "liberally and beneficently construed" to afford a remedy to victims, as is characteristic of remedial statutes designed to protect individual liberty.[119] Even the bill's opponents understood the broad remedial power that Congress intended.[120] While opposing the bill, Senator Allen Thurman observed, "[T]here is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used."[121]

Despite its noble beginnings, however, § 1983 was dormant for nearly a century.[122] Indeed, § 1983 was "almost dead on arrival" given the

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[116] Monroe v. Pape, 365 U.S. 167, 180 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs. Of City of N.Y., 436 U.S. 658 (1978).

[117] CONG. GLOBE, 42nd Cong., 1st Sess., App. 374 (1871) (statement of Rep. David Lowe). Rep. Lowe reported, "Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice." *Id.*; *see also* Ngiraingas v. Sanchez, 495 U.S. 182, 182 (1990) ("[I]n 1871, Congress was concerned with Ku Klux Klan activities that were going unpunished in the Southern States and designed § 1983's remedy to combat this evil, recognizing the need for original federal-court jurisdiction as a means to provide at least indirect federal control over the unconstitutional acts of state officials.")

[118] *See, e.g.*, Gildin, *supra* note 102, at 888 ("The unqualified language and legislative history of Section 1983 suggest that the statute would furnish a generous remedy to victims of governmental misconduct."); Gomez v. Toledo 446 U.S. 635, 639 (1980) ("As remedial legislation, § 1983 is to be construed generously to further its primary purpose.").

[119] CONG. GLOBE APP., 42nd Cong., 1st Sess. 68 (1871) (statement of Rep. Samuel Shellabarger) ("Th[e] [A]ct is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation.").

[120] *See* Gildin, *supra* note 102, at 888 ("Supporters and opponents alike acknowledged the breadth of the remedy that Section 1983 imparted to citizens whose federal constitutional rights were invaded.").

[121] CONG. GLOBE APP., 42nd Cong., 1st Sess. 216–17 (1871) (statement of Sen. Allen Thurman). The Court felt that Thurman "gave the most exhaustive critique" of the Act during legislative debates. *Monell*, 436 U.S. at 682.

[122] ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.2, at 374 (1989).

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Supreme Court's treatment of civil rights after Reconstruction.[123] The Court's view of civil rights in the decades following its passage "immobilized section 1983."[124] Its ineffectiveness likely kept it good law, however, since "[m]ost of the effective civil rights laws were repealed in 1894."[125] As Supreme Court Justice Harry Blackmun concluded, in this "Dark Age of Civil Rights, . . . the Nation's commitment to civil rights lay in remnants."[126] A study in 1951 found only twenty-one reported § 1983 cases in the fifty years after its enactment.[127]

b. *The Renewal of § 1983* – Monroe v. Pape

The Court brought § 1983 back to life in 1961 in *Monroe v. Pape*.[128] In *Monroe*, an African American family (including young children) alleged that thirteen Chicago police officers broke into their home early one morning, "routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers."[129] The father, James Monroe, was then taken to the police station and detained on "open charges" for ten hours, interrogated in connection with a murder, denied a hearing before a magistrate, barred from calling his family or an attorney, and subsequently released with no charges against

[123] *See* Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of § 1983*, 77 GEO. L.J. 1493, 1498–99 (1989) (noting that § 1983 "served as the litigational vehicle for only a smattering of constitutional cases in its first fifty years").

[124] *See* Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 506 (1993) ("Shortly after the 1871 statute became law, and for the next ninety years, the Court's opinions immobilized [§] 1983, rendering it ineffective against both an individual officer's constitutional abuses and a municipality's role as a 'moving force' in causing those constitutional violations.").

[125] *See* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 549 n.153 (1982) ("Ironically, had § 1983 developed in the 1870s, it is unlikely that it would have survived. Most of the effective civil rights laws were repealed in 1894.").

[126] Justice Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 11 (1985). As Justice Harry Blackmun reported, "from the 1890's to the 1940's, the Civil Rights Acts lay virtually dormant." *Id.* at 12. And "between 1939 and 1961, the significant § 1983 cases, like those prior to 1939, were few." *Id.* at 19. Part of the reason for so few suits was that there were also few recognized federal rights. Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 188 (2012) ("With so few rights to assert in a § 1983 lawsuit, there were few lawsuits.").

[127] Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363–66 (1951).

[128] 365 U.S. 167, 169 (1961); *see also* Barbara Kritchevsky, *"Or Causes to Be Subjected": The Role of Causation in Section 1983 Municipal Liability Analysis*, 35 UCLA L. REV. 1187, 1188 (1988) ("The Supreme Court liberated [§] 1983 from almost a century of obscurity when it decided *Monroe v. Pape*.").

[129] *Monroe*, 365 U.S. at 169.

him.[130] Using § 1983, the family sued the officers, the Chicago Police Department, and the City of Chicago for damages.[131] The lower court dismissed the complaint, and the Seventh Circuit Court of Appeals upheld the dismissal, ruling that police officer misconduct did not make a "sufficient showing of a violation" of § 1983 under existing precedent.[132]

The Supreme Court reversed the Seventh Circuit decision, holding that a § 1983 action could be brought against persons who violated federally protected rights even though their acts were not authorized by state law.[133] After a lengthy review of the legislative history, the Court established three core principles of § 1983 jurisprudence. First, the Court clarified that police officers could still be held liable under § 1983 if their conduct was not authorized (or even prohibited) by the state, expanding the definition of "under color of state law."[134] Second, the Court held that § 1983 "was supplementary to the state remedy" so that plaintiffs did not have to first demonstrate whether state law remedies were available.[135] As a result, *Monroe* "not only contributed to the expanded role of federal law in protecting individual rights but also guaranteed direct access to a federal forum in § 1983 actions" regardless of whether there were any state law remedies available.[136] Third, § 1983 requires no particular state of mind requirement as a condition of liability.[137] Accordingly, "*Monroe* led to an

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[130] *Id.*

[131] Monroe v. Pape, 272 F.2d 365, 365 (7th Cir. 1959), *rev'd*, 365 U.S. 167 (1961).

[132] *Id.* at 366. As the Seventh Circuit explained, "We do not condone the alleged misconduct of defendants, if true, but that is not the question before us. Under the . . . decisions of this circuit . . . the dismissal before us necessarily follows. Plaintiffs are not without their remedy in the state court." *Id.*

[133] *Monroe*, 365 U.S. at 184–85.

[134] *Id.* at 171. As the Court explained, "Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Id.* at 171–72; *see also* United States v. Classic, 313 U.S. 299, 326 (1941) ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."). As the Court in *Monroe* made clear, "We conclude that the meaning given 'under color of' law in the *Classic* case . . . was the correct one; and we adhere to it." *Monroe*, 365 U.S. at 187.

[135] *Monroe,* 365 U.S. at 183 ("It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked"). As the Court made clear, § 1983 "was passed . . . to afford a federal right in federal courts." *Id.* at 180.

[136] Steven H. Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. MIAMI L. REV. 381, 389 (1984).

[137] *See Monroe*, 365 U.S. at 187 (ruling that the law "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions").

explosion of Section 1983 claims in federal courts and to a corresponding increase in attempts by the Court to limit its effects."[138]

c. Congress Strengthens § 1983 – Attorney's Fees

Congress would soon enhance § 1983 with the addition of attorney's fees for successful plaintiffs in 1976.[139] Congress added attorney's fees in response to the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*.[140] The Court ruled in *Alyeska* that without statutory guidance or other exceptions that were not applicable in this case, attorney's fees were not available.[141] In doing so, the Court reaffirmed the "American rule" that "each party in a lawsuit ordinarily shall bear its own attorney's fees unless there is express statutory authorization to the contrary."[142] Although *Alyeska* was not a § 1983 case, lower courts interpreted the decision to apply to § 1983 claims.[143]

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[138] Edward R. Stabell, III, Zinermon v. Burch*: Putting Brackets Around the Parratt Doctrine*, 42 MERCER L. REV. 1655, 1656 (1991). Justice Scalia also noticed the impact of *Monroe* on the volume of cases. *See* Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("*Monroe* changed a statute that had generated only 21 cases in the first 50 years of its existence into one that pours into the federal courts tens of thousands of suits each year . . . .").

[139] Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976) (amending 42 U.S.C. § 1988 (1970), current version at 42 U.S.C. § 1988 (2000)) (providing that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs"); *see also* Maine v. Thiboutot, 448 U.S. 1, 9 (1980) ("The legislative history is entirely consistent with the plain language. As was true with § 1983, a major purpose of the Civil Rights Attorney's Fees Awards Act was to benefit those claiming deprivations of constitutional and civil rights.").

[140] 421 U.S. 240 (1975). For an interesting historical perspective detailing the origins of the bill, including the role NAACP lobbyist Clarence Mitchell had in the initiation of the legislation, see Armand Derfner, *Background and Origin of the Civil Rights Attorney's Fee Awards Act of 1976*, 37 URB. LAW. 653, 653 (2005).

[141] *See Alyeska*, 421 U.S. at 247 ("[W]e are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals.").

[142] Hensley v. Eckerhart, 461 U.S. 424, 429 (1983); *see also Alyeska*, 421 U.S. at 247 ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.").

[143] *Alyeska* was brought under the Mineral Leasing Act of 1920, but the Court's denial of attorney's fees absent statutory authorization was used by courts in denying attorney's fees in § 1983 actions. *See* Jeffrey A. Parness & Gigi A. Woodruff, *Federal District Court Proceedings to Recover Attorney's Fees for Prevailing Parties on Section 1983 Claims in State Administrative Agencies*, 18 GA. L. REV. 83, 86–88 (1983) (citing Hostrop v. Bd. of Junior Coll., 523 F.2d 569, 580 (7th Cir. 1975) (former college president entitled to recover damages for wrongful termination of employment, but not attorney's fees under § 1983), *cert. denied*, 425 U.S. 963 (1976); Burband v. Twomey, 520 F.2d 744, 749 (7th Cir. 1975) (finding a state prisoner who challenged certain prison disciplinary proceedings under § 1983 was not entitled to an award of attorney's fees); Hander v. San Jacinto Junior

In response, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988,[144] authorizing courts to award reasonable attorney's fees to prevailing plaintiffs in civil rights cases.[145] Congress explicitly referenced *Alyeska* in crafting the new legislation, pointing out that every other civil rights law included provisions for attorney's fees.[146] As Professor Pamela Karlan explained, "Every significant contemporary civil rights statute contains some provision for attorney's fees, and in 1976, Congress passed a comprehensive attorney's fee statute that provides for fees under the most important Reconstruction [e]ra civil rights statutes as well."[147]

In providing attorney's fees, Congress recognized the important role of private parties and their lawyers in enforcing § 1983.[148] The drafters understood that without providing attorney's fees, many civil plaintiffs would be unable to afford counsel.[149] As the legislative history explains, "[i]f private

Coll., 519 F.2d 273, 281 (5th Cir. 1975) (wrongful discharge of "bearded" college president would not justify award of attorney's fees under § 1983)).

[144] Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified at 42 U.S.C. § 1988 (1976)). The statute reads as follows: "In any action or proceeding to enforce a provision of § 1981, 1982, 1983, and 1986 of this title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Id.* at § 1988(b).

[145] *Hensley*, 461 U.S. at 429.

[146] *See* S. REP. NO. 94-1011, 4, 1976 U.S.C.C.A.N. 5908, 5912 ("This bill . . . is an appropriate response to the *Alyeska* decision. It is limited to cases arising under our civil rights laws, a category of cases in which attorneys' fees have been traditionally regarded as appropriate. It remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska*, and makes our civil rights laws consistent.")

[147] Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 205 (2003); *see also* S. REP. 94-1011, 4, 1976 U.S.C.C.A.N. 5908, 5911 ("This decision and dictum created anomalous gaps in our civil rights laws whereby awards of fees are, according to *Alyeska*, suddenly unavailable in the most fundamental civil rights cases.").

[148] S. REP. NO. 94-1011, 2, 1976 U.S.C.C.A.N. 5908, 5909–10 ("All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.").

[149] *See id.* at 5910 ("In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer."); *Zarcone v. Perry*, 581 F.2d 1039, 1042 (2d Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979) ("Its goal was to remove financial impediments that might preclude or hinder 'private citizens,' collectively or individually, from being 'able to assert their civil rights.'" (citations omitted)); *see also* H.R. REP. NO. 1558, 94th Cong., 2nd Sess. 1 (1976) ("The effective enforcement of federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate a court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing

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citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."[150] In addition, without attorney's fees, lawyers might avoid cases that involve only equitable relief, many of which "often do the most to vindicate important societal interests."[151]

As the Supreme Court acknowledged, the Attorney's Fees Awards Act "g[ave] the victims of civil rights violations a powerful weapon that improves their ability to employ counsel, to obtain access to the courts, and thereafter to vindicate their rights by means of settlement or trial."[152] The addition of attorney's fees has proven to be "an important tool to ensure that civil rights laws are enforced."[153] The impact of the Act was seen immediately in the number of civil rights cases filed. Within the first five years, "the number of civil rights cases brought against state and local governments under 42 U.S.C. § 1983 increased by two-thirds."[154] Despite significant setbacks in recent years in the Supreme Court,[155] and a

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an award of reasonable attorney's fees § 1988 is designed to give such persons effective access to the judicial process where their grievances can be resolved according to the law.").

[150] S. REP. NO. 94-1011, 2, 1976 U.S.C.C.A.N. 5908, 5910. Congress recognized that without fee awards to promote private enforcement of civil rights laws, these laws would become "mere hollow pronouncements" out of the reach of victims of racial discrimination. *Id.* at 6, *reprinted in* 1976 U.S.C.C.A.N. at 5913.

[151] Karlan, *supra* note 147, at 205–06. Indeed, as Professor Karlan explained, such cases, which often do not involve large damages awards and contingency payouts for lawyers, "are the ones where plaintiffs function most clearly as private attorneys general." *Id.*; *see also* Newman v. Piggie Park Enters., 390 U.S. 400, 401 (1968) ("If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.").

[152] Evans v. Jeff D., 475 U.S. 717, 741 (1986).

[153] Case Note, *Federal Government Litigation—Equal Access to Justice Act—Fourth Circuit Holds That Attorney's Fees Are Payable to Claimant and Are Eligible for Administrative Offset*—Stephens ex rel. R.E. v. Astrue, 565 F.3d 131 (4th Cir. 2009), 123 HARV. L. REV. 792, 797 (2010).

[154] Mark D. Boveri, Note, *Surveying the Law of Fee Awards Under the Attorney's Fees Awards Act of 1976*, 59 NOTRE DAME L. REV. 1293, 1295 (1984) (citing Robert A. Diamond, *The Firestorm Over Attorney Fee Awards*, 69 A.B.A. J. 1420 (1983)). According to the Administrative Office of the U.S. Courts, "the number of lawsuits filed against state and local governments rose from 17,543 in 1976 to 29,173 in 1981." *Id.* at 1295 n.14. *But see* Jose Roberto Juarez, Jr., *The Supreme Court As the Cheshire Cat: Escaping the Section 1983 Wonderland*, 25 ST. MARY'S L.J. 1, 52 (1993) ("While there has been a dramatic increase in the number of Section 1983 cases filed since the decision in Monroe, there is little empirical evidence that the federal courts are 'flooded' with Section 1983 cases.").

[155] Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 198 (1997) ("In the years since Congress enacted the Attorney's Fees Awards Act, however, Supreme Court decisions have sanctioned the practice of permitting waivers of attorneys' fees as a condition of settlement, imbued Rule 68 of the Federal Rules of Civil Procedure with enormous impact in civil rights cases, eliminated contingent risk enhancement of fees, and defined the damages available for

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proliferation of litigation on the calculation of fee awards,[156] attorney's fees remain a critical component to the enforcement of civil rights.[157]

2. *How the Supreme Court Has Undermined § 1983*

Despite its recognition as restoring the promise of § 1983,[158] the *Monroe* decision also marks the beginning of one of the Court's strikes against its efficacy. While the *Monroe* Court provided broad powers to sue individuals, it foreclosed the option of suing the responsible city government of a police department. In *Monroe*, the Court ruled that a municipality was not a "person" within the meaning of the statute and thus not liable under § 1983.[159] By barring civil rights suits against municipalities and local governments, the *Monroe* Court "eviscerated a valuable civil rights remedy."[160] Municipal liability was not recognized until seventeen years later in *Monell v. Department of Social Services*.[161] However, instead of respondeat superior, which is recognized in "nearly every other area of law,"[162] the Court in *Monell* limited recovery to "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . ."[163]

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violations of civil rights in a manner that minimizes the intangible or non-pecuniary character of many of the federal rights in issue.").

[156] *See* Emily M. Calhoun, *Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U.S.C. § 1988*, 55 U. COLO. L. REV. 341, 343–44 (1984) ("Attorneys frequently request courts to award fees in civil rights cases and, as a result, litigation over the propriety of fee awards proliferates.").

[157] *See* Gautreaux v. Chi. Hous. Auth., 610 F. Supp. 29, 30 (N.D. Ill. 1985) ("When Congress created the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, it recognized the critical nexus between providing for recovery of attorney's fees and ensuring enforcement of the civil rights laws.").

[158] Justice Blackmun, *supra* note 126, at 19 ("*Monroe* . . . is correctly credited as being a watershed in the development of § 1983.").

[159] Monroe v. Pape, 365 U.S. 167, 191–92 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). The Court explicitly ignored the "policy considerations" that "doubts should be resolved in favor of municipal liability because private remedies against officers for illegal searches and seizures are conspicuously ineffective, and because municipal liability will not only afford plaintiffs responsible defendants but cause those defendants to eradicate abuses that exist at the police level." *Id.* at 191.

[160] Conrad K. Harper, *The Overthrow of* Monroe v. Pape: *A Chapter in the Legacy of Thurgood Marshall*, 61 FORDHAM L. REV. 39, 39 (1992).

[161] *Monell*, 436 U.S. 658.

[162] *See* Chemerinsky, *supra* note 33 ("In almost every other area of law, an employer can be held liable if its employees, in the scope of their duties, injure others, even negligently. This encourages employers to control the conduct of their employees and ensures that those injured will be compensated.").

[163] *Monell*, 436 U.S. at 694. According to the Court,

a. *The Malignant Growth of Qualified Immunity*

Although addressing attorney's fees lowered a significant barrier to plaintiffs, the largest barrier to recovery for damages for police misconduct comes from qualified immunity. As studies consistently show, "nearly all of the Supreme Court's qualified immunity cases come out the same way—by finding immunity."[164] As Professor Joanna Schwartz recently concluded, "[s]ince 2005, when John Roberts became Chief Justice, the Court has granted certiorari to consider twenty qualified immunity denials, and ruled in the government's favor every time."[165] The Court has now "made clear that an officer's entitlement to qualified immunity remains stronger than ever."[166]

The concept of qualified immunity has existed in tort law since the nineteenth century, leaving the question of whether an officer exercised good faith for the jury to decide at trial.[167] But "common law qualified immunity is different from that which has been developed by federal courts construing civil rights claims."[168] The Supreme Court removed the question of good faith from the inquiry and converted a subjective test that was a

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> [T]he language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.

Id. at 691. For a survey of the various critiques of the *Monell* decision, see Edward C. Dawson, *Replacing* Monell *Liability with Qualified Immunity for Municipal Defendants in 42 U.S.C. § 1983 Litigation*, 86 U. CIN. L. REV. 483, 504 (2018) ("The *Monell* doctrine has drawn significant criticism and critique by both jurists and scholars."); *see also* City of Oklahoma City v. Tuttle, 471 U.S. 808, 841 (1985) (Stevens, J., dissenting) ("If the action of a police officer is far more serious than an ordinary state tort because it is made possible by his position, the underlying reason that such an action is a matter of federal concern is that it is treated as the action of the officer's employer. If the doctrine of *respondeat superior* would impose liability on the city in an ordinary tort case, *a fortiori,* that doctrine must apply to the city in a § 1983 case.").

[164] *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 82–83 (2018) ("In the thirty-five years since it announced the objective-reasonableness standard in *Harlow v. Fitzgerald,* the Court has applied it in thirty qualified immunity cases. Only twice has the Court actually found official conduct to violate clearly established law.").

