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Between the Facts and Norms of Police Violence: Using Discourse Models to Improve Deliberations around Law Enforcement

Franciska Coleman

BETWEEN THE "FACTS AND NORMS" OF POLICE VIOLENCE: USING DISCOURSE MODELS TO IMPROVE DELIBERATIONS AROUND LAW ENFORCEMENT

Franciska Coleman*

Police violence and protests of police violence have become a common feature of today's news cycles and have led to widespread critique and distrust of the law enforcement apparatus and police practice. States and municipalities have responded to the delegitimization of police practice with community-police dialogues. This Article argues that such dialogues can only restore the legitimacy of the police practice if they are deliberative in the Habermasian sense and also address the entrenched power asymmetries between communities and the police. This Article uses the community listening sessions of the Minnesota Governor's Council on Law Enforcement and Community Relations to ground its argument that community-police dialogues that are non-deliberative and dismissive of the discourse models of the affected community are unlikely to result in the restored legitimacy of police practice. Rather, such non-deliberation and exclusion are more likely to delegitimize the attempt at dialogue and to amplify rather than reduce community perceptions of the invalidity of the law enforcement apparatus.

This Article conjoins the sociolinguistic concept of discourse models with Jürgen Habermas's discourse theory of democracy to argue that restoring the legitimacy of police practice in the aftermath of police violence incidents requires monitoring and countering the discursive marginalization of community narratives indexed by transgressive discourse models. In this context, discourse models are defined as the presuppositions about the world that one must ascribe to individuals in order for their truth claims to be intelligible and coherent. Habermas's

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elements of validity—truth, authenticity, and normative rightness—are used to illustrate the potential of inclusive approaches to discourse models to reveal and redress communicative distortions in police-community deliberations created by power asymmetries. This Article concludes with a set of best practices designed to ensure that community-police deliberations can function as sites of consensual truth and equal political autonomy.

I. INTRODUCTION

Thompson: "The policeman says there's been some robberies in your neighborhood and asks if you have any information."

T'Challa: "What is—not only do I tell this man what I know, but I also assist him in tracking down the offender. After all, our ministers of law enforcement are only here to protect us. Is this correct?"

Thompson: "I mean, it should be. But I don't think you have spent much time in America."[1]

For the past six years, society has been bombarded with images of the state killings of black men under highly questionable circumstances. From Walter Scott shot in the back while running away,[2] to Philando Castile shot in the front seat of his car for trying to avoid misinterpretations of his licensed carry,[3] to Tamir Rice shot for playing in the park.[4] It has also been bombarded by videos of fifteen-year-old black girls in swimsuits being hurled to the ground by armed policemen,[5] young black men being tackled and beaten on their front porch for being too uppity,[6] and old black men being shot *just because*

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1. Saturday Night Live, *Black Jeopardy with Chadwick Boseman*, NBC (Apr. 7, 2018), https://www.nbc.com/saturday-night-live/video/black-jeopardy-with-chadwick-boseman/3697831.

2. Michael S. Schmidt & Matt Apuzzo, *Officer Is Charged with Murder of a Black Man Shot in the Back*, N.Y. TIMES, Apr. 8, 2015, at A1, https://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html.

3. Mitch Smith, *Officer Cleared in 2016 Killing of Black Driver*, N.Y. TIMES, June 17, 2017, at A1, https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html.

4. Safia Samee Ali, *Tamir Rice Shooting: Newly Released Interview Reveals Cop's Shifting Story*, NBC NEWS (Apr. 26, 2017, 4:45 PM), https://www.nbcnews.com/news/us-news/newly-released-interview-footage-reveal-shifting-stories-officers-who-shot-n751401.

5. Kristine Phillips, *Black Teen Who Was Slammed to the Ground by a White Cop at Texas Pool Party Sues for $5 Million*, WASH. POST (Jan. 5, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/01/05/black-teenager-who-was-slammed-to-the-ground-at-texas-pool-party-sues-ex-cop-city-for-5m/?noredirect=on&utm_term=.a8c85adf1002.