[165] Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 310–11 (2020).

[166] Wayne S. Melnick, Sun S. Choy & A. Ali Sabzevari, *Flash-Bang Use: The Militarization of Police and the Status of Qualified Immunity*, DRI FOR DEF., June 2017, at 24, 26.

[167] Gail Donoghue & Jonathan I. Edelstein, *Life After* Brown*: The Future of State Constitutional Tort Actions in New York*, 42 N.Y.L. SCH. L. REV. 447, 526 (1998).

[168] *Id.*

question of fact for the jury into a question of law that allows courts to dismiss claims before ever reaching a fact finder.[169]

The Supreme Court began the process of undermining § 1983 claims when it first recognized the availability of the qualified immunity defense for police officers in 1967.[170] Despite any references to immunity in the statute itself or in the legislative history of the original Act,[171] the Court decided that the common law protected police officers from suit when they acted in good faith.[172] The rise of qualified immunity was likely the Court's response to a growth in constitutional tort claims, which began to rise after *Monroe* was decided in 1961.[173] Courts generally became concerned that "many of these lawsuits were frivolous and that defending them imposed both societal and individual costs."[174]

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[169] *See id.* ("The more recent objective inquiry established in *Harlow v. Fitzgerald* is purely a creature of civil rights law."); Anderson v. Creighton, 483 U.S. 635, 645 (1987) (acknowledging that the Court has "completely reformulated qualified immunity along principles not at all embodied in the common law").

[170] Pierson v. Ray, 386 U.S. 547, 557 (1967). Notably, the Court in *Pierson* never used the phrase "qualified immunity." Instead, the Court observed that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." *Id.* at 554. The Court also noted that "the prevailing view in this country [is that] a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved." *Id.* The Court then held that "the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983." *Id.* at 557.

[171] Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 78 (2016) ("[Q]ualified immunity is a doctrine—and a limitation on that statute—that is entirely the Court's creation, devoid of support in § 1983's legislative history.").

[172] *See Pierson*, 386 U.S. at 556–57 ("Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause."). Tort law had also been important to the Court in *Monroe*, where the Court said § 1983 "should be read against the background of tort liability." *Monroe*, 365 U.S. at 187.

[173] *See generally* CHEMERINSKY, *supra* note 122, at 428 (tracking the "phenomenal" growth in § 1983 litigation in the thirty years after *Monroe*). The rise in the number of cases was due to many factors, including the adoption of attorney's fees and the general growth in federal litigation during the 1980s. *Id.* at 428–29; *see also* Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1938–39 (2018) (noting that other contributing factors likely included extending the exclusionary rule to state courts under *Mapp v. Ohio* and recognizing a damages action against federal officials for constitutional violations under *Bivens*).

[174] Chen, *supra* note 173, at 1938–39 (identifying three categories of such costs that the Court found concerning, including: (1) the unfairness of imposing financial liability on officials who might not understand the nuances of constitutional doctrine; (2) the risk that officials would hesitate when required to act if they were concerned that their actions could subject them to a lawsuit ("overdeterrence"); and (3) being subject to the burdens of the judicial process would cost police officers time, distract them from their jobs, and require them to incur litigation expenses).

The Court has steadily expanded the reach of qualified immunity.[175] Within a few years of establishing qualified immunity in § 1983 cases, the Court began to shift from common law interpretation to imposing an objective standard that government officials had a responsibility to know the law.[176] Thereafter, the Court established qualified immunity as a shield against lawsuits, not merely as a defense to be raised at trial.[177] In *Harlow v. Fitzgerald*,[178] the Court eliminated the inquiry into an officer's subjective intent and put the emphasis squarely on whether the officer's conduct was objectively reasonable.[179] The Court was now making it possible for an officer, even acting in bad faith, to be immune from suit through qualified immunity.[180]

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[175] *See* Kinports, *supra* note 171, at 78 ("In recent years, the Supreme Court opinions applying the qualified immunity defense have engaged in a pattern of describing the defense in increasingly generous terms and qualifying and deviating from past precedent—without offering any justification or even acknowledgement of the Court's departure from prior case law."); *see also* Baude, *supra* note 164, at 81 (explaining the "unusual degree" to which the Court has "openly tinkered" with qualified immunity to negative effect).

[176] The Court reasoned that "the appropriate standard necessarily contains elements of both" subjective and objective factors. Wood v. Strickland, 420 U.S. 308, 321 (1975), *abrogated by* Harlow v. Fitzgerald, 457 U.S. 800 (1982). According to the Court, under § 1983, officials "must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges." *Id.* at 322. In extending qualified immunity to school district officials, the Court ruled that "an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice." *Id.* at 321.

[177] *See* Butz v. Economou, 438 U.S. 478, 508 (1978) ("[S]uits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity."). As the Court put it, "plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." *Id.*; *see also* Hunter v. Bryant, 502 U.S. 224, 227 (1991) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."); Mitchell v. Forsyth, 472 U.S. 511, 527 (1985) ("[T]he denial of qualified immunity should be similarly [immediately] appealable."); Hon. Adelman, *supra* note 29, at 10 ("[W]hen a defendant appeals an adverse ruling on qualified immunity, the appeal brings an immediate halt to all proceedings in the trial court. The effect of this, of course, is to make it much more difficult for a civil rights plaintiff to pursue a claim.").

[178] Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[179] The Court decided that "[t]he subjective element of the good-faith defense frequently has proved incompatible with our admonition that insubstantial claims should not proceed to trial." *Id.* at 815–16 (citations omitted).

[180] *See, e.g.*, Mullenix v. Luna, 577 U.S. 7, 26 (2015) (Sotomayor, J. dissenting) (stating "an officer's actual intentions are irrelevant"); *see also* Joanna Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1802 (2018) ("Even when a plaintiff can demonstrate that a defendant was acting in bad faith, that evidence is considered irrelevant to the qualified immunity analysis.").

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Lastly, the Court imposed the standard that the conduct in question must violate "clearly established law."[181] As the Court now makes clear, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[182] The Court requires that "existing precedent must have placed the statutory or constitutional question beyond debate."[183] Whether the right at issue was clearly established involves an analysis of precedent to determine whether it "squarely governs the case" before the court.[184] As one circuit judge put it, "[m]erely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question 'beyond debate' to 'every' reasonable officer."[185]

b. Qualified Immunity – The Current State

The vast expansion of qualified immunity has played out with distressing results. Courts "aggressively dismiss[] civil rights cases on the ground of qualified immunity."[186] The Court watches lower courts like a hawk, closely monitoring any motions denying qualified immunity and placing outsized attention on the issue.[187] The Court has managed to draw

[181] Anderson v. Creighton, 483 U.S. 635, 639 (1987). Qualified immunity shields police officers from lawsuits based on official conduct if reasonable officers in the same position could have believed their conduct was "lawful, in light of clearly established law and the information the . . . officers possessed" at the time. *Id.* at 641. According to the Court, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640; *see also Mitchell* v. Forsyth, 472 U.S. 511, 528 (1985) (finding that officials are immune unless "the law clearly proscribed the actions" they took).

[182] Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017); *see also Malley v. Briggs,* 475 U.S. 335, 341 (1986) ("Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.").

[183] Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

[184] Brosseau v. Haugen, 543 U.S. 194, 201 (2004).

[185] Zadeh v. Robinson, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part). Judge Willett expressed his "broader unease with the real-world functioning of modern immunity practice." *Id.* In a scathing rebuke of the Supreme Court's qualified immunity jurisprudence, he concluded that "[t]o some observers, qualified immunity smacks of unqualified impunity," because public officials are allowed to "duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the first to behave badly." *Id.*

[186] Hon. Adelman, *supra* note 29, at 9 (reporting that a recent survey found that courts dismissed approximately seventy-two percent of claims, and "most of the dismissals were based on a determination that the plaintiff failed to present a sufficiently similar precedent").

[187] *See, e.g.,* City & Cnty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1780 n.3 (2015) ("[T]he Court often corrects lower courts when they wrongly subject individual officers to liability."); *see also* Baude, *supra* note 164, at 48 ("Essentially, the Court's agenda is to especially ensure that lower courts do not improperly deny any immunity. This approach

criticism from a wide range of ideological perspectives on its application of qualified immunity.[188] Even Justices from different ideological camps have openly questioned the Court's approach to qualified immunity.[189] And numerous scholars have criticized the doctrine,[190] illustrating example after example of the miscarriage of justice in the pursuit of such unexamined deference to police officers.[191] As Justice Sotomayor explained, the balance

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sends a strong signal to lower courts and elevates official-protective qualified immunity cases to a level of attention exceeded only by the Court's state-protective habeas docket.").

[188] *See, e.g.*, Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner at 6, Baxter v. Bracy, 751 F. App'x 869 (6th Cir. 2018) (No. 18-1287), *cert. denied* 140 S. Ct. 1862 (2020) ("*Amici* reflect an extensive cross-ideological and cross-professional consensus that this Court's qualified immunity case law undermines accountability, harming citizens and public officials alike. . . . The diversity of the signatories reflects how qualified immunity abets and exacerbates the violation of constitutional rights of every sort—including the rights to freedom of speech and religious exercise, to keep and bear arms, to be free from unreasonable searches and seizures, to be free from cruel and unusual punishment, to be free from racial discrimination, and to pursue a lawful occupation, just to name a few.").

[189] *See, e.g.,* Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In further elaborating the doctrine of qualified immunity . . . we have diverged from the historical inquiry mandated by the statute."); *Wyatt v. Cole,* 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity . . . we have diverged to a substantial degree from the historical standards."); *Kisela v. Hughes,* 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (stating the Court's "one-sided approach to qualified immunity" has "transform[ed] the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment").

[190] *See, e.g.*, Schwartz, *supra* note 165, at 311–12 ("[T]here have been growing calls by courts, as well as by a number of commentators and advocacy organizations across the political spectrum, to reconsider qualified immunity or do away with the defense altogether."); Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1892 (2018) ("The doctrine of qualified immunity is beyond repair."); Baude, *supra* note 164, at 88 (arguing the doctrine "lacks legal justification, and the Court's justifications are unpersuasive"); Kinports, *supra* note 171, at 78 (finding that the "increasingly broad brush" with which the Supreme Court has categorized the qualified immunity defense will likely increase protections for government defendants); Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 232 (2006) (arguing the Supreme Court has increasingly treated qualified immunity like absolute immunity—that is, as a total bar on suits against government officials).

[191] One of several examples comes from one of the most progressive circuits in the nation, illustrating just how widespread the issue is throughout the federal court system. The Ninth Circuit upheld a grant of qualified immunity to a police officer who, during a routine traffic stop, directed the vehicle's driver to sit on the officer's cruiser, pointed a gun at the driver's head, and threatened to kill him if he declined to surrender on weapons charges when the officer discovered a gun in the backseat. Thompson v. Rahr, 885 F.3d 582, 588 (9th Cir. 2018). The court granted qualified immunity because the unlawfulness of the officer's actions had not been clearly established under the circumstances because the stop had occurred at night, the driver had a prior conviction for unlawful firearms possession, and the driver "stood six feet tall," "weighed two hundred and sixty-five pounds," and "was only 10–15 feet away" from the gun. *Id.*; *see also* Rachel Moran, *In Police We Trust*, 62 VILL. L. REV. 953,

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tips too favorably toward the police, as the Court now "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."[192]

3. *The New Federalism – States Take Over As Federal Courts Have Failed*

States have the power to restore the original promise of § 1983 by creating an equivalent statute under state law. Ironically, it may now be left to state courts to provide the sort of accountability that federal courts were assigned 160 years ago in the Ku Klux Klan Act: it could be up to the states to prosecute what the federal government cannot.[193] Looking to state law when federal courts have restricted civil rights is not new, of course. As Justice Brennan wrote over forty years ago in the face of growing resistance in federal court to desegregation and other issues, "the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach."[194] Justice Brennan was writing in "response to the

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968 (2017) (collecting cases from the Supreme Court demonstrating that "[t]he Court's veneration of police officers has not abated in recent years"); Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1407 (2019) (collecting other recent cases from the Supreme Court and answering the question, "why does qualified immunity matter? Among other reasons, because it excuses conduct that seems inexcusable.").

[192] *See Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting).

[193] Of course, the law may not be the only reason why state courts could be better venues for prosecuting civil rights. The federal bench is becoming less and less diverse demographically and by legal experience. *See, e.g.*, Maggie Jo Buchanan, *The Startling Lack of Professional Diversity Among Federal Judges*, CTR. FOR AM. PROGRESS (June 17, 2020), https://www.americanprogress.org/issues/courts/news/2020/06/17/486366/startling-lack-professional-diversity-among-federal-judges/ [https://perma.cc/LW5J-WHBP] ("According to the Federal Judicial Center, only around 1 percent total of all federal appellate judges spent the majority of their careers as public defenders or legal aid attorneys."); Elie Mystal, *Donald Trump and the Plot to Take Over the Courts*, THE NATION (July 15, 2019), https://www.thenation.com/article/society/trump-mcconnel-court-judges-plot/ [https://perma.cc/TR3D-59KB] ("They're hostile to minority voting rights and claims of racial or gender discrimination. They're largely young and inexperienced, and an unsettling number have earned their stripes as partisan think-tank writers, op-ed columnists, or even bloggers."); Andrew Cohen, *Trump and McConnell's Overwhelmingly White Male Judicial Appointments*, BRENNAN CTR. FOR JUST. (July 1, 2020), https://www.brennancenter.org/our-work/analysis-opinion/trump-and-mcconnells-overwhelmingly-white-male-judicial-appointments [https://perma.cc/5MXM-ANN4] ("In his first 40 months in office, Trump already has filled about 30 percent of the positions in the country's federal appeals courts, where most of federal law is settled. Not a single one of Trump's 53 confirmed appeals court nominees is Black. Only a single confirmed appeals court nominee is Latino.").

[194] Justice William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977). One generation earlier, Justice Brandeis made a similar call for more state-based efforts. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single

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Burger Court's increasingly conservative interpretation of the federal constitution."[195] Until now, however, examples of using state courts to promote civil rights have been few and far between.[196]

a. Examples from Other States

A state-equivalent § 1983 statute is the logical next step to overcome what has happened to the federal version. Colorado has already taken such a step. Shortly after the killing of George Floyd amidst protests at the state Capitol,[197] and with remarkable bipartisan support,[198] Colorado enacted Senate Bill 20–217 ("SB-217").[199] Hailed as "The Law Enforcement

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courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[195] Caroline Davidson, *State Constitutions and the Humane Treatment of Arrestees and Pretrial Detainees*, 19 BERKELEY J. CRIM. L. 1, 4–5 (2014).

> Adopting the premise that state courts can be trusted to safeguard individual rights, the Supreme Court has gone on to limit the protective role of the federal judiciary. But in so doing, it has forgotten that one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled.

Justice Brennan, *supra* note 194, at 502–03.

[196] Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN ST. L. REV. 783, 783 (2011) ("The promise of 'the New Judicial Federalism'—of the independent interpretation by state courts of state constitutional corollaries to the federal Bill of Rights—has gone largely unfulfilled. . . . [I]ndependent state constitutionalism . . . is today more an aspiration than a practice."). *But see* Jim Hilbert, *Restoring the Promise of* Brown*: Using State Constitutional Law to Challenge School Segregation*, 46 J.L. & EDUC. 1, 4 (2017) (discussing how state constitutional claims can address school segregation).

[197] The protests had an impact. As Colorado State Representative and co-author of the bill Leslie Herod recalled, "Every day we would go into the capitol, and by about noon, we would start to hear chants from the crowd, . . . [like,] 'Pass 217! I can't breathe.['] [Then] eight minutes, forty-six seconds of silence. That gets in people's minds." Berman, *supra* note 41.

[198] The Colorado Senate approved the bill nearly unanimously by a vote of thirty-three to two, and the House passed it by a vote of fifty-two to thirteen. Alex Burness & Saja Hindi, *How Colorado Found the Political Will to Pass a Sweeping Police Reform Law in Just 16 Days*, DENVER POST (June 19, 2020), https://www.denverpost.com/2020/06/19/colorado-police-reform-accountability-bill/ [https://perma.cc/L9UT-BBPA].

[199] Representative Herod acknowledged the broad implications of the new bill. *See* Nick Sibilla, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way to Protect Civil Rights*, FORBES MAG. (June 21, 2020), https://www.forbes.com/sites/nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/#11b3e3cb378a [https://perma.cc/2VS7-LSDE] (quoting Representative and co-sponsor Leslie Herod, "Generations of Coloradans and communities across the country have been waiting far too long for this historic moment. . . . Together, we've made real change to address the violence and brutality that Black and Brown communities have endured at the hands of law enforcement."). Representative Herod had tried to implement narrower reforms earlier in

Integrity and Accountability Act," SB-217 implements a wide range of major policing reforms, including mandatory body-worn cameras,[200] annual reporting on the use of force,[201] prohibitions on the use of projectiles and chemical agents in response to protests,[202] new limits on the general use of force,[203] including a ban on the use of choke holds,[204] and a duty to intervene on the part of officers who witness fellow officers use excessive force.[205]

While those reforms are important changes to Colorado law and represent significant improvements, a unique aspect of the legislation was the creation of a § 1983 state-equivalent.[206] Similar to its federal counterpart, SB-217 created a civil action for anyone whose state constitutional rights are deprived by a police officer acting "under color of law."[207] Importantly, SB-217 makes explicit that "[q]ualified immunity is not a defense to liability pursuant to this section."[208] SB-217 also grants attorney's fees to prevailing parties.[209] By denying qualified immunity and providing attorney's fees, the

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the year in response to the death of Elijah McClain in Aurora, Colorado. Berman, *supra* note 41. Were it not for the pandemic, the Colorado Legislature would have already adjourned by the time of the killing of George Floyd. *Id.* McClain died after being placed in a choke hold by police and then injected with the sedative ketamine. *See generally* Lucy Tompkins, *Here's What You Need to Know About Elijah McClain's Death*, N.Y. TIMES (Aug. 16, 2020), https://www.nytimes.com/article/who-was-elijah-mcclain.html [https://perma.cc/3LK5-ZA6N].

[200] COLO. REV. STAT. ANN. § 24-31-902, subdiv. 2(a) (West 2020) (effective July 1, 2023) (requiring any recordings relevant to a complaint of officer misconduct be released to the public within twenty-one days).

[201] *Id.* § 24-31-903.

[202] *Id.* § 24-31-905.

[203] COLO. § 18-1-707.

[204] *Id.* subdiv. 2.5(a).

[205] *Id.* § 18-8-802.

[206] Jay Schwiekert, *Colorado Passes Historic, Bipartisan Policing Reforms to Eliminate Qualified Immunity*, CATO INST. (June 22, 2020), https://www.cato.org/blog/colorado-passes-historic-bipartisan-policing-reforms-eliminate-qualified-immunity [https://perma.cc/P23W-5RV7] (observing that Colorado "is the first state to specifically negate the availability of qualified immunity as a defense through legislation" and praising the ACLU of Colorado for "tremendous wisdom in recognizing that any civil rights legislation would need to specifically address and negate the defense of qualified immunity").

[207] COLO. REV. STAT. ANN. § 13-21-131, subdiv. 1 (West 2020) (stating that a police officer who "under color of law" deprives any person of rights protected under Article II of the Colorado State Constitution "is liable to the injured party for legal or equitable or any other appropriate relief").

[208] *Id.* subdiv. 2(b). The Act also removes liability caps and excludes other immunities. *See id.* subdiv. 2(a) ("Statutory immunities and statutory limitations on liability, damages, or attorney feeds do not apply to claims brought pursuant to this section.").

[209] *Id.* subdiv. 3 ("In any action brought pursuant to this section, a court shall award reasonable attorney fees and costs to a prevailing plaintiff.").

Colorado legislation essentially takes the best of § 1983 without the baggage of the limitations that federal courts have imposed over the past sixty years.[210]

While certainly the most ambitious, Colorado's remarkable police reform in summer 2020 is not the first legislation to create a state-equivalent § 1983 statute.[211] The Massachusetts Civil Rights Act ("the MCRA"), which is also known as "little 1983" or the "baby civil rights bill," was the first and most fully-developed state civil rights statute.[212] The Massachusetts Legislature acted to overcome "the challenge posed by the Supreme Court's retrenchment on civil rights."[213] Enacted "in response to problems of racial violence and harassment,"[214] the MCRA authorizes a private right of action

[210] In addition, SB-217 limits indemnification and requires officers to contribute to any damages assessed against them, but only if the officer's employer "determines that the officer did not act upon a good faith and reasonable belief that the action was lawful." *Id.* subdiv. 4. In such cases, the officer is "personally liable and shall not be indemnified . . . for five percent of the judgment or settlement or twenty-five thousand dollars, whichever is less." *Id.* The Colorado legislation is silent on *respondeat superior* liability, but Colorado law already recognizes the doctrine in its state tort law and may incorporate it into SB-217 automatically. *See Rowe v. Parks*, No. 06-01192, 2007 WL 683989, at *2 (D. Colo. Mar. 1, 2007) (citing Stokes v. Denver Newspaper Agency, LLP, 159 P.3d 691 (Colo. App. 2006)) ("[U]nder Colorado law, the doctrine of *respondeat superior* provides that an employer is liable for the torts of an employee acting within the scope of employment.").

[211] In addition to Colorado, Connecticut has also passed legislation that could limit the application of qualified immunity in state-based claims against police officers, but the Connecticut law includes a governmental immunity exemption for police officers who "at the time of the conduct complained of, . . . had an objectively good faith belief that such officer's conduct did not violate the law." *See* An Act Concerning Police Accountability, H.B. 6004, 2020 Sess. (Conn. 2020), https://www.cga.ct.gov/2020/act/Pa/pdf/2020PA-00001-R00HB-06004SS1-PA.PDF [https://perma.cc/3FMR-6UYX]; *see also* Nick Sibilla, *New Connecticut Law Limits Police Immunity in Civil Rights Lawsuits, But Loopholes Remain*, FORBES MAG. (July 31, 2020), https://www.forbes.com/sites/nicksibilla/2020/07/31/new-connecticut-law-limits-police-immunity-in-civil-rights-lawsuits-but-loopholes-remain/?sh=4fc56edace8d [https://perma.cc/6RXM-574Z] (concluding "the new law contains multiple loopholes that undermine its effectiveness").

[212] Donoghue & Edelstein, *supra* note 167, at 544.

[213] Ian F. Haney Lopez, Recent Development, *An Act Relative to Civil Rights Under Law–Massachusetts General Laws Ch. 93, S 102 (1989)*, 25 HARV. C.R.-C.L. L. REV. 147, 163 (1990) ("As the Supreme Court of the United States has pulled back from the enforcement of civil rights, those seeking redress for violation of their rights have looked increasingly to state laws and to the state courts." (quoting the Boston Bar Association, Proposed Civil Rights Legislation Explanatory Statement Presented in Advance of the Legislation)).

[214] O'Connell v. Chasdi, 511 N.E.2d 349, 352 (Mass. 1987). In signing the bill, Governor Dukakis stated that the MCRA "reinstates the employment discrimination protection of the 1976 Supreme Court *Runyon v. McCrary* ruling which was partially overturned in June by *Patterson v. McLean Credit Union*." Lopez, *supra* note 213, at 157. The act has also extended to sexual harassment. *O'Connell*, 511 N.E.2d at 353 ("Sexual harassment accomplished by threats, intimidation, or coercion constitutes precisely the kind of conduct proscribed by the act.").

in state court for violation of state and federal civil rights.[215] The MCRA, like other civil rights statutes, is remedial and "is entitled to liberal construction of its terms."[216] As an example of the possibilities of using state law to exceed federal court limitations, the MCRA goes beyond what is allowed in federal civil rights cases by including actions performed by non-state, private actors.[217]

In addition to Colorado and Massachusetts, three other states have created statutes similar to § 1983.[218] A handful of states have enacted more limited provisions that allow claims for violations of only certain rights.[219] The majority of state legislatures, however, "have not affirmatively established a civil action to recover damages for the deprivation of state constitutional rights."[220]

One important limitation on previous state-based § 1983 statutes is that they import federal jurisprudence with respect to qualified immunity. The text of other state civil rights statutes "is typically cast in general terms."[221] As Professor Gary Gildin observes, "[a]bsent unambiguous

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[215] *See* MASS. GEN. LAWS ANN. ch. 12, § 11I (1996) ("Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in § 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages.").

[216] Batchelder v. Allied Stores Corp., 473 N.E.2d 1128, 1130 (Mass. 1985).

[217] *See* Chaabouni v. City of Boston, 133 F. Supp. 2d 93, 100–01 (D. Mass. 2001) ("The purpose of the MCRA was to provide a state remedy for deprivation of civil rights extending beyond the limits of federal law by incorporating private action within its bounds. . . . Thus, the Legislature intended to provide a remedy under state law coextensive with the federal remedy except that the federal statute requires state action whereas the MCRA does not." (citation omitted)).

[218] *See, e.g.*, Arkansas Civil Rights Act of 1993, ARK. CODE ANN. § 16-123-105(c) (2006); Tom Bane Civil Rights Act of 1993, CAL. CIV. CODE § 52.1(a) & (b) (West 1997); ME. REV. STAT. ANN. tit. 5, § 4682, 1-A (West 1996); *see also* Donoghue and Edelstein, *supra* note 167, at 541 (noting that "[t]he idea of a civil rights statute at the state level is a relatively new one in American law" and "[p]rior to 1977, only federal law provided a statutory cause of action for damages for violation of constitutional rights").

[219] Nebraska also has a civil rights statute, but it is limited to private employment discrimination cases. *See* NEB. REV. STAT. ANN. § 20-148 (1997); *see also* Wiseman v. Keller, 358 N.W.2d 768, 771 (Neb. 1984) (discussing the legislative history of the Nebraska civil rights act and indicating it was limited to private employment discrimination cases); CONN. GEN. STAT. ANN. § 31-51q (West 1983) (recognizing claim by employee disciplined or discharged because of exercise of right of expression or religious belief as provided by state constitution); N.H. REV. STAT. ANN. § 98-E:1 (2017) (protecting state employees' right of freedom of speech); New Jersey Civil Rights Act, N.J. STAT. ANN. § 10:6-2 (West 2014) (providing a private cause of action where interference state constitutional protections was made through "threats, intimidation, or coercion").

[220] Gildin, *supra* note 102, at 885.

[221] *Id.* at 887.

guidance from the statutory text, courts may turn to what superficially appears to be the most analogous authority—relevant Supreme Court doctrine on defenses available to those same state and local officials and entities when they violate the federal constitution."[222] This is precisely what Massachusetts courts have done. According to the Massachusetts Supreme Court, "[w]e presume that the Legislature was aware of this case law [on qualified immunity] when it chose to pattern the Massachusetts Civil Rights Act after § 1983."[223] As a result, the MCRA "affords qualified immunity to public officials to the same extent that § 1983 does."[224]

Minnesota legislators would be wise to look to their colleagues to the West for ideas on improving how Minnesota law might handle police misconduct in the civil context, as Colorado avoids this issue by explicitly stating that qualified immunity does not apply. Minnesota courts have already signaled that qualified immunity, or other similar immunity, would likely apply in a state-based § 1983 claim without explicitly prohibiting the defense.[225] As the Minnesota Supreme Court instructed, "[i]f a statutory enactment is to abrogate common law, the abrogation must be by express wording or necessary implication."[226] A Minnesota state-based § 1983 claim could avoid qualified immunity (and the lack of *respondeat superior*) through clear drafting to explicitly prohibit the defense.[227]

b. The Present State of Minnesota Civil Law and Police Abuse

Currently, under Minnesota state law, civil remedies for police abuse are available only through tort law.[228] Like the vast majority of states,

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[222] *Id.*

[223] Duarte v. Healy, 537 N.E.2d 1230, 1232 (Mass. 1989); *see also* Lyons v. Nat'l Car Rental Sys., Inc., 30 F.3d 240, 246 (1st Cir. 1994) ("Accordingly, we look to cases construing the federal Civil Rights Act for guidance [in interpreting MCRA cases].").

[224] *See* Rodriques v. Furtado, 575 N.E.2d 1124, 1127 (Mass. 1991) (explaining that the MCRA "intended to adopt the standard of immunity for public officials developed under 42 U.S.C. 1983").

[225] State by Beaulieu v. City of Mounds View, 518 N.W.2d 567, 570 (Minn. 1994) (applying official immunity to Minnesota Human Rights Act because "this court has long followed the presumption that statutory enactments are consistent with common law doctrines").

[226] *Id.*

[227] While not a focus of this article, one other clear advantage that a state-based § 1983 statute could have is the application of *respondeat superior*. Under Minnesota law, municipalities may be liable for the misconduct of their police officers under the doctrine. Yang v. City of Brooklyn Park, 194 F. Supp. 3d 865, 875 (D. Minn. 2016) (citing Watson by Hanson v. Metro. Transit Comm'n, 553 N.W.2d 406, 414 (Minn.1996)). The U.S. Supreme Court eliminated such liability from § 1983 five decades ago. *See supra* notes 159–63 and accompanying text.

[228] Police may also be subject to discrimination claims under the Minnesota Human Rights Act. In June 2020, the Minnesota Department of Human Rights opened an investigation into the Minneapolis Police Department, claiming that the killing of George Floyd and other

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Minnesota does not have a statutory equivalent of § 1983.[229] Additionally, with a few important exceptions,[230] there is (almost) no private right of action for violations of the state constitution, let alone for violations by police.[231] Plaintiffs using state law to prosecute police abuse are stuck with similar challenges of immunity issues, and unlike § 1983, there are generally no attorney's fees included with available remedies.

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incidents "similar to it since at least January 1, 2010 and continuing to the present" require investigation into whether the department's "training, policies, procedures, practices, including but not limited to use of force protocols, and any corresponding implementation, amounts to unlawful race-based policing, which deprives People of Color, particularly Black community members, of their civil rights." Minnesota Department of Human Rights, Charge of Discrimination, Minneapolis Police Department (Respondent), June 2, 2020 (on file with author).

[229] *See* Jihad v. Fabian, No. 09-1604 (SRN/LIB), 2011 WL 1641885, at *8 (D. Minn. Feb. 17, 2011) ("Minnesota has not enacted a statute that is equivalent to § 1983"), *report and recommendation adopted*, 2011 WL 1641767, at *3 (D. Minn. May 2, 2011); Riehm v. Engelking, No. 06-293 (JRT/RLE), 2007 WL 37799, at *8 (D. Minn. Jan. 4, 2007) (dismissing claims under Minnesota Constitution because "[u]nlike 42 U.S.C. § 1983, Minnesota has no statutory scheme providing for private actions based on violations of the Minnesota Constitution"); Thomsen v. Ross, 368 F.Supp.2d 961, 975 (D. Minn. 2005) (finding that "Minnesota has not enacted a statute equivalent to § 1983").

[230] *See* Skeen v. State, 505 N.W.2d 299, 302–03 (Minn. 1993) (permitting lawsuit by school districts with low property-tax bases alleging that state school financing formula violates Education Clauses and Equal Protection guarantees of the Minnesota Constitution); Knudtson v. City of Coates, 506 N.W.2d 29, 34 (Minn. Ct. App. 1993) (enjoining prohibition on non-obscene nude dancing under free expression provision to Minnesota Constitution); Mitchell v. Steffen, 487 N.W.2d 896, 904–05 (Minn. Ct. App. 1992), *aff'd on other grounds*, 504 N.W.2d 198 (Minn. 1993) (striking down welfare statute disfavoring new Minnesotans under Equal Protection guarantees of the Federal and Minnesota Constitutions); McGovern v. City of Minneapolis, 480 N.W.2d 121, 126–27 (Minn. Ct. App. 1992) (permitting owners of houses damaged in police actions to obtain compensation from the City of Minneapolis under the state constitution's takings clause); Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 41–42 (Minn. 1991), *reh'g denied*, (Jan. 27, 1992) (holding that a municipality is not insulated from liability to homeowners under doctrine of public necessity); *see also* Thiede v. Town of Scandia Valley, 14 N.W.2d 400, 409 (Minn. 1944) (permitting hybrid tort/constitutional lawsuit against officials but not the town); Thomsen v. Ross, 368 F. Supp. 2d 961, 975–76 (D. Minn. 2005) ("The Court is mindful of the remedies clause of the Minnesota Constitution, which provides a 'certain remedy in the laws' for injuries and wrongs . . . . Here, the Court assumes, without deciding, that a Minnesota court would recognize a private right of action to remedy violations of Article I, sections 6, 7 and 10." (citations omitted)).

[231] *See* Eggenberger v. W. Albany Twp., 820 F.3d 938, 941 (8th Cir. 2016) ("[T]here is no private cause of action for violations of the Minnesota Constitution."); *see also* Mlnarik v. City of Minnetrista, No. A09-910, 2010 WL 346402, at *1 (Minn. Ct. App. Feb. 2, 2010) (explaining "no private cause of action for a violation of the Minnesota constitution has yet been recognized"); Danforth v. Eling, No. A10-130, 2010 WL 4068791, at *6 (Minn. Ct. App. Oct. 19, 2010) (noting "there is no private cause of action for violations of the Minnesota Constitution").

First, immunity defenses provide a barrier to tort claims. Police officers in Minnesota may avoid state tort actions through the application of another affirmative defense—official immunity.[232] The defense applies to "discretionary duties,"[233] and it requires that plaintiffs prove a "willful or malicious wrong" by defendants to overcome the defense.[234] Under Minnesota law, the decision to use deadly force is a discretionary decision entitling a police officer to official immunity absent a willful or malicious wrong.[235]

In determining whether an official has committed a malicious wrong, Minnesota courts "consider whether the official has intentionally committed an act that he or she had reason to believe is prohibited."[236] Importantly, this "contemplates less of a subjective inquiry into malice, which was traditionally favored at common law, and more of an objective inquiry into the legal reasonableness of an official's actions."[237] The defense applies even if officers take intentional action that could support an

[232] Elwood v. Rice County, 423 N.W.2d 671, 677 (Minn. 1988) (en banc).

[233] Under Minnesota law, a public official is entitled to official immunity from state law claims when the official's duties require the exercise of discretion or judgment. Johnson v. Morris, 453 N.W.2d 31, 41 (Minn. 1990). As opposed to "discretionary" duties, "an [o]fficial duty is ministerial when it is absolute, certain and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Elwood*, 423 N.W.2d at 677. On the other hand, the commissioner of corrections and a prison warden had discretionary duties in supervising the prison industries program, insulating those officials from liability for a negligence claim arising from a prison factory incident. Susla *v. State,* 247 N.W.2d 907, 912 (Minn. 1976) (en banc). Not surprisingly, the distinction between "discretionary" and "ministerial" duties has been subject to "enigmatic application and occasional breakdown." Papenhausen v. Schoen, 268 N.W.2d 565, 571 (Minn. 1978).

[234] *Susla*, 247 N.W.2d at 912.

[235] Maras v. City of Brainerd, 502 N.W.2d 69, 77 (Minn. Ct. App. 1993).

[236] State by Beaulieu v. City of Mounds View, 518 N.W.2d 567, 571–72 (Minn. 1994).

[237] *Id.* at 571. Courts regularly determine that, where the use of force was not objectively unreasonable, it was also not willful or malicious. Henderson v. City of Woodbury, 233 F. Supp. 3d 723, 732–33 (D. Minn. 2017); *see also* Hayek v. City of St. Paul, 488 F.3d 1049, 1056 (8th Cir. 2007) ("Because the officers' use of deadly force was reasonable, a reasonable fact-finder could not conclude the officers' conduct was willful or malicious.").

intentional tort claim.[238] Official immunity also extends to protect government entities from vicarious liability for an official's actions.[239]

The analysis for determining whether official immunity applies "is similar, but not identical," to the analysis of qualified immunity in § 1983 actions.[240] As with the federal standard for § 1983 cases, an official seeking protection through official immunity in Minnesota must show that (1) his or her conduct was "legally reasonable," or (2) "no clearly established law or regulation prohibited [the] conduct."[241] Minnesota rejected the argument that federal law supplanted the Minnesota common law doctrine of official immunity in part because the Minnesota Supreme Court determined that *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action."[242]

The Minnesota official immunity doctrine and the federal qualified immunity doctrine differ with respect to the analysis of "legal reasonableness."[243] In *Elwood v. Rice County*,[244] the Minnesota Supreme Court declined to adopt the federal governmental immunity analysis to common law official immunity as applied to state tort claims because the U.S. Supreme Court had eliminated the subjective "good faith" component

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[238] Greiner v. City of Champlin, 27 F.3d 1346, 1355 (8th Cir. 1994) (finding immunity for state tort claims, including intentional infliction of emotional distress); Rico v. State, 472 N.W.2d 100, 102–06 (Minn. 1991) (finding immunity for an official who fired a former employee, even if the official intentionally committed an act later determined to be wrong); *Johnson*, 453 N.W.2d at 42 (finding immunity for shooting out tires and handcuffing a man who evaded arrest even though those same actions would otherwise be battery); *Elwood*, 423 N.W.2d at 674 (finding immunity on claims of battery and trespass). Of course, the court is careful to add, "The doctrine protects honest law enforcement efforts, and is not intended to shield police brutality." *Id.* at 679.

[239] Wiederholt v. City of Minneapolis, 581 N.W.2d 312, 316 (Minn. 1998); *see also* Mike Steenson, *The Character of the Minnesota Tort System,* 33 WM. MITCHELL L. REV. 239, 252 (2006) ("If official immunity applies to a government official, the Minnesota Supreme Court has made the decision to extend vicarious official immunity to the governmental entity employing that official.").

[240] Galarnyk v. Fraser, No. 08-3351 (JMR/AJ), 2009 WL 2929428, at *9 (D. Minn. June 25, 2009) (citing Gleason v. Metro. Council Transit Operations, 563 N.W.2d 309, 317–18 (Minn. Ct. App. 1997), *aff'd in part*, 582 N.W.2d 216 (Minn. 1998)); *see also* Greiner v. City of Champlin, 816 F. Supp. 528, 545 (D. Minn. 1993), *decision rescinded*, 27 F.3d 1346 (8th Cir. 1994) ("While qualified immunity and official immunity are distinct concepts, the tests are similar.").

[241] *Compare Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)* ("clearly established statutory or constitutional rights of which a reasonable person would have known"), *with Rico*, 472 N.W.2d at 107 ("[N]o clearly established law or regulation prohibited [the] conduct.").

[242] *Ellwood,* 423 N.W.2d at 677. Accordingly, the court held that "[w]e decline to simply apply the federal standard in all state tort actions." *Id.*

[243] *Gleason*, 563 N.W.2d at 317.

[244] 423 N.W.2d at 677.

of legal reasonableness.[245] Despite this, some Minnesota cases have sometimes "indicated favor for the federal standard and the federal courts' attempts to isolate purely legal questions on which to decide the applicability of immunity."[246] But the court has retained reference to the subjective "good faith" component of legal reasonableness in stating its test.[247] The Minnesota test is three parts. "Immunity for the discretionary act applies when the official demonstrates: (1) the conduct was 'objectively' legally reasonable, that is, legally justified under the circumstances; (2) the conduct was 'subjectively' reasonable, that is, taken with subjective good faith; or (3) the right allegedly violated was not clearly established, that is, there was no basis for knowing the conduct would violate the plaintiff's rights."[248]

Also, unlike § 1983 claims, Minnesota courts generally do not provide for attorney's fees for tort claims against police officers.[249] Minnesota follows the American rule, which "prevents a party from shifting its attorney fees to its adversary without a specific contract or statutory authorization."[250]

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[245] *Id.* The U.S. Supreme Court eliminated the subjective "good faith" component because it typically involved fact questions requiring resolution by a jury and was therefore contrary to the purpose of immunity which is to protect officials from suit. *Harlow,* 457 U.S. at 818.