6. *See* Kristine Phillips, *'Brutal' Video Shows White Officer Violently Arresting Black Man Sitting on His Mother's Porch*, WASH. POST (Oct. 4, 2016), https://www.washingtonpost.com/

while lying in the street with their hands up.[7] All of these occurred against a backdrop of FBI reports of a deep Klan presence in modern police departments,[8] of perennial racial disparities in sentencing,[9] and of high profile cases of police corruption and abuse of power in minority communities.[10]

As a result, increasing numbers of scholars from both sides of the political spectrum recognize the existence of a crisis in criminal justice[11] and have proposed varied solutions. Some propose a greater role for the judiciary, encouraging courts to use the systemic facts in their possession to improve their oversight of local law enforcement practices.[12] Others advocate a bureaucratic approach, arguing that police departments should be treated like executive agencies with corresponding requirements of transparency, public accountability, and ex-ante regulation.[13] The bureaucratic approach is often countered by the democratization approach, which focuses on making criminal justice more democratic, community-centered, and responsive to popular influence.[14]

In the aftermath of police violence incidents, states and municipalities often adopt elements of democratization—holding public forums, forming community councils, and providing public access to policing statistics.[15] These attempts to communicate with and involve the

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news/post-nation/wp/2016/10/04/brutal-video-shows-white-officer-violently-arresting-black-man-sitting-on-his-mothers-porch/?utm_term=.d87fdbba99f6.

7. Charles Rabin, *Cop Shoots Caretaker of Autistic Man Playing In The Street With Toy Truck*, MIAMI HERALD (July 20, 2016, 7:34 PM), http://www.miamiherald.com/news/local/crime/article90905442.html.

8. FBI COUNTERTERRORISM DIVISION, INTELLIGENCE ASSESSMENT: WHITE SUPREMACIST INFILTRATION OF LAW ENFORCEMENT 6 (Oct. 17, 2006), http://s3.documentcloud.org/documents/402521/doc-26-white-supremacist-infiltration.pdf.

9. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (discussing racial discrimination in the criminal justice system).

10. Timothy Williams, *In Baltimore, Brazen Officers Took Every Chance to Rob and Cheat*, N.Y. TIMES (Feb. 6, 2018), https://www.nytimes.com/2018/02/06/us/baltimore-police-corruption.html; Ryan Young, *15 Men Exonerated in One Day - and 7 Chicago Cops Taken Off the Street*, CNN (Dec. 27, 2017, 7:49 AM), https://www.cnn.com/2017/11/18/us/chicago-charges-dropped-corrupt-cop/index.html.

11. *See infra* notes 12-14.

12. Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2065-66 (2016).

13. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1834 (2015).

14. Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1376 (2017).

15. *See, e.g.*, Danielle Ameden, *Forums Planned to Help Framingham Heal After Stamps Shooting*, METROWEST DAILY NEWS (Jan. 18, 2012, 6:06 PM), http://www.metrowestdailynews.com/article/20120118/News/301189922; Randy Furst, *Gov.*

community are not merely about increasing community participation in policing, however; they are often equally (if not more) concerned about restoring the legitimacy of policing in the eyes of the community. For example, in the police violence incidents mentioned above, the law generally deemed the officer's actions legally justified, despite heartfelt community insistence on the fundamental nature of the injustice.[16] The effect of this disconnect was a sizable gap between what the law made factually fair and what communities believed to be normatively fair.

Jürgen Habermas identified this gap as a gap between "facts" and "norms," and viewed it as undermining the legitimacy of law.[17] He suggested that this gap could be bridged by a dialogue among free and equal people,[18] which would ground the force of the law in the "unforced force of the better argument."[19] The dialogue he proposed, however, is not the participatory dialogue often adopted in the aftermath of police violence incidents, but a deliberative dialogue that presupposes discursive equality and legal norms that are collaboratively constructed in the democratic discourse of the citizenry.[20] This means the citizenry must have sufficient public autonomy to establish the norms that protect their private autonomy, determining for themselves how, to what extent, and along what dimensions their private autonomy ought to be protected from government overreaching.[21] According to Habermas, when law protects the private autonomy of affected citizens along dimensions they themselves have shaped and defined, law is more likely to be the reflection of the authentic self-understanding of the community, to be viewed as normatively right and to be rooted in consensual if conditional social truths—in other words, to be perceived as legally valid and legitimate.[22] These three elements—truth, authenticity, and normative rightness[23]—are the essential elements of legitimacy produced by dialogue. Moreover, the process by which public autonomy both presupposes and is presupposed by private autonomy draws upon the idea of democracy as government by discussion and assumes an ideal

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Dayton's Law Enforcement Commission Comes Under Fire, STAR TRIB. (Sept. 30, 2017, 12:15 AM), http://www.startribune.com/gov-dayton-s-law-enforcement-commission-releases-first-extensive-report/448695363.