[246] *Gleason*, 563 N.W.2d at 317; *see, e.g.*, Carter v. Cole, 539 N.W.2d 241 (Minn. 1995) (citing Johnson v. Jones, 515 U.S. 304 (1995) (adopting federal reasoning for separating appeals challenging evidence sufficiency, a fact-based question, from appeals of immunity denials, a legal question); *Rico,* 472 N.W.2d at 108 ("[F]ederal decisions interpreting qualified immunity under § 1983, though certainly not conclusive, are instructive when we examine an official immunity issue because § 1983 qualified immunity and common law official immunity further the same purpose.").

[247] *See* State by Beaulieu v. City of Mounds View, 518 N.W.2d 567, 571 (Minn. 1994) (The standard contemplates "less of a subjective inquiry into malice, which was traditionally favored at common law, and more of an objective inquiry into the legal reasonableness of an official's actions."). The "subjective inquiry into malice" does not refer to the question of whether the official was acting with animus. *See id.* Malice in the context of immunity connotes a concept unrelated to "ill will" or "improper motive." *See Rico*, 472 N.W.2d at 107 n.5 (distinguishing malice in the defamation context).

[248] *Gleason*, 563 N.W.2d at 318. Though, as the court acknowledged, "it is the rare case in which the 'subjective component' of legal reasonableness will be relevant or a viable theory for the defendant seeking to avoid suit." *Id.* at 318. Rather, the "subjective component" allows an official to argue that, despite the lack of an "objective" legal justification for the violation, the offending acts were taken in good faith. *Id.*; *see Rico,* 472 N.W.2d at 107.

[249] *See generally* John M. Bjorkman, *Minnesota and the American Rule: The Recoverability of Attorneys' Fees Following* In Re Silicone Implant Insurance Coverage Litigation, 30 WM. MITCHELL L. REV. 541, 543–46 (2003) (discussing the history of the American rule in Minnesota).

[250] Kallok v. Medtronic, Inc., 573 N.W.2d 356, 363 (Minn. 1998); *see also* Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 145 (Minn. 1999) (Anderson, J., dissenting) ("That fees may not be shifted in the absence of a statute or contract was settled more than 100 years ago in this state. With limited exception, this court has consistently adhered to the American Rule." (citations omitted)); *see generally* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1575–78 (1993) (describing the origin and history of the American Rule).

The exception to the American rule is when legislatures enact fee-shifting provisions in statutes, like Congress did in § 1983.[251] While tort claims in the state do not have this provision, Minnesota has enacted several hundred statutes authorizing attorney's fees for other claims.[252]

B. Proposal No. 2: Require that Police Officers Carry Individual Professional Liability Insurance

Employment and labor laws create their own set of barriers to holding police officers accountable.[253] Supervisors have increasingly limited ability to discipline and fire police officers no matter how egregious their conduct because of arbitration provisions in police union contracts or other statutorily required protections.[254] And even when officers are found guilty in civil court and substantial damages are imposed, the officers are indemnified entirely by taxpayers and usually never pay a dime.[255]

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[251] According to Justice Russell Anderson, "the legislature, not the court, has the power to determine when, or if, an attorney should be awarded attorney fees against unsuccessful litigants." *Irwin*, 599 N.W.2d at 145 (Minn. 1999) (Anderson, J., dissenting). There are exceptions to the rule, of course. *See, e.g.*, Langeland v. Farmers State Bank of Trimont, 319 N.W.2d 26, 33 (Minn. 1982) ("An exception to this rule arises in situations in which the defendant's wrongful act thrusts the plaintiff into litigation with a third person.").

[252] See generally MARY MULLEN, MINN. H.R. RSCH. DEP'T, ATTORNEY FEE AWARDS IN MINNESOTA STATUTES (2018), http://www.house.leg.state.mn.us/hrd/pubs/attyfee.pdf [https://perma.cc/C765-NNKG] (identifying well over 400 statutory provisions). One such provision is the Minnesota Human Rights Act. See MINN. STAT. § 363A.33, subdiv. 7 (providing that "the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs").

[253] *See* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 799 (2012) (detailing the various employment and labor laws that interfere with efforts of police reform).

[254] Collective bargaining agreements are one source for arbitration protections, but there is wide variability on where precisely in state law arbitration protections reside. *See* Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 551 (2019) ("These procedures are often articulated not just in state statutes or municipal codes, but also in department-specific police union contracts."). Minnesota police officers' rights to collective bargaining and arbitrate disputes over discipline are both creatures of statutory law. *See* MINN. STAT. § 179A.06, subdiv. 2 ("Public employees have the right to form and join labor or employee organizations."); MINN. STAT. §§ 179A.20-.21 (outlining arbitration rights).

[255] Schwartz, *supra* note 34, at 960 (reviewing the policies and practices of eighty-one different police departments and finding that "officers almost never contribute anything to settlements and judgments in police misconduct suits"). Most of the indemnification requirements stem from state law. *See, e.g.*, MINN. STAT. § 466.07, subdiv. 1 ("Subject to the limitations in § 466.04, a municipality or an instrumentality of a municipality shall defend and indemnify any of its officers and employees, whether elective or appointive, for damages, including punitive damages, claimed or levied against the officer or employee."); MINN. STAT. § 3.736, subdiv. 9(a) ("The state shall defend, save harmless, and indemnify a peace officer who is not acting on behalf of a private employer and who is acting in good faith under § 629.40, subdivision 4, the same as if the officer were an employee of the state."). Yet Professor Schwartz found that "[g]overnments satisfied settlements and judgments in police

Both arbitration and indemnification are deeply embedded across nearly every police department in the country. Some other mechanism must come into play to remove problem officers and create incentives for all officers to comport with good practices. While it is still relatively obscure, individual liability insurance, unheard of for police officers, creates important accountability in other professions, such as medicine and law, and could fill the gap that arbitration and indemnification have carved into police officer accountability.[256]

1. *Arbitration Protections and the Inability to Fire Problem Officers*

Failure to fire police officers who are clearly unfit for duty can have significant ripple effects. Officers with serious past misconduct remain on the force despite numerous complaints against them, and they are likely at a higher risk of killing suspects. Derek Chauvin had seventeen misconduct complaints against him during his nineteen years as a Minneapolis policeman before he killed George Floyd.[257] Chauvin joins a long list of officers involved in killing suspects who already had multiple complaints filed against them.[258] Garrett Rolfe, who shot and killed Rayshard Brooks just two weeks after Mr. Floyd was killed, had twelve complaints.[259]

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misconduct cases even when indemnification was prohibited by statute or policy." Schwartz, *supra* note 34, at 890. Indemnification even covered officers who had been fired or criminally prosecuted for the conduct in question. *Id.*

[256] *See* Deborah Ramirez, Marcus Wraight, Lauren Kilmister, & Carly Perkins, *Policing the Police: Could Mandatory Professional Liability Insurance for Officers Provide A New Accountability Model?*, 45 AM. J. CRIM. L. 407, 412 (2019) ("Our hope is that just as drivers with established histories of reckless driving can be priced off the road by insurance premiums, so too, the most dangerous officers might be forced into another profession."). As Professor Ramirez and her colleagues explain, "The idea has the advantage of being market-based, aligning the financial interests of individual officers, police departments, municipalities, and insurance companies towards safer policing . . . [and] has the added benefit of not being solely punitive; officers with histories indicating their professionalism and excellence can be financially rewarded with lower premiums." *Id.*

[257] Stephen Montemayor, Jennifer Bjorhus & Matt McKinney, *Even To Friends, Former Officer Derek Chauvin Was An Enigma*, Star Trib. (Aug. 8, 2020), https://www.startribune.com/those-who-know-derek-chauvin-say-they-would-not-have-predicted-his-killing-of-george-floyd/572054552/ [https://perma.cc/R6UF-9QCC].

[258] Of course, complaints are not the only measure of misconduct, and most civil rights verdicts against officers are not part of an officer's record. Judith A.M. Scully, *Rotten Apple Or Rotten Barrel?: The Role Of Civil Rights Lawyers In Ending The Culture Of Police Violence*, 21 NAT'L BLACK L.J. 137, 150–52 (2008) (finding that civil rights settlements are not kept on the personnel files of problem officers, which could reflect a clean record but multiple § 1983 claims).

[259] Curtis Gilbert, *Atlanta Cop Who Killed Rayshard Brooks Had Prior Controversial Shooting*, APM Reps. (June 17, 2020), https://www.apmreports.org/story/2020/06/17/officer-garrett-rolfe-atlanta-shooting [https://perma.cc/L39J-BAYY].

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Jason Van Dyke, who shot and killed seventeen-year-old Laquan McDonald in Chicago, had twenty-two complaints against him.[260] Daniel Pantaleo, the NYPD officer who used a fatal choke hold on Eric Garner, had seven disciplinary complaints and fourteen individual allegations lodged against him.[261] These officers are not mere outliers. Emerging research supports the logical assumption: officers with multiple complaints are higher risks for future misconduct.[262]

The current system actually protects officers—who, in most other professions, would lose their jobs—and keeps those officers in a position to inflict deadly force. Former Boston Police Commissioner William Evans explained the predicament police leadership faces: "he can't hire the officers he wants, promote those who share his values, effectively discipline errant officers, and he can't fire them, or if he did, he risks having the decision overturned."[263] A former police chief explained that "in nearly nine years as chief . . . , [he] had 16 cops out of 650 whom [he] felt should be fired. Four [he] actually did fire. The Civil Service Commission promptly reversed [him] on three of them."[264] This same problem exists in Minnesota. In the past eight years in Minneapolis, "9 of every 10 accusations of misconduct were resolved without punishment or intervention aimed at changing an officer's behavior."[265] After receiving approximately 3,000 total

[260] Michael Lansu, *Former Chicago Cop Jason Van Dyke Sentenced to 81 Months in Prison For 2014 Murder*, NAT'L PUB. RADIO (Jan. 18, 2019), https://www.npr.org/2019/01/18/686391662/former-chicago-cop-jason-van-dyke-to-be-sentenced-for-laquan-mcdonald-murder [https://perma.cc/6T27-49CN] (noting Chicago police records show that at least twenty-two complaints had been filed against Van Dyke before he shot McDonald).

[261] Danika Fears, *Cop Who Fatally Choked Eric Garner Had Long List of Complaints*, N.Y. POST (Mar. 21, 2017), https://nypost.com/2017/03/21/cop-who-fatally-choked-eric-garner-had-long-list-of-complaints/ [https://perma.cc/UJ6E-MFDC].

[262] Kyle Rozema & Max Schanzenbach, *Good Cop, Bad Cop: Using Civilian Allegations to Predict Police Misconduct*, 11 AM. ECON. J.: ECON. POL'Y 225, 227 (2019) (finding that past civilian allegations predict future misconduct). Researchers reviewed more than 50,000 civilian complaints against officers in Chicago and determined that "[t]he worst one percent of officers, as measured by civilian allegations, generate almost five times the number of payouts and over four times the total damage payouts in civil rights litigation." *Id.*

[263] Ramirez et al., *supra* note 256, at 411.

[264] Daniel Oates, *I Used to Be a Police Chief. This Is Why It's So Hard to Fire Bad Cops*, Wash. Post (June 12, 2020), https://www.washingtonpost.com/opinions/2020/06/12/i-used-be-police-chief-this-is-why-its-so-hard-fire-bad-cops/ [https://perma.cc/UQ8H-F3GW].

[265] Reade Levinson & Michael Berens, *Special Report: How Union, Supreme Court Shield Minneapolis Cops*, REUTERS (June 4, 2020), https://www.reuters.com/article/us-minneapolis-police-culture-specialrep/special-report-how-union-supreme-court-shield-minneapolis-cops-idUSKBN23B2LL [https://perma.cc/Z497-6JW8].

complaints against Minneapolis police officers during that period, only five officers were fired.[266]

Arbitration puts a startling number of fired officers back on the job.[267] In Minnesota, approximately half of all officers fired since 2013 got their jobs back through arbitration.[268] Those who were returned to work by arbitrators included one officer who was fired for "kicking an unarmed suspect who was already on the ground being attacked by a police dog," another officer for "repeatedly punching a handcuffed . . . man in the face," and a third officer for "failing to write up nearly four dozen cases, copying a judge's signature onto search warrants[,] and lying during the investigation."[269] As the Minnesota Supreme Court acknowledged, even conduct that "[n]o doubt many observers would find . . . disturbing" is not sufficient if an arbitrator decides the officer should be back on the job.[270] Under our current system, even the most miscreant officer can get their job back from an arbitrator.[271]

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[266] *Id.* As one example, Officer Blayne Lehner was fired "for violating the department's use of force policy after video showed him repeatedly throwing a woman to the ground while responding to a domestic disturbance." *Id.* Officer Lehner had more than thirty complaints during his eighteen-year career. *Id.* Despite his conduct and past complaint, an arbitrator overturned the termination of his employment and reduced the penalty to a forty-hour suspension without pay. *Id.*; *see also* Mark Iris, *Unbinding Binding Arbitration of Police Discipline: The Public Policy Exception*, 1 VA. J. CRIM. L. 540, 545 (2013) (detailing how an arbitration reversal required the St. Paul police to reinstate a convicted sex offender to the force).

[267] Kimbriell Kelly, Wesley Lowery, & Steven Rich, *Fired/Rehired: Police Chiefs Are Often Forced to Put Officers Fired for Misconduct Back on the Streets*, WASH. POST (Aug. 3, 2017), https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired/ [https://perma.cc/HEF3-WJDZ] (describing data collection efforts that found a significant proportion of American law enforcement officers terminated by their police departments are ordered to be rehired on appeal by arbitrators).

[268] Jon Collins, *Half of Fired Minnesota Police Officers Get Their Jobs Back Through Arbitration*, MINN. PUB. RADIO (July 9, 2020), https://www.mprnews.org/story/2020/07/09/half-of-fired-minnesota-police-officers-get-their-jobs-back-through-arbitration [https://perma.cc/D8MC-9KEU] ("Since 2013, independent arbitrators in Minnesota have ruled about half the time that police officers who were terminated should get their jobs back or receive lesser discipline.").

[269] Jennifer Bjorhus, *Fired Minnesota Officers Have a Proven Career Saver: Arbitration*, STAR TRIB. (June 21, 2020), https://www.startribune.com/minnesota-cops-fired-then-rehired/571392702/ [https://perma.cc/XY6Q-WGZD].

[270] City of Richfield v. Law Enf't Labor Servs., Inc., 923 N.W.2d 36, 42 (Minn. 2019). In October 2015, a Richfield police officer, who had previously been disciplined for how he used force, was fired for striking a teenager in the head during a traffic stop. Collins, *supra* note 268. The officer had also pushed the teenager twice and used profanity. *Richfield*, 923 N.W.2d at 39. Three and a half years later, the court upheld the arbitrator's ruling to give the officer his job back, despite the "disturbing" nature of the behavior. *See id.* at 42 ("But state statute requires arbitration, and the City's contract with the Union gives the arbitrator the authority to decide what constitutes just cause for termination.").

[271] *See* Rushin, *supra* note 254, at 550 (documenting numerous cases of officers who were given their jobs back despite serious misconduct). As Professor Rushin concludes, "police

This process not only puts problem officers back at their job, but it makes their supervisors less likely to impose disciplinary sanctions in the first place.[272] As Minneapolis Police Chief Medaria Arradondo explained, "There is nothing more debilitating to a chief from an employment matter perspective, than when you have grounds to terminate an officer for misconduct, and you're dealing with a third-party mechanism that allows for that employee to not only be back on your department, but to be patrolling in your communities."[273] The process also "can have a corrosive effect on police discipline and morale, telling the misbehaving officers they may continue their misconduct without fear of adverse action, while undermining the morale of those who adhere to police regulations and ethical norms."[274] Nevertheless, most departments continue to include arbitration provisions in their police union contracts.[275]

Not surprisingly, city officials from all across Minnesota made arbitration one of their main targets for reform during last summer's special

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disciplinary appeals have forced communities to rehire police officers deemed unfit for duty by their supervisors." *Id.* at 550–51; *see also* Iris, *supra* note 266, at 544 (examining numerous studies and concluding that arbitrations often overturn "disciplinary actions, grounded in conduct which chiefs of police and presumably the public at large would find simply unacceptable"); Martha Bellisle, *Police in Misconduct Cases Stay on Force Through Arbitration*, AP NEWS (June 24, 2020), https://apnews.com/article/d098a19c1c34749d763fd57a721d9e1d [https://perma.cc/BP8K-G97P] (collecting examples, including an Oregon police officer who "lost his job and then returned to work after fatally shooting an unarmed Black man in the back[, a] Florida sergeant [who] was [fired] six times for using excessive force and stealing from suspects[, and] a Texas lieutenant [who] was terminated five times after being accused of striking two women, making threatening calls[,] and committing other infractions").

[272] Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2211–12 (2014) ("An officer's ability to contest adverse employment actions makes supervisors less likely to impose disciplinary sanctions because while a supervisor faces a possible headache for not disciplining a misbehaving subordinate, they face a certain headache if they do.").

[273] Bjorhus, *supra* note 269. The process makes it less likely that problem officers will be fired. Minneapolis Assistant Chief Mike Kjos explained, "The fact that firing an officer could end up in arbitration—and be reversed—weighs on decisions to officially terminate." *Id.*

[274] Iris, *supra* note 266, at 546.

[275] *See generally* Rushin, *supra* note 254 (drawing on a dataset of 656 police union contracts to show that the overwhelming majority of these contracts provide officers with the option to appeal disciplinary action to arbitration and provide officers with other protections on appeal). In addition to providing unusually strong appeal mechanisms, police unions have other distinctive features. *See* Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1335–36 (2020) ("In many ways, police unions flout both traditional assumptions about organized labor and contemporary framings of the new labor movement. Where unions often swing left, police unions swing right. Where much modern labor organizing focuses on low-wage workers, police unions protect higher-wage professionals. Where unionism and antiracism sometimes have travelled hand-in-hand, police unions still represent predominantly white workers and frequently take public stands that are hostile to racial justice or that express outright racism.").

legislative sessions.[276] The Mayor of Minneapolis, Jacob Frey, stated, "If the legislature is serious about deep, structural police reforms, this is the most impactful change they could make."[277] The St. Paul Police Chief Todd Axtell recommended making arbitration decisions more easily appealed.[278] Coon Rapids Police Chief Brad Wise testified that "there's nothing worse, in my view, for an organization than to lose an arbitration. . . . [I]t makes police leaders be reluctant to even let cases go to arbitration for fear of losing them."[279] Duluth Police Chief Mike Tusken testified that serious misconduct cases erode public trust and to maintain that trust "[w]e need a process in which there is a fair outcome."[280]

Despite calls for broader reform, the changes passed last summer provided only a minor tweak to the arbitration system in Minnesota and left in place arbitrators' largely unlimited authority to reinstate officers fired for

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[276] Erik Misselt, interim executive director of the Peace Officers Standards and Training Board, told the media that arbitration is an issue "we hear a lot about. Chiefs have made it pretty clear that is one of the things they want the Legislature to address." Star Tribune Editorial Board, *Police Arbitration System Needs an Overhaul*, STAR TRIB. (June 26, 2020), https://www.startribune.com/police-arbitration-system-needs-an-overhaul/571511992/ [https://perma.cc/P85G-Y2DM]. St. Paul Mayor Melvin Carter submitted a statement joining several Twin City area mayors in calling for major arbitration reform. *See* MSR News Online, *Frey, Arradondo, and MN Mayors Call on Legislators to Fix Arbitration Process for Law Enforcement*, MINN. SPOKESMAN-RECORDER (June 18, 2020), https://spokesman-recorder.com/2020/06/18/frey-arradondo-and-mn-mayors-call-on-legislators-to-fix-arbitration-process-for-law-enforcement/ [https://perma.cc/CD3Y-UXZW] (quoting Mayor Carter as saying, "This moment demands decisive action. Reforming arbitration is critical to ensuring we can hold officers who betray our trust accountable.").

[277] Coulter Jones & Louise Radnofsky, *Many Minnesota Police Officers Remain on the Force Despite Misconduct*, Wall St. J. (June 25, 2020), https://www.wsj.com/articles/many-minnesota-police-officers-remain-on-the-force-despite-misconduct-11593097308 [https://perma.cc/3WPZ-G4C3].

[278] Emma Nelson, *St. Paul Police Chief Defends His Officers, Calls for Arbitration Reform*, STAR TRIB. (June 25, 2020), https://www.startribune.com/chief-axtell-defends-st-paul-police-calls-for-arbitration-reform/571488382/#:~:text=Paul%20police%20chief%20defends%20his%20officers%2C%20calls%20for%20arbitration%20reform,-St.&text=A%20month%20to%20the%20day,a%20Minneapolis%20police%20officer%2C%20St.&text=Paul%20would%20need%201%2C600%20officers,a%20sworn%20force%20of%20630. [https://perma.cc/3BG5-4NGM]. Specifically, the Chief told the City Council that "he would like to see a new arbitration process that would allow the department to appeal overturned firings in court." *Id.*

[279] Star Tribune Editorial Board, *supra* note 276. Chief Wise added that losing an arbitration "creates distrust within the workplace . . . and saps the confidence of a police leader." *Id.*

[280] *Id.* Incidentally, Chief Tusken's great-aunt was Irene Tusken, who had claimed to have been raped by six Black circus workers in 1920 which set in motion the Duluth lynchings. Dan Kraker, *'We Never Solved the Problem': Echoes of 1920 Duluth Lynching Persist At Centennial*, MINN. PUB. RADIO (June 15, 2020), https://www.mprnews.org/story/2020/06/15/we-never-solved-the-problem-echoes-of-1920-duluth-lynching-persist-as-city-marks-centennial [https://perma.cc/CJS8-C7EG].

misconduct. Under the new law, arbitrators in police officer employment disputes will be selected directly by the Commissioner of the State Bureau of Mediation Services, not the parties to the dispute, as before.[281] The Commissioner, "in consultation with community and law enforcement stakeholders," will appoint a roster of six arbitrators who can only serve as arbitrators in police grievance arbitrations.[282] Arbitrators are selected through an alphabetical rotation.[283] The arbitrators will be required to attend training on cultural competency and implicit bias, as well as training on the "daily experience of peace officers, which may include ride-alongs with on-duty officers or other activities that provide exposure to the environments, choices, and judgments required of officers in the field."[284] But the main concern of the chiefs and mayors—that arbitration undermines their authority to fire problem officers—was not addressed. Not surprisingly, city leaders complained that the change was too insignificant and would hinder police chiefs' ability to "effectively address individual officer behavior."[285]

2. *The History of Personal Liability Insurance for Officers as an Idea*

In response to the impact of indemnification and arbitration, academics and community activists have proposed mandatory personal liability insurance for police officers. Initial credit for this idea goes to Professor Noel Otu of the University of Texas at Brownsville, who suggested mandatory professional liability insurance for police in 2006.[286] Professor Otu proposed that all police officers should be required to carry "occupational liability insurance" so that financial liability for misconduct

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[281] *See* MINN. STAT. § 626.892, subdiv. 11 (2020) ("The parties shall not participate in, negotiate for, or agree to the selection of an arbitrator or arbitration panel under this section.").

[282] *Id.* subdiv. 4. In selecting the six arbitrators, the Commissioner may consider a "candidate's familiarity with labor law, the grievance process, and the law enforcement profession; or experience and training in cultural competency, racism, implicit bias, and recognizing and valuing community diversity and cultural differences." *Id.*

[283] *Id.* subdiv. 11 ("The commissioner shall assign or appoint an arbitrator or panel of arbitrators from the roster to a peace officer grievance arbitration under this section on rotation through the roster alphabetically ordered by last name.").

[284] *Id.* subdiv. 10(a)(1)–(2) ("(1) at least six hours on the topics of cultural competency, racism, implicit bias, and recognizing and valuing community diversity and cultural differences; and (2) at least six hours on topics related to the daily experience of peace officers, which may include ride-alongs with on-duty officers or other activities that provide exposure to the environments, choices, and judgments required of officers in the field.").

[285] Bailey & Bella, *supra* note 7 (quoting Minneapolis Mayor Jacob Frey).

[286] Noel Otu, *The Police Service And Liability Insurance: Responsible Policing*, 8 INT'L J. OF POLICE SCI. & MGMT. 294, 309 (2006); *see also* Ramirez et al., *supra* note 256, at 439 (reporting how related ideas on this from both academics and community activists "originates in [Professor Otu's] article.").

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was removed from departments and cities and placed squarely on the officer's liability insurance.[287] Currently, no state or municipality has a liability insurance requirement for their police officers. However, as part of its significant police reform legislation last summer, Colorado passed a bill that makes officers personally liable for up to $25,000 in damages in lawsuits related to misconduct.[288]

Professor Deborah Ramirez at Northeastern University Law School and her colleagues (who are all recent graduates of Northeastern) recently "dust[ed] off" Professor Otu's idea and updated it in some important ways.[289] They proposed that the municipality cover the base premium for all officers, but individual officers might have to cover their own costs if they are assessed a surcharge because of being a higher risk (e.g., for having past complaints of misconduct).[290] In other words, "[o]fficers with histories that create a higher premium would be responsible for paying the difference between their premium and the departmental average."[291] This would give insurance companies "leverage over both the whole department and over individual officers."[292]

But academics are not the only ones suggesting this novel approach.[293] Activists in Minnesota have been calling for liability insurance for years,[294] and they came close to getting it on the ballot in Minneapolis.

[287] Professor Otu also proposed that officer salaries be increased to cover the basic liability insurance premium. Otu, *supra* note 286, at 309.

[288] COLO. REV. STAT. ANN. 13-21-131 (4) (West 2020) (requiring that an officer to pay 5% or $25,000, whichever, is less, toward any judgment or settlement if the officer's employer determines that the officer "did not act upon a good faith and reasonable belief that the action was lawful"). For other aspects of the Colorado police reform bill, *see supra* notes 197-210 and accompanying text.

[289] Ramirez et al., supra note 256, at 411.

[290] *Id.* at 455. This is similar to the proposal by activists in Minneapolis. *See infra* notes 294–96 and accompanying text.

[291] Ramirez et al., *supra* note 256, at 455.

[292] *Id.* at 455 ("Should the department adopt safer policies, like mandatory de-escalation training, the average officer base premium would be reduced. Similarly, insurance companies can tie premium reductions to specific trainings and programs that are shown to lower risk and liability, giving individual officers a direct incentive to seek out such trainings. Departments and individual officers alike would face a simple choice: recoup the financial benefits of reducing risk or bear the cost of being less risk averse.").

[293] Similar ideas were floated in the Chicago City Council and the Maryland State Legislature but did not get very far. *Id.* at 439. The New York Senate proposed a similar bill last summer. N.Y. S.B. 8676 (N.Y. 2020), https://legislation.nysenate.gov/pdf/bills/2019/S8676 [https://perma.cc/6CW7-2RBH].

[294] Michelle Gross, president and founder of Communities United Against Police Brutality and co-founder of The Committee for Professional Policing, came up with the idea in 2010. *Carla Murphy, A Push to Make Cops Carry Liability Insurance in Minneapolis, CHI. REP. (June 27, 2016), https://www.chicagoreporter.com/a-push-to-make-cops-buy-liability-insurance-in-minneapolis/ [https://perma.cc/8QEV-UMBZ]. According to Gross,* "It's using market forces to motivate individual cops to change police culture." *Id.*

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In July 2016, a now-defunct community group, the Committee for Professional Policing, submitted a petition to the Minneapolis City Council for a proposed amendment to the city charter to be placed on the November 2016 general election.[295] The proposed amendment would have required Minneapolis police officers to obtain and maintain professional liability insurance coverage.[296] The proposed amendment was ultimately rejected by the City Council as being contrary to state law, and the Minnesota Supreme Court upheld the Council's decision.[297]

Yet in the wake of the George Floyd killing, Communities United Against Police Brutality, Minnesota's Council on American-Islamic Relations, and two Black Lives Matter chapters re-introduced the idea of mandatory liability insurance for individual officers, among other recommendations.[298] Steven Belton, president and CEO of the Urban

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[295] The group collected more than 7,000 signatures. Susan Du, *Group Wants Minneapolis Police to Carry Liability Insurance*, CITY PAGES (Apr. 7, 2016), http://www.citypages.com/news/group-wants-minneapolis-police-to-pay-for-their-own-liability-insurance-8182566 [https://perma.cc/L4VR-GN4Y]. The group tried three times to get the measure on the ballot, 2014, 2015, and 2016. *Id.* The group was formed in 2014 by Citizens United Against Police Brutality ("CUAPB"), a long-time community organization working to address police brutality. FLYER, CONCERNED ABOUT MINNEAPOLIS POLICE BRUTALITY? HELP US! (on file with author).

[296] The proposed additional text to the city charter included the following:

> Each appointed police officer must provide proof of professional liability insurance coverage in the amount consistent with current limits under the statutory immunity provision of state law and must maintain continuous coverage throughout the course of employment as a police officer with the city. Such insurance must be the primary insurance for the officer and must include coverage for willful or malicious acts and acts outside the scope of the officer's employment by the city. If the City Council desires, the city may reimburse officers for the base rate of this coverage but officers must be responsible for any additional costs due to personal or claims history. The city may not indemnify police officers against liability in any amount greater than required by State Statute unless the officer's insurance is exhausted. This amendment shall take effect one year after passage.

TEXT OF PROPOSED CHARTER AMENDMENT SUBMITTED VIA PETITION BY THE COMMITTEE FOR PROFESSIONAL POLICING, July 26, 2016 (on file with author).

[297] Bicking v. City of Minneapolis, 891 N.W.2d 304, 315 (Minn. 2017). According to the court in a *per curiam* decision, the charter amendment would: (1) add requirements that are absent from existing state law on municipal insurance requirements, such as designating the officer's required coverage as "primary"; (2) include provisions that permit what state law forbids, such as relieving the City of its liability for torts committed in the scope of the officer's employment until the officer's insurance coverage is first "exhausted"; and (3) amend provisions to forbid what state law expressly permits, such as purchasing insurance coverage for acts for which the City would otherwise be immune. *Id.* at 315.

[298] Amy Forliti & Mohamed Ibrahim, *Some Minneapolis Activists Doubt Disbanding the Police Will Work*, Associated Press (June 8, 2020), https://apnews.com/56a32b17f029abd750bfd58927ec5563 [https://perma.cc/49DZ-CB28].

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League Twin Cities, specifically criticized the reforms passed in July for "not includ[ing] a requirement that law enforcement officers carry their own personal liability insurance . . . [which] creates an incentive for officers to check themselves."[299] Unlike the efforts in 2016, however, this time activists are targeting the Minnesota State Legislature.[300]

3. *Indemnification – Taxpayers, Not Police Officers, Pay for Police Misconduct*

One key assumption in our legal process is that liability in civil court will incentivize better police conduct.[301] The U.S. Supreme Court has said that the fear of paying judgments creates important incentives for officers to follow the law.[302] The Court relies on this assumption for its qualified immunity jurisprudence.[303] In *Pierson v. Ray*, the same case in which the

In addition, Black Lives Matter Cleveland included the idea in its list of 10 demands for accountability of Cleveland law enforcement last summer. Amanda VanAllen, *Black Lives Matter Cleveland Has a 10-point Proposal for Better Policing in Cleveland*, News 5 Cleveland (June 5, 2020), https://www.news5cleveland.com/news/america-in-crisis/black-lives-matter-cleveland-has-a-10-point-proposal-for-better-policing-in-cleveland [https://perma.cc/X325-Q783].

[299] Bjorhus & Van Oot, *supra* note 12.

[300] Tiffany Bui, *What to Do About the MPD? How Three Activist Groups Are Rethinking Public Safety*, MinnPost (July 1, 2020), https://www.minnpost.com/metro/2020/07/what-to-do-about-the-mpd-how-three-activist-groups-are-rethinking-public-safety/ [https://perma.cc/99T7-KC7B] (reporting that "CUAPB's latest iteration for this measure appeals to the Minnesota Legislature instead").

[301] *See* Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093, 1102 (2005) ("Ordinarily, the threat of liability for compensatory damages also gives the defendant an incentive to behave in the manner required by the standard of care.").

[302] Smith v. Wade, 461 U.S. 30, 50 (1983) ("[W]e assume, and hope, that most officials are guided primarily by the underlying standards of federal substantive law—both out of devotion to duty, and in the interest of avoiding liability for compensatory damages.").

[303] Richard H. Fallon, Jr., *Asking the Right Questions about Officer Immunity*, 80 FORDHAM L. REV. 479, 495–96 (2011) (observing that in its qualified immunity analysis, "the Court relied heavily on the assumption that officials, absent immunity, would face the threat of personal liability for constitutional violations committed in the ostensible performance of their official duties"); *see also* Forrester v. White, 484 U.S. 219, 223 (1988) ("When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it."). Of course, the Court has articulated other justifications for qualified immunity for police officers. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'"); Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.").

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Court introduced the concept of qualified immunity, the Court explained its rationale for protecting officers from judgments: "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[304]

Federal courts generally seem to believe that police officers have to pay for whatever damages are assessed against them in civil rights cases.[305] Jurors may believe the same thing, particularly in the Eighth Circuit, which has prohibited lawyers from telling jurors that police do not have to pay for judgments against them.[306] The Eighth Circuit has made clear that it is prejudicial to clarify for the jury that the government will pay damages, and not the officers, because it "could result in an overly generous award of damages."[307]

But police do not pay for the judgments against them in civil rights cases, undermining a core assumption that civil liability for misconduct will incentivize better police behavior. As Professor Joanna Schwartz found in her recent study, "governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement."[308] Police officers paid $0 toward the $3.9 million in total punitive damages.[309] Many officers paid nothing whatsoever, regardless of the type of judgment.[310] Governments paid for police officer damages even when indemnification was prohibited by statute or policy, when officers

[304] Pierson v. Ray, 386 U.S. 547, 555 (1967).
[305] Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 79 (1999) ("Although federal officials do not in practice pay the costs of defending themselves or compensating the victims of constitutional violations, the federal courts have not accounted for that reality. The courts instead have taken the fiction of individual liability seriously, acting as if individual officials continue to bear the costs of litigation and liability personally.").
[306] Griffin v. Hilke, 804 F.2d 1052, 1058 (8th Cir. 1986).
[307] *Id.* As the court explained, "We see no distinction between this and the injection of testimony or argument concerning insurance, however. We believe that the jury's apprehension that the government would be responsible for paying damages could result in an overly generous award of damages." *Id.* Minnesota state courts have a similar restriction on informing juries about insurance or indemnification. *See* Purdes v. Merrill, 268 Minn. 129, 135, 128 N.W.2d 164, 168 (1964) ("We have discussed in numerous cases the impropriety of referring to the subject of insurance coverage by counsel in arguments to the jury."); *see also* Hon. Peder B. Hong, *Summation at the Border: Serious Misconduct in Final Argument in Civil Trials*, 19 HAMLINE L. REV. 179, 188 (1995) ("Counsel must avoid undue, unwarranted references to whether or not either party to an action is insured. This type of misconduct, if not cured, may result in a new trial.").
[308] Schwartz, *supra* note 34, at 890.
[309] *Id.* Note that in Professor Schwartz's study, she found that one officer was required to pay a $300 punitive damages award, but that officer ended up never paying anything. *Id.* at 918.
[310] *Id.* ("And officers in the thirty-seven small and mid-sized jurisdictions in my study never contributed to settlements or judgments in lawsuits brought against them.").

were disciplined, and when officers had been terminated by the department or criminally prosecuted for their conduct.[311] With nearly no financial stake in these lawsuits, officers, therefore, have "little financial incentive to correct course."[312]

4. *Specific Legislation for Professional Liability Insurance*

Several representatives of the Minnesota House of Representatives proposed a bill last July to require liability insurance for Minnesota police officers.[313] As a first step, the proposed bill would eliminate mandatory indemnification by the employing city that is now provided under Minnesota Statute sections 466.03 and 466.07.[314] Next, the proposed legislation would require liability insurance for each police officer in the state.[315] Officers would have to cover any additional costs of insurance due to misconduct or other factors that raise their premiums, and police departments would be permitted to reimburse the officer "for the base rate

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[311] One example Professor Schwartz shares is particularly egregious:

> Another example concerns the case brought by the estate of Kathryn Johnston, a 92-year-old Atlanta woman who was shot and killed by Atlanta police officers after they illegally raided her home. Officers involved in the shooting later admitted that they planted marijuana in Johnston's home after her death and submitted as evidence cocaine that they falsely alleged had been purchased at her home. Three officers pleaded guilty to offenses related to the shooting and coverup. They were sentenced to between five and ten years in federal prison and were ordered to pay $8180 restitution--the cost to bury Johnston. Another nine officers were fired or disciplined, or resigned, following the incident. The City of Atlanta paid $4.9 million to settle the civil suit brought by Johnston's estate. No officers contributed to the settlement.

Id. at 923–24.

[312] Megan Quattlebaum & Tom Tyler, *Beyond the Law: An Agenda for Policing Reform*, 100 B.U. L. REV. 1017, 1023–24 (2020).

[313] Representatives Jay Xiong, *Kaohly Her*, A*isha Gomez, Fue Lee, and Hodan Hassan authored the bill during the second special session. H.R. 87, 91st Leg., 2nd Spec. Sess. (Minn. 2020).*

[314] Under current Minnesota law, cities must indemnify their police officers. MINN. STAT. § 466.07, subdiv. 1. The proposed bill would eliminate that requirement. *See* H.R. 87, 91st Leg., 2nd Spec. Sess. *ll.* 1.12–1.14 (Minn. 2020) ("Neither the officer's employing agency nor any other individual or organization, public or private, may assume liability in lieu of the officer or the officer's insurance . . . ."); *see also id.* at *l.* 1.20 (adding the language "other than licensed peace officers" to 466.07, subdiv.1, exempting police from the indemnification requirement). In addition, the proposed legislation stated that any settlements would remain public data (even if between private individuals). *Id.* at *ll.* 1.15–1.16.

[315] *See id.* at *ll.* 3.18–3.24 ("Each licensed peace officer shall obtain a policy of professional liability insurance coverage in an amount no less than current limits for municipalities as provided in § 466.04.").

of the policy required by this subdivision, but may not cover any additional premium costs due to personal or claims history."[316]

5. Why Insurance Could Work

There are several compelling arguments as to why a market-based insurance program could reduce police misconduct. For starters, problem officers might have trouble maintaining their position because they are no longer insurable.[317] This has already played out for small communities where the cost or inability to get liability coverage has led to the closure of entire police departments, mainly because of lawsuits.[318] The same could be true for officers whom insurers refuse to insure or place such high premiums on their continued service that they can no longer afford to be police officers.[319] In this fashion, insurers in a compulsory insurance environment serve "effectively as quasi-regulators" and provide a way to screen and filter

[316] *Id.* at *ll.* 3.24–3.26.

[317] *See, e.g.*, Communities United Against Police Brutality, *What Will It Take to End Police Violence? Recommendations for Reform* (2020), https://d3n8a8pro7vhmx.cloudfront.net/cuapb/pages/1/attachments/original/1591595256/WHAT_WILL_IT_TAKE_TO_END_POLICE_VIOLENCE_with_Appendices.pdf?1591595256 [https://perma.cc/Q6QL-CV8N] ("Some of the worst offenders—likely including ex-Officer Derek Chauvin—would become uninsurable and then would no longer be able to work as police officers.").

[318] Ramirez et al., *supra* note 256, at 443–44. Communities cited include Lincoln Heights, Ohio; Maywood, California; Oakley, Michigan; Sorrento, Louisiana; Niota, Tennessee; King City, California; and Port Marion, Pennsylvania. *Id.* These police departments were considered uninsurable for a wide range of misconduct, including rampant fraud, threats of violence against a romantic partner, and exposing oneself on a previous job. *Id.* In these circumstances, at least, the inability to purchase insurance has worked to eliminate problem officers from service.

[319] As the plaintiffs in *Bicking* explained, the proposed insurance amendment seeks to address "the incorrigible and longstanding problem" of police misconduct by "applying the proven risk management strategy of professional liability insurance." Bicking v. City of Minneapolis, 891 N.W.2d 304, 312 n.7 (Minn. 2017). As Dave Bicking told National Public Radio, "We have one officer [in Minneapolis] who's had five significant settlements against him just in a year and a half. Someone like that could never, ever buy insurance. They'd have to charge him $60[,000]-$70,000 a year. That officer would be gone." Martin Kaste, *To Change Police Practices, a Push for Liability Insurance in Minneapolis*, NAT'L PUB. RADIO (June 26, 2016), https://www.npr.org/2016/06/27/483420607/to-stop-police-lawsuits-reformers-want-officers-to-get-insurance#:~:text=To%20Change%20Police%20Practices%2C%20A,Liability%20Insurance%20In%20Minneapolis%20%3A%20NPR&text=Live%20Sessions-,To%20Change%20Police%20Practices%2C%20A%20Push%20For%20Liability%20Insurance%20In,police%20misconduct%20complaints%20and%20lawsuits [https://perma.cc/8HPT-QJAX].

individuals who undertake important but potentially socially harmful activities.[320]

Relatedly, the impact of premium cost could deter bad behavior. Professor Ramirez and colleagues use car insurance as a potential model, and they collected data to support the notions that increasing premiums for bad driving does bring accidents down and that higher costs of insurance makes people more cautious.[321] And of course, if a person has been in too many accidents for any insurance company to offer them car insurance, the result is that they cannot buy insurance and thus legally cannot drive a car.[322]

There is also the strong possibility that the insurance industry itself could bring significant leverage to impose policies that improve policing safety. The automobile industry is a good analogy for this, too. Car insurers have fought the industry and government for stronger vehicle safety policies for decades.[323] They were an early and strong advocate for airbags.[324] The insurance companies have continued to work together to collect information and conduct studies to improve safety.[325] More recently, car

[320] Ronen Avraham, *The Economics of Insurance Law–A Primer*, 19 CONN. INS. L.J. 29, 41 (2012) (describing such gatekeeping as a principal function of compulsory insurance companies).

[321] Ramirez et al., *supra* note 256, at 443–44 (collecting studies). Professor Ramirez and her colleagues suggest that car insurance is a better model than malpractice insurance for lawyers, in part, because most states do not require lawyers to carry malpractice insurance. *Id.* at 399. Only two states currently require malpractice insurance for lawyers, and five states are studying the issue. *See* Susan Saab Fortney, *Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots*, 9 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 190, 193 (2019) ("Over the last two years, a few states have considered whether to join Oregon, and now Idaho, in requiring malpractice insurance for practicing attorneys. Bar groups in California, Washington, Nevada, New Jersey, and Georgia have studied the issue of mandatory insurance coverage for attorneys.").

[322] Avraham, *supra* note 320, at 41.

[323] *See, e.g.*, Walter Rugaber, *Industry Resists Car-Safety Costs*, N.Y. TIMES (Apr. 6, 1975), https://www.nytimes.com/1975/04/06/archives/industry-resists-carsafety-costs-companies-feel-consumers-will.html [https://perma.cc/7PUZ-R6JU] (describing the coalition of insurance companies working with Ralph Nader to require air bags among other safety provisions). The insurance companies took the fight all the way to the Supreme Court and won. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (reinstating the original air bag requirement). Of course, Ralph Nader and the auto insurers were not always on the same side. Alan Fram, *Auto Insurers, Consumer Activists Square Off Over California Proposition*, ASSOCIATED PRESS (Dec. 6, 1988), https://apnews.com/7fa6fd19854c43e897ba3be7db263f74 [https://perma.cc/9PHP-4ECF] (quoting Nader's testimony to Congress, "Insurance customers will be standing up for their rights against unreasonable insurance rates, arbitrary practices[,] and lobbying pressure by insurance companies and their corporate allies to take away victims' rights.").

[324] *See generally* Robert Kneuper & Bruce Yandle, *Auto Insurers and the Air Bag*, 61 J. RISK & INS. 107 (1994) (documenting the decades-long strategy and motivation of the auto insurers to fight for air bags).

[325] Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 222 (2012) (describing, as one example, the

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insurers successfully fought for "graduated driver licensing" laws (under which driving privileges are introduced gradually) and published ratings of state highway safety laws.[326]

Insurance providers who provide insurance to entire police departments have similarly had some positive impact on policing.[327] Current municipal insurance providers already provide a number of "loss-prevention" measures to the police departments they cover, including policy development, education and training, accreditation, and auditing.[328] Insurers have also successfully imposed their influence on the firing of problem officers,[329] and they have even seen to the reconstitution of entire departments due to widespread officer misconduct.[330]

As Professor John Rappaport explained, "the insurer may be better positioned than the government to reform police behavior."[331] Compared to government oversight agencies, the insurer

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Insurance Institute for Highway Safety, "a nonprofit organization wholly funded by the auto insurance industry . . . whose stated goal is to reduce the losses from highway crashes" and whose claim to fame is "testing and rating the crashworthiness of new automobiles as they come on the market").

[326] *Id.* at 222–23 (citations omitted).

[327] *See generally* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1543 (2017) (arguing that insurance risk management encourages better policing practices). By using market-based incentives, "an insurer writing police liability insurance may profit by reducing police misconduct." *Id.* at 1543–44. Because an insurer has significant power over the police department, it has the "the means and influence necessary" to "regulate" the police. *Id.* at 1544. Insurance "has probably been the source of the most far-reaching yet deep reforms in American policing over the past three decades." Michael D. White, Henry F. Fradella, Weston J. Morrow, & Doug Mellom, *Federal Civil Litigation as an Instrument of Police Reform: A Natural Experiment Exploring the Effects of the Floyd Ruling on Stop-and-Frisk Activities in New York City*, 14 OHIO ST. J. CRIM. L. 9, 41 (2016).

[328] Rappaport, *supra* note 327, at 1574–86 (detailing the many efforts insurers use to reduce the incidence and magnitude of police misconduct); White et al., *supra* note 327, at 40 (noting that "insurance companies would not offer attractively priced policies if police agencies could not demonstrate that they had done everything possible to reduce the risk of lawsuits").

[329] *See, e.g.*, Rachel B. Doyle, *How Insurance Companies Can Force Bad Cops off the Job*, THE ATLANTIC (June 10, 2017), https://www.theatlantic.com/politics/archive/2017/06/insurance-companies-police/529833/ [https://perma.cc/V2JG-TH44] (reporting that "[i]n 2010, a police chief in Rutledge, Tennessee, was fired to appease the town's liability insurer after assault allegations were leveled against him").

[330] Radley Balko, *How the Insurance Industry Could Reform American Policing*, WASH. POST, (Mar. 1, 2016), https://www.washingtonpost.com/news/the-watch/wp/2016/03/01/how-the-insurance-industry-could-reform-american-policing/ [https://perma.cc/K42B-4PF2] (including, among other examples, "[t]he town of King City, California, [which] had to rebuild its police department from scratch after reports of cops operating a towing scheme against low-income Latin[x] drivers").

[331] Rappaport, *supra* note 327, at 1544.

> may possess superior information, such as data that cut across myriad police agencies; deeper and more nimble resources, including 'boots on the ground' and the capacity to develop harm-prevention technologies; market incentives that favor good, but not overzealous, risk-management policies; and the flexibility to develop and prescribe individualized risk-reduction plans.[332]

The profit motive in such a market-based structure can create powerful incentives for insurance companies to impose reform on police departments.[333] Departments usually listen.[334]

But general insurance at the municipal level is not enough. To the extent that general insurance for municipal police departments can have positive impacts on policing policy, any such benefits typically do not reach the larger municipalities. Larger city police departments, Minneapolis and St. Paul, in particular, are self-insured.[335] The larger police departments not only miss out on any positive influence from an outside insurance provider (which might push for reforms), but they also lack any sort of risk-management structures.[336] Indeed, Professor Carol Archbold surveyed the 354 largest municipal agencies about their risk-management programs, and

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[332] *Id.* at 1544.

[333] As Professor John Rappaport explains:

> When the insurer assumes the risk of liability, it also develops a financial incentive to reduce that risk through loss prevention. By reducing risk, the insurer lowers its payouts under the liability policy and thus increases profits. An effective loss-prevention program can also help the insurer compete for business by offering lower premiums.

Id. at 1543.

[334] *See id.* at 1596–97 ("To the extent that researchers have identified successful strategies for combating police misconduct, insurers have been reasonably effective at inducing police agencies to use them," including effective policies on vehicle pursuits, the use of force and other high-risk conduct, and the use of body-worn cameras and training simulators.).

[335] Furst & Webster, *supra* note 28. To self-insure, Minneapolis sets aside money each year in its budget to cover any anticipated legal judgments. Miguel Otárola, *Minneapolis Taxpayers Will Feel Effect of Record $20 Million Settlement*, STAR TRIB., (May 10, 2019), https://www.startribune.com/minneapolis-taxpayers-will-feel-effect-of-record-20-million-settlement/509756012/ [https://perma.cc/8XZH-QA5D]. The city contracts with a third-party actuarial firm annually to determine appropriate premium charges; the May 28 cash balance in the self-insurance fund was approximately $96 million. Judy Greenwald, *Group Presses for Police Insurance Reform: Minneapolis Self-Insured*, BUS. INS. (June 10, 2020), https://www.businessinsurance.com/article/20200610/NEWS06/912335052/Group-presses-for-police-insurance-reform-Minneapolis-self-insured# [https://perma.cc/X28E-7CR6].

[336] Rappaport, *supra* note 327, at 1597 (noting that "the Chicagos and New Yorks may do surprisingly little loss prevention").

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only fourteen of the 354 employed an in-house risk manager (most were presumably self-insured).[337]

C. *Proposal No. 3: Expand Minnesota's Deadly-Use-of-Force Statute[338] to Include What Officers Did (or Did Not Do) Before They Used Deadly Force*

1. *Current Standards Are Inadequate*

Current deadly use of force standards have not sufficiently curtailed police-involved killings. Only a tiny fraction of the officers that kill suspects are prosecuted, and an even smaller number are convicted.[339] In Minnesota, no police officer had been convicted out of nearly 200 police-involved deaths since 2000 until Somali-American Officer Mohamed Noor was convicted of third-degree murder in 2017 (the victim, notably, was White).[340] This is very likely "the first time a Minnesota police officer has been convicted of murder for an on-duty shooting."[341] Until the killing of George Floyd, only one other police officer in Minnesota had been charged

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[337] *Id.* (citing CAROL A. ARCHBOLD, POLICE ACCOUNTABILITY, RISK MANAGEMENT, AND LEGAL ADVISING 62, 77–79 (2004)). Based on her research, Archbold concluded that "risk management programs are still in the infancy stage of being embraced by police agencies," and that "the vast majority of the over 18,000 law enforcement agencies across the country have no outside reviewers to assist with accountability efforts." *Id.* at 1597–98.

[338] MINN. STAT. § 609.066 (effective Mar. 1, 2021).

[339] Madison Park, *Police Shootings: Trials, Convictions Are Rare for Officers*, CNN (Oct. 3, 2018), https://www.cnn.com/2017/05/18/us/police-involved-shooting-cases/index.html [https://perma.cc/DN8S-GXNN] (providing examples of high-profile police killings across the country that did not result in charges or convictions against the officers including Lamar Anthony Smith in 2011, Sylville Smith in 2016, Philando Castile in 2016, Terence Crutcher in 2016, Freddie Gray in 2015, Samuel DuBose in 2015, Eric Garner in 2014, Michael Brown in 2014, Tamir Rice in 2014, Sandra Bland in July 2015, and Alton Sterling in 2016). As researchers at FiveThirtyEight found last summer, "despite the increased scrutiny on police violence since 2014 (when the shooting of Michael Brown in Ferguson, Missouri, and the Black Lives Matter movement raised public awareness of the issue), neither the number of officers charged nor the number of convictions has meaningfully increased." Amelia Thomson-DeVeaux, Nathaniel Rakich, & Likhitha Butchireddygari, *Why It's So Rare for Police Officers to Face Legal Consequences*, FIVETHIRTYEIGHT (June 4, 2020) https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/ [https://perma.cc/7PWX-WPHD] (analyzing data from the Henry A. Wallace Police Crime Database).

[340] Rachel M. Cohen, *After a Black Cop Was Convicted of Killing a White Woman, Minnesota Activists Say Focus Should Be Police Reform*, THE INTERCEPT (May 2, 2019), https://theintercept.com/2019/05/02/minnesota-police-convicted-justine-damond/ [https://perma.cc/M6TZ-ZX35].

[341] Amy Forliti, *Conviction for Minneapolis Cop Prompts Questions About Race*, ASSOCIATED PRESS (May 1, 2019), https://apnews.com/f87950f2f05243fbaa7a93bb1f826f1a [https://perma.cc/P8K7-JZAJ].

for killing a suspect in recent history—Jeronimo Yanez, a Latino officer, who was later acquitted of manslaughter in the 2016 death of Philando Castile.[342]

Similarly, police officers nationwide rarely get charged for the deaths of those in their custody.[343] Over the last several years, police killed on average about 1,000 people each year in the United States.[344] A staggering number, particularly when compared to other countries.[345] While more White suspects have been killed overall, Black and Indigenous suspects are significantly more likely to be killed by the police.[346] Despite thousands of

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[342] *Id.*

[343] MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org/ [https:/perma.cc/C62L-ZYX9] (database updated as of Oct. 28, 2020) (99% of police killings from 2013-2019 have not resulted in officers being charged with a crime).

[344] John Sullivan, Liz Weber, Julie Tate & Jennifer Jenkins, *Four Years in a Row, Police Nationwide Fatally Shoot Nearly 1,000 People*, WASH. POST (Feb. 12, 2019) https://www.washingtonpost.com/investigations/four-years-in-a-row-police-nationwide-fatally-shoot-nearly-1000-people/2019/02/07/0cb3b098-020f-11e9-9122-82e98f91ee6f_story.html [https://perma.cc/N77Z-5BRC] (reporting that approximately one thousand people die annually from police shootings). Mapping Police Violence's data, which is gathered from public databases and law enforcement records, also shows that the number of police killings varied by year from 2013 to 2019 but did not fall significantly overall—in that span, the number of killings fell to a low of 1,050 in 2014, and had a high of 1,143 in 2018. MAPPING POLICE VIOLENCE, *supra* note 343; *Fatal Force*, WASH. POST (updated Nov. 3, 2020), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/95VQ-34UC]; Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 955 (2020) (compiling data on fatal police shootings).

[345] Jamiles Lartey, *By The Numbers: US Police Kill More in Days Than Other Countries Do in Years*, THE GUARDIAN (June 9, 2015), https://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killings-us-vs-other-countries [https://perma.cc/CMF8-29PM] (comparing the number of police shootings in the U.S. with those in the United Kingdom, Australia, Iceland, Germany, Canada, and Finland and concluding that "America is the outlier—and this is what a crisis looks like"). For example, in England and Wales (with one-sixth the population of the U.S.), there were fifty-five fatal police shootings in the twenty-four years between 1990 and 2015, and there were fifty-nine fatal police shootings in the U.S. in the first twenty-four days of 2015. *Id.*

[346] Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369, 376 (2018) (finding that over the two-year period of 2015–2016, African Americans and Native Americans were respectively 2.5 times and 2.7 times more likely to be killed by police than Whites). The disparity may be even higher for unarmed suspects. *See, e.g.*, Barbara E. Armacost, *Police Shootings: Is Accountability the Enemy of Prevention?*, 80 OHIO ST. L.J. 907, 910 (2019) ("Unarmed African-American individuals are 3.5 times more likely to be shot by police than unarmed [W]hite persons."); *see also* Ann C. Hodges & Justin Pugh, *Crossing the Thin Blue Line: Protecting Law Enforcement Officers Who Blow the Whistle,* 52 U.C. DAVIS L. REV. ONLINE 1, 6 (2018) (collecting studies suggesting that Persons of Color were far more likely to be shot and killed by police officers than Whites). The disparity is even more pronounced in Minneapolis. *See* 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/XM5F-

police killings since 2005, only 110 officers have been charged with murder or manslaughter in an on-duty shooting,[347] and only 42 of those officers have been convicted.[348]

2. Minnesota's Most Recent Reforms

Minnesota took substantial steps last summer to strengthen its standards with respect to deadly use of force by police. Minnesota's previous standard essentially "boiled down to a 'subjective' perception about whether an individual officer felt threatened."[349] The key for prosecutors when contemplating whether to charge officers was what an officer believed subjectively at the time the deadly force was used.[350] As a group of local criminology and criminal justice professors concluded, "[i]f an officer 'feels' threatened, regardless of whether or not they are, deadly force is justified."[351] In their view, "the law gives officers wide discretion and makes it difficult to prosecute and charge officers."[352] After the trial of Officer Yanez for the shooting of Philando Castile, jurors specifically "pointed to the law authorizing police to use deadly force to explain their decision to find Yanez

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XUAW] ("Black people accounted for more than 60 percent of the victims in Minneapolis police shootings from late 2009 through May 2019, data shows.").

[347] Thomson-DeVeaux et al., *supra* note 339 (analyzing data from the Henry A. Wallace Police Crime Database). This data does not include killings that did not involve shooting, but setting aside the killing of George Floyd, deaths not involving guns are quite rare. *Id.*

[348] *See id.* ("Fifty were not [convicted] and 18 cases are still pending. . . . [M]any of these convictions ended up being for a lesser offense—only five of these officers were convicted of murder (and did not have that conviction overturned).").

[349] Gina Erickson, Sarah Greenman, Jillian Peterson & Shelly Schaefer, *Break the Cycle: Five Changes in Minnesota Policing That Can Be Enacted Right Now*, MINNPOST (June 2, 2020), https://www.minnpost.com/community-voices/2020/06/break-the-cycle-fives-changes-in-minnesota-policing-that-can-be-enacted-right-now/ [https://perma.cc/44GA-TQZL] (legal analysis of Minnesota's deadly use-of-force statute by associate professors of criminology and criminal justice at Hamline University).

[350] Indeed, in his decision not to charge the officers in the fatal shooting of Isak Aden, Dakota County Attorney James Backstrom concluded that because "it was objectively reasonable for these five police officers to subjectively believe Aden posed a deadly threat to other officers at the scene of this incident at the time they fired their service weapons and, therefore, they were legally justified in using deadly force in this instance." LEGAL CHARGING STATEMENT OF JAMES BACKSTROM, DAKOTA CTY. ATT'Y (Nov. 13, 2019), https://www.co.dakota.mn.us/LawJustice/AttorneyNewsReleases/Pages/Eagan-And-Bloomington-Police-Officers-Were-Legally-Justified-In-Using-Deadly-Force-In-Shooting-Death-Of-Isak-Aden.aspx [https://perma.cc/DAG6-DEER]. Hennepin County Attorney Mike Freeman similarly refused to charge the officers in the death of Jamar Clark because Officer Schwarze "reasonably believed" that Clark was lethal threat to the arresting officers. David A. Graham, *No Charges in the Shooting of Jamar Clark*, THE ATLANTIC (Mar. 30, 2016), https://www.theatlantic.com/national/archive/2016/03/no-charges-in-the-shooting-of-jamar-clark/476031/ [https://perma.cc/V22A-EM25].

[351] Erickson et al., *supra* note 349.

[352] *Id.*

not guilty."[353] One of the jurors in the Yanez trial lamented the result and challenged the public to "go after the law."[354] Removal of the subjective standard became one of the major components in the reform efforts last summer.[355]

The reforms passed in July 2020 included numerous changes to the deadly use of force standards. In addition to outlawing choke holds and other dangerous restrictive holds,[356] it also established a legislative intent that deadly force must be "exercised judiciously" and "for the sanctity of every human life."[357] Importantly, the reforms also enhanced reporting on the use of force,[358] adding the requirement that officers intervene when present and observing the excessive use of force by another officer.[359] Lastly, the use of

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[353] Jon Collins, *Law Gives Officers Wide Discretion in Deadly Force Incidents*, MINN. PUB. RADIO (Aug. 14, 2018), https://www.mprnews.org/story/2018/08/14/police-shootings-prompt-discussion-of-deadly-force-laws [https://perma.cc/YHA5-P8NQ].

[354] Tom Weber, *Yanez Juror: "Nobody Was OK with It,"* MINN. PUB. RADIO (June 23, 2017), https://www.mprnews.org/story/2017/06/23/74-seconds-yanez-juror [https://perma.cc/74RG-KERB].

[355] Brian Bakst, *Deadly Force Law a Key Issue in Capitol Policing Debate*, MINN. PUB. RADIO (June 17, 2020), https://www.mprnews.org/story/2020/06/16/deadly-force-law-a-key-issue-in-capitol-policing-debate [https://perma.cc/JJ6Y-ZUJ9]. During a legislative hearing last summer, Representative Rena Moran explained, "We've heard . . . before from law enforcement officers that said, 'Well, I feared for my life or I was scared.' . . . This makes prosecuting and gaining a conviction extremely difficult." Mara Gottfried, *Would Proposed Changes to MN Law Bring More Charges Against Officers? Probably Not, Attorneys Say*, PIONEER PRESS (June 13, 2020), https://www.twincities.com/2020/06/13/lawmakers-weigh-use-of-deadly-force-as-they-consider-police-reform-in-wake-of-george-floyds-death/ [https://perma.cc/BY8J-KB7J].

[356] MINN. STAT. § 609.06, subdiv. 3 (2020). Importantly, the definition of "choke hold" includes "applying pressure to a person's neck on either side of the windpipe, but not to the windpipe itself, to stop the flow of blood to the brain via the carotid arteries." *Id.* subdiv. 3(b). In addition to choke holds, the new bill prohibits "tying all of a person's limbs together behind the person's back to render the person immobile" and "securing a person in any way that results in transporting the person face down in a vehicle." *Id.* subdiv. 3(a)(2), (3).

[357] MINN. STAT. § 609.066, subdiv. 1(a) (effective Mar. 1, 2021).

[358] *See* MINN. STAT. § 626.5534 (2020) ("A chief law enforcement officer must provide the information requested by the Federal Bureau of Investigation about each incident of law enforcement use of force resulting in serious bodily injury or death, as those terms are defined in the Federal Bureau of Investigation's reporting requirements, to the superintendent of the Bureau of Criminal Apprehension.").

[359] MINN. STAT. § 626.8475 (2020). Just days before the second special session, Twin Cities law enforcement officials sent a letter to legislative leaders urging them to pass a requirement that officers intervene when witnessing other officers using excessive use of force, among other suggested reforms. Dana Ferguson, *Police Reforms Among the Issues Legislators Expected to Take Up When They Return to the Capitol*, PIONEER PRESS (July 10, 2020), https://www.twincities.com/2020/07/10/police-reforms-among-the-issues-legislators-expected-to-take-up-when-they-return-to-the-capitol/ [https://perma.cc/CXD4-P75H]. The letter was signed by Ramsey County Attorney John Choi, Hennepin County Attorney Mike Freeman, St. Paul Police Chief Todd Axtell, Minneapolis Police Chief Medaria Arrandondo, and Minnesota Public Safety Commissioner John Harrington. *Id.* St. Paul Police had already

force reforms removed the subjective belief standard and replaced it with that of an objectively reasonable officer.[360] Now an officer can only use deadly force "if an objectively reasonable officer would believe, based on the totality of the circumstances known to the officer at the time and without the benefit of hindsight, that such force is necessary . . . to protect the peace officer or another from death or great bodily harm."[361]

3. Problems with Minnesota's New Deadly Use of Force Standard

a. Reasonableness is Not a Reasonable Way to Hold Police Accountable

The change in Minnesota's use of deadly force statute improved the standard but did not go far enough. Objective reasonableness of an officer's beliefs alone does not get at the full picture.[362] It relies too heavily on viewing the circumstances from the officer's perspective and restricts the time frame to the seconds before the officer uses deadly force.[363] A more comprehensive analysis of what led to the police shooting is needed—a standard that includes the officer's pre-deadly force actions, and not just the officer's beliefs at the moment deadly force was employed.

As a preliminary matter, there is a problem generally with any standard of review that relies on the "reasonableness" of an officer's belief.[364]

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required their officers to intervene "to prevent the use of excessive force." ST. PAUL POLICE DEP'T MANUAL, POLICY 246.01, II. (updated Feb. 25, 2020).

[360] *See* MINN. STAT. § 609.066, subdiv. 2(a) (effective Mar. 1, 2021) ("[T]he use of deadly force by a peace officer in the line of duty is justified only if an objectively reasonable officer would believe, based on the totality of the circumstances known to the officer at the time and without the benefit of hindsight, that such force is necessary . . . .").

[361] *See id.*

[362] Even the determination of what is "reasonable" is problematic. Mawia Khogali, *Redefining Standards of Excessive Force: Implications for Policy and Practice*, 12 S. J. POL'Y & JUST. 105, 137 (2018) ("[A]long with the possibility that perceptions of 'reasonableness' vary across different departments and individual officers, there is evidence that officers' ability to perceive situations objectively is obstructed when they are prepared to fire a gun.").

[363] Part of the issue may be "the popular perception that law enforcement is extremely dangerous work and that police officers are under constant threat of attack." John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J.C.L. & C.R. 155, 167–68 (2016). People generally are wrong about this. As Professor Gross found, "While law enforcement can be dangerous, those dangers have been greatly exaggerated. The reality is that more police officers are killed accidentally by motor vehicles than are fatally shot." *Id.* at 168. Without minimizing the risks to law enforcement, it is important to keep in mind that "[b]eing a truck driver, construction worker, or a roofer is more dangerous than being a police officer." *Id.*

[364] This is the standard used in most states. *See* Steven M. Salky & Joshua A. Levy, *Reforming Police Use of Deadly Force to Arrest*, THE CHAMPION 52 (June 2020) (providing a brief summary of the current number of states using objective reasonableness as the deadly use of force standard).

The term "reasonableness" is too much of "an open-ended standard" to provide sufficient guidance to the jury deciding whether an officer's deadly use of force was justified.[365] Jurors can struggle with the concept of reasonableness in the context of police behavior, in particular.[366] The Supreme Court has clouded the matter by suggesting officers be given deference and that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[367] Jurors have followed this guidance and are reluctant to hold police accountable.[368] It can be difficult for jurors to find that an officer's beliefs were unreasonable when they too often accept the testimony of police as more believable than the testimony of others.[369] As a result, "almost any use of deadly force can appear to be reasonable."[370]

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[365] Lee, *supra* note 39, at 654–55. The Court acknowledged the messiness and lack of any real standard. Scott v. Harris, 550 U.S. 372, 383 (2007) ("[W]e must still slosh our way through the fact bound morass of "reasonableness.").

[366] Khogali, *supra* note 362, at 109 (noting that "it is not exactly clear what constitutes 'objective reasonableness' . . . [since] the definition of a reasonable officer is equivocal [and given] hundreds of thousands of police officers in the U.S., perceptions of 'reasonableness' may not be universally similar").

[367] Graham v. Connor, 490 U.S. 386, 396–97 (1989). As Professor John Gross points out, "the Court did not say that police officers should be shown some amount of deference in their decision making when the situation they are in *actually* is 'tense, uncertain, and rapidly evolving,' but simply because they are *often* placed in such situations." Gross, *supra* note 363, at 158–59 (citations omitted, emphasis added). In such circumstances, "[t]here is an understandable desire of jurors to give officers the benefit of the doubt, especially when making split-second decisions in what they perceive as life-threatening circumstances." Erwin Chemerinsky, Opinion, *Police Dodge Accountability for Deaths*, ORANGE CTY. REG. (Dec. 7, 2014), https://www.ocregister.com/2014/12/07/erwin-chemerinsky-police-dodge-accountability-for-deaths/ [https://perma.cc/3D3G-FNQ9].

[368] Justice Burger recognized the reluctance of jurors to hold police accountable forty years ago. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 421 (1971) (Burger, J. dissenting) ("There is some validity to the claims that juries will not return verdicts against individual officers except in those unusual cases where the violation has been flagrant or where the error has been complete."); *see also* Ramirez et al., *supra* note 256, at 420 ("[J]urors do not believe that police officers who have mistakenly perceived a deadly threat and thus mistakenly used deadly force are criminals. Jurors think of these cases as instances where a police officer doing a dangerous job made a mistake in the line of duty. They often empathize with an officer who had to make an unexpected split-second life-or-death decision.").

[369] German Lopez, *Cops Are Almost Never Prosecuted and Convicted for Use of Force*, VOX, (Nov. 14, 2018), https://www.vox.com/identities/2016/8/13/17938234/police-shootings-killings-prosecutions-court [https://perma.cc/J52Z-DN9U]. Part of what makes police more believable to jurors may be that "police are also trained and skilled narrators of observed conflicts and also skilled witnesses and advocates." FRANKLIN E. ZIMRING, WHEN POLICE KILL 181 (2017).

[370] Gross, *supra* note 363, at 176.

A second problem is that reasonableness, while sounding objective, often incorporates negative stereotypes.[371] Racial bias, for example, can impact juror perception of whether an officer's beliefs were "reasonable" in two related ways.[372] First, jurors might find an officer's beliefs "reasonable" because they do not notice (or do not care) that the officer's beliefs were motivated by racist assumptions.[373] The reasonableness standard often turns on whether the quick thinking of an officer was reasonable in light of circumstances, and such "mental shortcuts" can trigger racial bias by an officer.[374] Second, jurors might act on their own racial biases in determining whether it would be reasonable to use force, particularly when the victim of the force is a Person of Color.[375] Whether implicit or

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[371] Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153, 187 (2008) (arguing that standards like reasonableness "have always been assigned a race (White), a gender (male), and a class (wealthy)").

[372] *See generally* Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931, 980 (2019) (detailing the long and disturbing history of White fear of People of Color and concluding that "implicit bias inevitably affects factfinding analyses").

[373] *See, e.g.*, Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 74 (1993) ("[M]any White Americans are quite insensitive to cues of prejudiced behavior in others.").

[374] Former FBI Director James Comey explained, in rather unfiltered terms, how the process can work inside the minds of police officers:

> A mental shortcut becomes almost irresistible and maybe even rational by some lights. The two young Black men on one side of the street look like so many others the officer has locked up. Two White men on the other side of the street—even in the same clothes—do not. The officer does not make the same association about the two White guys, whether that officer is White or Black. And that drives different behavior.

Remarks by James Comey, *Hard Truths: Law Enforcement and Race* (Feb. 12, 2015), https://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race [https://perma.cc/69JS-74J2]. Professors L. Song Richardson and Phillip Goff describe how quick thinking often triggers a "suspicion heuristic" where "perceiving race – even absent racial animus – can influence judgments of criminality beyond conscious awareness." L. Song Richardson & Phillip A. Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 307 (2012). The "Black-as-Criminal Stereotype" can influence the officer's belief in the need to shoot, especially given that heuristics are often relied on to "reduce complex decisions to simpler assessments." *Id.* at 298. Police officers, like others, can experience "attentional bias" when they see Black faces, and this is "driven by stereotypic associations that [officers] are not even aware are operating on [them]" but are based on the false equivalence between being African American and being a criminal. JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO 60–61 (2019).

[375] *See* Fields, *supra* note 372, at 980 (reporting that "implicit bias inevitably affects factfinding analyses"). Racism on the part of White jurors, in particular, is nothing new. *See, e.g.*, Natalie A. Spiess, Peña-Rodriguez v. Colorado*: A Critical, but Incomplete, Step in the Never-Ending War on Racial Bias*, 95 DENV. L. REV. 809, 825 (2018) ("A wealth of research has also found that juries are more likely to convict People of Color than Whites, even when the facts in two separate cases are identical."); *see also* Samuel R. Sommers & Phoebe C. Ellsworth, *How*

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explicit, "racist beliefs continue to factor into jury deliberations."[376] As a result, applying a standard of reasonableness can "fail[] to effectively protect Persons of Color by allowing racial bias to influence an officer's use of deadly force."[377]

Even after the modest reforms passed last summer, Minnesota's state policing standards are still behind local law enforcement policies for deadly use of force by officers. For example, St. Paul requires its officers to first try to de-escalate conflict and limits authorized use of force to situations involving an "imminent" threat.[378] Minneapolis requires its officers to consider all reasonable alternatives before using deadly force.[379] Minnesota's state government should be pushing departments to do more, not the other way around.

b. Minnesota Law Lags Behind Current Policies of Local Police Departments

The U.S. Supreme Court has acknowledged the importance of at least keeping up with the policies of local law enforcement in the context of the use of deadly force in particular. In *Tennessee v. Garner*, the Court emphasized the importance of reviewing actual police practice when considering what constitutes a reasonable use of deadly force.[380] The Court overturned a longstanding common law rule that permitted any amount of force, including deadly force, to stop a fleeing felon, after examining "the sweeping change in the legal . . . context."[381] The Court found that examining

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Much Do We Really Know About Race & Juries? A Review of Social Science Theory & Research, 78 CHI.-KENT L. REV. 997, 1010 (2003) ("[S]ubstantial evidence exists to support the conclusion of many legal scholars that, at least under some conditions, White jurors exhibit racial bias in their verdicts and sentencing decisions.").

[376] Kathryn E. Miller, *The Attorneys Are Bound and the Witnesses Are Gagged: State Limits on Post-Conviction Investigation in Criminal Cases*, 106 CALIF. L. REV. 135, 172 (2018).

[377] Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 999–1000 (2020). As Professors Fagan and Campbell note, "Without rethinking the reasonableness standard, persons who are perceived to be dangerous on account of their race . . . will remain at risk." *Id.*

[378] ST. PAUL POLICE DEP'T, POLICY MANUAL 246.01 IV (de-escalation), 246.00 VII.B (2020).

[379] MINNEAPOLIS POLICE DEP'T, POLICY MANUAL 5-301 III.B.3 (2020) ("Officers shall not use deadly force except in accordance with MN Statute § 609.066, and [adding] even in those circumstances officers shall first consider all reasonable alternatives including less lethal measures, before using deadly force."). Minneapolis also requires officers to de-escalate and reduce the use of force "immediately as resistance decreases or control is achieved." MINNEAPOLIS POLICE DEP'T, POLICY MANUAL 5-301 III.G.4 (2020).

[380] Tennessee v. Garner, 471 U.S. 1, 19 (1985) (citing numerous studies of police department regulations).

[381] *See id.* at 13 ("Because of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry.").

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the reasonableness of officer conduct required consideration "[i]n light of the rules adopted by those who must actually administer them" and noted that "[a]ctual departmental policies are important."[382]

The reverse is true, too. Changes in the law can impact police department policy. After the *Garner* decision, numerous departments improved their internal policies.[383] In a survey of police departments in the 100 most populous U.S. cities about their policy response to the *Garner* decision, over thirty percent had changed their deadly force policies as a result of *Garner*.[384] The other seventy percent had already instituted policies at least as restrictive as what *Garner* required.[385] Even in departments that were already in compliance with *Garner*, stronger policies were enacted beyond what even *Garner* required.[386] As research has shown, "individual police department rules . . . generally place a more restrictive standard of conduct than permitted by law."[387] The impact of these adjustments to department policies, prompted by the change in the law from *Garner*, led to a significant reduction in police homicides.[388]

4. Deadly Use of Force Restrictions Need to Include the Actions or Inactions of the Officers that Take Place Before the Use of Deadly Force, not Just Their Beliefs

Actions (and inactions) by officers are often just as important as the reasonableness of their beliefs. The Supreme Court's concern that "police officers are often forced to make split-second judgments"[389] overstates how

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[382] *Id.* at 19. Not every department was ahead of the law, however. *See* Abraham N. Tennenbaum, *The Influence of the Garner Decision on Police Use of Deadly Force*, 85 J. CRIM. L. & CRIMINOLOGY 241, 244 (1994) ("[A]ctual police departments' policies before [*Garner*] varied significantly not only from state to state, but also within each state.").

[383] *See id.* at 260 ("[T]he *Garner* decision demonstrates that a decision can have a strong effect on police behavior.").

[384] Samuel Walker & Lori Fridell, *Forces of Change in Police Policy: The Impact of* Tennessee v. Garner, 11 AM. J. POLICE 97, 101 (1992). State legislatures, however, were less enthusiastic about following *Garner*'s lead. *See* James J. Fyfe & Jeffery T. Walker, Garner *Plus Five Years: An Examination of Supreme Court Intervention into Police Discretion and Legislative Prerogatives*, 14 AM. J. CRIM. JUST. 167, 177 (1990) (concluding that of the twenty-two states that *Garner* impacted, only four amended their statutes to comply with the ruling).

[385] Fyfe & Walker, *supra* note 384, at 177.

[386] Jerry R. Sparger & David J. Giacopassi, *Memphis Revisited: A Reexamination of Police Shootings After the Garner Decision*, 9 JUST. Q. 211, 218 (1992) ("Even though Memphis' policy before *Garner* was consistent with the Supreme Court's decision, the police restricted the policy even further after the decision.").

[387] Tennenbaum, *supra* note 382, at 256 (quoting KENNETH J. MATULIA, A BALANCE OF FORCES: MODEL DEADLY FORCE POLICY AND PROCEDURE 17 (2d ed. 1985)).

[388] *See id.* (finding that *Garner* led to a reduction in the total number of police homicides by approximately sixty homicides a year (more than sixteen percent)).

[389] Graham v. Connor, 490 U.S. 386, 396–97 (1989).

common such circumstances arise. Law professor and former police officer Seth Stoughton points out that "the realities of police violence are such that the circumstances in which officers must make a truly split-second decision are highly unusual."[390] On the contrary, it is typically the officer who is the first to use force. When a police officer uses force, it is usually done "*offensively* to induce compliance, not *defensively* to protect their own safety or the safety of an innocent bystander."[391] Use of force standards, therefore, should require officers to avoid taking actions that place them in situations where they have no choice but to make split-second decisions.[392]

Professor Cynthia Lee has put together an entire model use-of-force statute that recognizes the importance of the actions that officers take before using deadly force.[393] Among other reforms to standards of deadly use of force,[394] Professor Lee recommends directing juries to examine what "pre-seizure conduct" officers took when evaluating whether the use of

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[390] Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 869 (2014). Despite the fact that it describes only rare occasions, the phrase "tense, uncertain, and rapidly evolving" has become, inaccurately, "the accepted depiction of the environment in which police officers use force." *Id.* at 865. According to Professor Stoughton, since the Supreme Court first introduced that description in 1989, federal district and circuit courts have repeated it on more than 2300 occasions. *Id.*

[391] Megan Quattlebaum & Tom Tyler, *Beyond the Law: An Agenda for Policing Reform*, 100 B.U. L. REV. 1017, 1022 (2020); *see also* Stoughton, *supra* note 390, at 868 ("The vast majority of the time, then, officers use force aggressively, not defensively.").

[392] PERF GUIDING PRINCIPLES, *supra* note 27, at 17 (recommending policies "to take steps that help prevent officers from being placed in situations where they have no choice but to make split-second decisions").

[393] *See* Lee, *supra* note 39, at 635 ("My model statute goes beyond current law by broadening the time frame the law considers relevant when assessing the reasonableness of an officer's use of deadly force."). Professor Lee's model statute has already been adopted by Washington, D.C. Debra Cassens Weiss, *Lethal Force Laws Re-Examined after Police Killings; Is Reasonableness Standard Too Easy?*, A.B.A. (June 19, 2020, 11:23 AM), https://www.abajournal.com/news/article/lethal-force-laws-re-examined-after-police-killings-is-reasonableness-standard-too-easy [https://perma.cc/UAU8-5JVQ].

[394] For example, tracking traditional self-defense law, Professor Lee includes the requirement that the suspect posed an "imminent" threat of death or bodily injury to the officers or others. *See* Lee, *supra* note 39, at 667 ("My model statute includes an immediacy requirement in police use-of-force law for the same reasons that imminence is required in self-defense law. If the suspect did not pose an imminent threat of death or serious bodily injury, or if it was not immediately necessary to use deadly force against the suspect at the time the officer shot him, then it is hard to say it was necessary at that moment to shoot him."). Minnesota House Democrats had hoped the new Minnesota reforms would have changed the threshold for using deadly force to "imminent" from "apparent." Jessie Van Berkel & Briana Bierschbach, *Minnesota Lawmakers Still Hope for Police Reforms, Public Works Bill*, STAR TRIB. (July 8, 2020, 5:14 AM), https://www.startribune.com/legislature-getting-a-do-over-on-police-reform-public-works/571662302/ [https://perma.cc/K2Y4-TQFD]; *see* MINN. STAT. § 609.066, subdiv. 2(a)(1) (effective Mar. 1, 2021) ("[T]o protect the peace officer or another from *apparent* death or great bodily harm." (emphasis added)).

deadly force was justified.[395] Juries should also consider failure to take actions that could "de-escalate" the circumstances that led to the use of deadly force.[396] By broadening the time frame to look at a police officer's actions (or inaction) before the use of deadly force, Professor Lee hopes to "influence police behavior before the moment in time when an officer is fearing for his life."[397] The point is not to require any particular conduct *per se*, but to allow juries to consider what an officer did, or failed to do, that led to the circumstances of the deadly use of force.[398]

a. Pre-seizure Conduct

Minnesota law should be amended so that the jury can consider what actions the officer took before the incident that may have increased the likelihood of the use of deadly force. Such "pre-seizure conduct,"[399] sometimes known as "officer-created jeopardy,"[400] asks to what extent did

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[395] Lee, *supra* note 39, at 635.

[396] *Id.* According to "11 of the most significant law enforcement leadership and labor organizations in the United States," including the International Association of the Chiefs of Police, de-escalation is "[t]aking action or communicating verbally or non-verbally during a potential force encounter in an attempt to stabilize the situation and reduce the immediacy of the threat so that more time, options, and resources can be called upon to resolve the situation without the use of force or with a reduction in the force necessary." *National Consensus Policy and Discussion Paper on Use of Force*, INT'L ASS'N OF CHIEFS OF POLICE (Oct. 2017), https://www.theiacp.org/sites/default/files/2018-08/National_Consensus_Policy_On_Use_Of_Force.pdf [https://perma.cc/6NNH-N77P].

[397] *See* Lee, *supra* note 39, at 635. As Professor Stoughton explained:

> If an officer steps in front of a car and then shoots the driver because the car starts moving toward them, under this new law, the jury, the judge, the prosecutor will analyze the propriety, the appropriateness of the officer's actions not just at the moment that the shots were fired but also the officer's actions leading up to the moment that the shots were fired. And one of the questions there is whether the officer put themselves into an unnecessarily dangerous situation and then used force to address the danger that they should've avoided in the first place.

All Things Considered, *Law Professor on California's New Police Use-of-Force Law*, NAT'L PUB. RADIO (Aug. 24, 2019, 5:13 PM), https://www.npr.org/2019/08/24/754052321/law-professor-on-california-s-new-police-use-of-force-law [https://perma.cc/JBR6-TYMH].

[398] *See* Lee, *supra* note 39, at 670–71 ("Whether the officer engaged in de-escalation measures prior to using deadly force is merely one factor for the fact finder to consider when assessing the reasonableness of the officer's actions . . . . If an officer does not engage in such measures, the officer's actions could still be considered reasonable.") (citing Gardner v. Buerger, 82 F.3d 248, 253 (8th Cir. 1996) ("[U]nreasonable police behavior before a shooting does not necessarily make the shooting unconstitutional.")).

[399] Pre-seizure conduct refers to "conduct by the officer prior to the shooting that helped create the dangerous situation or increased the likelihood that deadly force would need to be used to protect the officer or others." Lee, *supra* note 39, at 671.

[400] "[Officer]-created . . . jeopardy . . . refers to a dangerous situation into which an officer unnecessarily puts himself." Brandon Garrett & Seth Stoughton, *A Tactical Fourth*

the officer create the situation that led to the use of deadly force.[401] As experts have pointed out, "a decision made early in an encounter, or even before an encounter begins, when there is no time pressure, can avoid putting officers into a position where they have to make a time-pressured decision."[402] For example, the Philadelphia Police Department instructs officers to "ensure their actions do not precipitate the use of deadly force by placing themselves or others in jeopardy by taking unnecessary, overly aggressive, or improper actions."[403]

Many federal courts are already employing a similar test in Fourth Amendment civil cases. The majority of circuits that have addressed the issue have held that "police use of force is unreasonable if the police create the situation that requires the police to use force."[404] Police officers can be culpable for the improper use of deadly force if they "set in motion a series of events" that lead to the deprivation of constitutional rights."[405] Even if an officer reasonably believed that the officer's life was in danger, the use of deadly force is unreasonable if the officer "had unreasonably created the encounter that led to the use of force."[406] As the Ninth Circuit warned, "it is

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Amendment, 103 VA. L. REV. 211, 259 (2017); *see also* Leon Neyfakh, *Tamir Rice's Death Resulted from "Officer-Created Jeopardy." So Why Were No Officers Indicted?*, SLATE (Dec. 28, 2015, 5:19 PM), http://www.slate.com/blogs/the_slatest/2015/12/28/tamir_rice_s_death_didn_t_lead_to_indictments_because_of_supreme_court_vagueness.html [https://perma.cc/4A8L-WRY5] (explaining how the officers who killed Tamir Rice put themselves in a bad position prior to killing him that likely led to their deadly actions).

[401] Cara McClellan, *Dismantling the Trap: Untangling the Chain of Events in Excessive Force Claims*, 8 COLUM. J. RACE & L. 1, 22 (2017) ("[O]fficers should be liable for excessive force when their conduct causes the justification for the force."). The conduct of a police officer "that precipitated the seizure matters, not just as context for understanding the seizure as an isolated segment, but as context for understanding the entire chain of events." *Id.*; *see also* Mason v. Lafayette City-Par. Consol. Gov't, 806 F.3d 268, 288 (5th Cir. 2015) (Higginbotham, J., dissenting in part) ("At some point, an officer crosses the line between setting up a risky situation and actually himself directly causing the 'threat.'").

[402] Garrett & Stoughton, *supra* note 400, at 259.

[403] PHILADELPHIA POLICE DEP'T, DIRECTIVE 10.1, USE OF FORCE - INVOLVING THE DISCHARGE OF FIREARMS 6 (Sept. 18, 2015). According to the policy, "It is often a tactically superior police procedure to withdraw, take cover or reposition, rather than the immediate use of force." *Id.*

[404] Arthur H. Garrison, *Criminal Culpability, Civil Liability, and Police Created Danger: Why and How the Fourth Amendment Provides Very Limited Protection from Police Use of Deadly Force*, 28 GEO. MASON U. C.R.L.J. 241, 245 (2018) (finding that six of the eleven circuits that have directly addressed the issue have so held); *see also* Armacost, *supra* note 346, at 986 n.275 (discussing circuit split).

[405] Pauly v. White, 814 F.3d 1060, 1075 (10th Cir. 2016), *cert. granted, judgment vacated*, 137 S. Ct. 548 (2017) (quoting Snell v. Tunnell, 920 F.2d 673, 700 (10th Cir. 1990)).

[406] *Yates v. City of Cleveland,* 941 F.2d 444, 447 (6th Cir. 1991) (holding that that an officer's actions preceding a deadly shooting were not objectively reasonable because the officer "enter[ed] the dark hallway at 2:45 a.m. without identifying himself as a police officer, without

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conceivable that some police officers could commit 'homicide by self-defense' by unconstitutionally and intentionally provoking an attack so that they could respond to it with deadly force."[407]

The proposed changes to the deadly-use-of-force statute require an examination of the true "totality of circumstances," which, in some use-of-force jurisprudence, has included pre-seizure conduct.[408] But Minnesota's new statute is clear that the totality to be considered is merely "based on the totality of the circumstances known to the officer at the time and without the benefit of hindsight."[409] This is consistent with how the Eighth Circuit excludes pre-seizure police conduct to be used in the determination of reasonableness: "[W]e scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment."[410]

b. De-escalation

Of course, police may fail to act when doing so might eliminate the need for deadly force. Just as they should examine what conduct officers take in creating a dangerous situation, juries should similarly be able to consider whether the officer failed to engage in de-escalation measures,

shining a flashlight, and without wearing his hat"); *see also* Sevier v. City of Lawrence, 60 F.3d 695, 699 (10th Cir. 1995) (holding that reasonableness of officers' actions depends in part on whether their own reckless or deliberate conduct during a seizure unreasonably created the need to use deadly force); Kirby v. Duva, 530 F.3d 475, 482 (6th Cir. 2008) (finding that "[w]here a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive."); Estate of Starks v. Enyart, 5 F.3d 230, 234 (7th Cir. 1993) (holding that a police officer cannot get in front of a suspect's car and then rely upon the danger of the oncoming car to justify the use of deadly force); Young v. City of Providence *ex rel.* Napolitano, 404 F.3d 4, 22 (1st Cir. 2005) (ruling that the court should examine the actions of the government officials leading up to the seizure, and therefore "police officers' actions for our purposes need not be examined solely at the moment of the shooting"). *But see* Sok Kong Tr. for Map Kong v. City of Burnsville, 960 F.3d 985, 993–94 (8th Cir. 2020) (reaffirming that in the 8th Circuit, the reasonableness of force depends on the threat the person poses during the shooting, even if officers created the need for deadly force through their own actions).

[407] Billington v. Smith, 292 F.3d 1177, 1191 (9th Cir. 2002), *abrogated by* Cnty. of Los Angeles, Cal. v. Mendez, 137 S. Ct. 1539 (2017).

[408] *See, e.g.*, Bella v. Chamberlain, 24 F.3d 1251, 1256 n.7 (10th Cir. 1994) ("Obviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable.").

[409] MINN. STAT. § 609.066, subdiv. 2 (2020) (effective Mar. 1, 2021).

[410] Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir. 1993) (holding that the police chase of a fleeing tractor trailer was not relevant to the subsequent shooting of the driver). The court explained that "[t]he Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general." *Id. But see* Gardner v. Buerger, 82 F.3d 248, 253 (8th Cir. 1996) (finding that "unreasonable police behavior before a shooting does not necessarily make the shooting unconstitutional."). That court, however, also wisely noted, "[b]ut this does not mean we should refuse to let juries draw reasonable inferences from evidence about events surrounding and leading up to the seizure." *Id.*

including communication, using distance, cover, and time, and using less lethal types of force, if feasible, prior to using deadly force.[411] Making de-escalation a consideration for the jury would obviously "give[] officers an incentive to engage in de-escalation measures and consider less deadly alternatives before using deadly force" and could change police culture.[412] Experts in the field single out de-escalation tactics as a significant opportunity to reduce police killings.[413] Indeed, many police departments already require officers to use de-escalation tactics or use deadly force only as a last resort, including the St. Paul Police and other major metropolitan area departments.[414]

Aside from the logical justifications, there are at least some signs of demonstrated results. As Professor Lee reports, several cities "have seen a marked reduction in the number of fatal police shootings after implementing de-escalation measures."[415] For example, Dallas saw a forty

[411] PERF GUIDING PRINCIPLES, *supra* note 27, at 9. PERF's fourth guiding principle on use of force is adopting de-escalation as a formal agency policy. *Id.* at 40 ("Agencies should adopt General Orders and/or policy statements making it clear that de-escalation is the preferred, tactically sound approach in many critical incidents."); *see also* PRESIDENT OBAMA'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 27, at 2 ("[L]aw enforcement agencies should have clear and comprehensive policies on the use of force (including training on the importance of de-escalation)."); INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 396, at 9 ("[T]he goal of de-escalation is to slow down the situation so that the subject can be guided toward a course of action that will not necessitate the use of force, reduce the level of force necessary, allow time for additional personnel or resources to arrive, or all three."); STATE OF MINN. WORKING GROUP, *supra* note 87, at 11 ("Require officers to de-escalate when such effort does not compromise officer safety."). The Department of Justice under President Clinton recognized the value of de-escalation decades ago. *See Principles for Promoting Police Integrity*, U.S. DEP'T JUST. (Jan. 2001), https://www.ncjrs.gov/pdffiles1/ojp/186189.pdf [https://perma.cc/YL3Y-VD86] ("[O]fficers should assess the incident to determine which nondeadly technique or weapon will best de-escalate the incident and bring it under control in a safe manner.").

[412] Lee, *supra* note 39, at 670.

[413] PERF GUIDING PRINCIPLES, *supra* note 27, at 7 (reporting that leading police executives believe that there is a "significant potential for de-escalation and resolving encounters by means other than the use of deadly force" in as many as one-third of the annual total of fatal officer-involved shootings).

[414] *See supra* notes 378–79 and accompanying text (reference to St. Paul and Minneapolis policies); *see also* SEATTLE POLICE DEP'T MANUAL http://www.seattle.gov/police-manual/title-8---use-of-force/8000---use-of-force-core-principles [https://perma.cc/SM83-93JJ] ("When safe, under the totality of the circumstances, and time and circumstances permit, officers shall use de-escalation tactics in order to reduce the need for force."); DALLAS POLICE DEP'T, GENERAL ORDER § 906.01(C), USE OF DEADLY FORCE (2009) ("Deadly force will be used with great restraint and *as a last resort* only when the level of resistance warrants the use of deadly force.") (emphasis added); *see also* PERF GUIDING PRINCIPLES, *supra* note 27, at 5 ("de-escalation [strategies] are already in place in many police agencies, and have been for years.").

[415] *See* Lee, *supra* note 39, at 669 (citing Dallas and Las Vegas, in particular). Cleveland is another possible example. Its chief recently credited de-escalation training, among other

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percent drop in shootings by police and a sixty-four percent drop in excessive force complaints against the department.[416] Las Vegas transformed itself from a department with some of the highest rates of police killings to a "model of police reform."[417] Importantly, de-escalation tactics can also protect officers' lives too.[418]

IV. CONCLUSION

The police play a critical role in our society. For most citizens, the police are by far the most visible members of our justice system, and "the entire society suffers if their behavior violates the rule of law."[419] Importantly,

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reforms, for a dramatic drop in police killings. *See* Heather Gillers, *For Many Police Departments, De-escalation Training Is a Response*, WALL ST. J. (Aug. 26, 2020, 3:30 PM), https://www.wsj.com/articles/for-many-police-departments-de-escalation-training-is-a-response-11598470239 [https://perma.cc/4VGV-Z2RS] (quoting Chief Williams that the department has seen a "dramatic decrease in deadly force and then use of force in general by our officers" between 2015 and 2019 compared with the previous four years); *see also* Armacost, *supra* note 346, at 961 ("Police departments that have instituted de-escalation training have reported drops in use-of-force incidents.").

[416] Dallas News Staff, *Dallas Police Excessive-Force Complaints Drop Dramatically*, DALLAS MORNING NEWS (Nov. 16, 2015, 11:00 PM), https://www.dallasnews.com/news/crime/2015/11/17/dallas-police-excessive-force-complaints-drop-dramatically/ [https://perma.cc/T74J-Z8U7]. And "[i]t's not just Dallas, the *Morning News* reported; excessive force complaints have also fallen in Seattle, Baltimore, and New York, among other major American cities." Drake Baer, *The Dallas Police Force Is Evidence That 'De-Escalation' Policing Works*, THE CUT (July 8, 2016), https://www.thecut.com/2016/07/deescalation-policing-works.html [https://perma.cc/8QSE-YDXA].

[417] Daniel Hernandez, *How One of the Deadliest Police Forces in America Stopped Shooting People*, QUARTZ (Dec. 4, 2015), https://qz.com/565011/how-one-of-the-largest-police-forces-in-america-stopped-shooting-people/ [https://perma.cc/RU82-N4MH].

[418] PERF GUIDING PRINCIPLES, *supra* note 27, at 14 ("Rather than unnecessarily pushing officers into harm's way in some circumstances, there may be opportunities to slow those situations down, bring more resources to the scene, and utilize sound decision-making that is designed to keep officers safe, while also protecting the public. Through de-escalation, effective tactics, and appropriate equipment, officers can prevent situations from ever reaching the point where anyone's life is in danger and where officers have little choice but to use deadly force.").

[419] Morgan Cloud, People v. Simpson*: Perspectives on the Implications for the Criminal Justice System: Judges, "Testilying," and the Constitution*, 69 S. CALIF. L. REV. 1341, 1354 (1996). President Obama has written about the special role that police have in our society:

> Police officers are the heroic backbone of our communities. They hold significant civic and law enforcement responsibilities and put their lives at risk to protect us each day, at times facing some of the most adverse circumstances imaginable. As I have emphasized time and again, the overwhelming majority of police officers are fair, dedicated, and honest public servants who strive daily to cultivate and sustain positive relationships with the communities they serve and protect.

the police have, at times, been at the leading edge of reform. In the wake of Mr. Floyd's killing, fourteen Minneapolis police officers sent a letter to "Everyone" condemning the unlawful acts of their colleagues and offering support for change: "We stand ready to listen and embrace the calls for change, reform, and rebuilding."[420] Many more officers were willing to sign the letter, but the group selected those fourteen officers to highlight the broad diversity of voices on the letter.[421] In addition, police chiefs have frequently pushed their departments to go beyond what is required by the law.[422] These efforts are commendable, but the legal system can do far better.

Despite many promising signs of reform, systems for holding police officers accountable are still broken. The courts are unable to provide the degree of necessary oversight, and the Supreme Court and inadequate state laws are largely at fault. The Supreme Court has greatly undermined § 1983 by continually expanding the nullifying effect of qualified immunity. Current state employment and labor laws make taxpayers, not officers, pay for judgments and settlements for police misconduct and make it too difficult for police chiefs to fire officers unfit for duty. Inadequate state criminal law has contributed to very few officers being charged and even fewer officers being convicted of even the most obvious criminal acts. The recent attempts at reform last summer by the Minnesota Legislature fell short of addressing these deficiencies.

But the Legislature has many options to fix this. A state-based § 1983 law, carefully crafted to exclude qualified immunity and to include attorney's fees and vicarious liability, could restore the promise of the original § 1983, this time under state law. Requiring officers to carry individual liability insurance, just like lawyers and doctors, could leverage market-based forces to weed out problem officers and create better incentives for safer policing. Finally, expanding the deadly-use-of-force statute to include what officers did (or did not do) before the moment they

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Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 840 (2017).

[420] Melissa Alonso & Josh Campbell, *Minneapolis Police Officers Pen Open Letter Condemning Former Officer Derek Chauvin*, CNN (June 13, 2020, 12:09 AM), https://www.cnn.com/2020/06/12/us/minneapolis-police-letter-chauvin-trnd/index.html [https://perma.cc/XA97-L3C5].

[421] According to their spokesperson, "There were many more willing to sign, but the group opted to showcase people from across the [department] as well as male/female, Black/White, straight/gay, leader/frontline, etc. Internally, this is sending a message." *Id.*

[422] Mara H. Gottfried, *St. Paul Police Reforms Were Underway for Years When George Floyd Died in Minneapolis*, PIONEER PRESS (June 25, 2020, 4:47 PM), https://www.twincities.com/2020/06/25/police-chief-to-city-council-reforms-in-st-paul-underway-for-years-when-george-floyd-died-in-minneapolis/ [https://perma.cc/PS5C-HZH2] (highlighting the reforms made in the St. Paul Police Department under Chief Todd Axtell); *see generally* Adam Minter, Opinion, *In the City of St. Paul, Police Reform Is Working*, STAR TRIB. (June 26, 2020, 11:41 AM), https://www.startribune.com/in-the-city-of-st-paul-police-reform-is-working/571505322/ [https://perma.cc/5ALC-Z6WL].

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used deadly force, such as de-escalation and other pre-seizure conduct, will hold more officers to account for deadly acts and put pressure on departments to train and require officers to avoid situations where deadly force is used.

These changes will not, of course, address the entire problem of racism and police abuse, but increasing these measures for officer accountability will make the court system a more useful tool for police reform. The Minnesota legislature has stepped up in the past to provide a model for the nation for addressing the scourge of lynching. But that was 100 years ago. It is time for Minnesota to act again.

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