    16. Phillips, *supra* note 5; Samee Ali, *supra* note 4; Smith, *supra* note 3.

    17. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 26-27, 414 (William Rehg trans., MIT Press 1996) (1992).

    18. *See id.* at 28-30.

    19. *Id.* at 305-06.

    20. *Id.* at 408-09.

    21. *Id.*

    22. *Id.* at 155-56.

    23. *Id.* at 318.

speech situation characterized by equal access, reason giving, and deliberative convergence on a decision all members of the community could endorse as reasonable.[24] This process functions as an argumentative instantiation of Kant's universal, with dialogue replacing practical reason as a universalizing force.[25] As a result, this Article argues that while conversations between police and the community groups are important in the aftermath of police violence incidents, such participatory dialogue cannot do the work of restoring legitimacy; a deliberative approach which seeks to secure the elements of truth, authenticity, and normative rightness is needed.

At the same time, however, the Habermasian presumption of discursive equality is a significant counterfactual in the context of dialogues between police and community members. The discourse around police violence is often embedded in asymmetrical power relations that make it difficult for communities to be co-authors of truth, to speak authentically, or to have their values reflected in norms of rightness.[26] Power asymmetries in police-community dialogues often place all three elements out of reach. Thus, for deliberation about police practice to be effective, it must also be critical—conjoining Habermas's discursive principle with Foucault's critique of power. This Article proposes the discourse model as an ideal vehicle for such conjunction, for discourse models reify the ideologies by which domination is maintained as well as those by which it is contested.[27] For example, dominant discourse models often index hegemony in dialogue, while transgressive discourse models often reveal sites of contestation.[28] As a result, the presence or absence of transgressive discourse models in a deliberation can provide useful insights into levels of minority autonomy and alert facilitators to hegemonic distortions in the process.[29] This Article argues that an inclusive approach to transgressive discourse models in a context of deliberation is essential to using

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24. *Id.* at 414.

25. *Id.* at xix, 32-33.

26. *Id.* at 381-84.

27. *See infra* Part IV.

28. Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Discrimination*, 101 HARV. L. REV. 727, 736 (1988) ("In order to become dominant, a discourse often must compete with other potentially dominant discourses . . . . Language is the medium through which this form of property is appropriated; ideology and assumptions underlying it are bought or sold by those with the ability to validate one discourse over another."); *The Governor's Council: Worse Than Doing Nothing*, CUAPB, https://d3n8a8pro7vhmx.cloudfront.net/cuapb/pages/44/attachments/original/1505623364/CUAPB_Governor's_Council_Flyer_20170912.pdf?1505623364 (last visited Feb. 3, 2019).

29. *The Governor's Council: Worse Than Doing Nothing, supra* note 28.

dialogue to restore perceptions of legitimacy in the aftermath of police violence incidents.[30]

This Article is divided into four main parts. In Part II of this Article, I set forth two elements of the theoretical framework of this Article. First, I discuss the role Habermas assigns to discourse as a mechanism of securing democratic legitimacy[31] and the implications of his discourse theory for efforts to use discourse to restore confidence in the legitimacy of police practice.[32] Second, I acknowledge the challenge power asymmetries in police-community relations poses to Habermas's theory and introduce the concept of transgressive discourse models as a potential means of meeting that challenge.[33] In Part II I also discuss what discourse models are and introduce three national transgressive discourse models[34] that have high salience in the community conversations around police violence. In Part III of this Article, I use this framework of "deliberation plus discourse models" to explore the efforts of the Minnesota Governor's Council for Law Enforcement and Community Relations to restore confidence in the legitimacy of policing in the aftermath of the killings of Philando Castile and Jamar Clark.[35] I consider the characteristics of deliberation incorporated into the Council's design but pay the most attention to the community listening sessions and the role of transgressive discourse models in influencing community perceptions of legitimacy along the axes of truth, authenticity, and normative rightness (elements of legitimacy identified by Habermas).[36] In Part IV, I suggest the types of best practices that might be introduced at the local level in order to increase the probability that police-community conversations around police reform in the aftermath of police violence incidents will have a net positive effect on community perceptions of the legitimacy of police practice.[37]

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30. *See infra* Part IV.
31. *See infra* Part II.A.
32. *See infra* Part II.A.
33. *See infra* Part II.A.1.
34. *See infra* Part II.A.1–2. These discourse models were chosen from the Twitter and Facebook discourse of three key activists' organizations, Black Lives Matter, NAACP, and the Color of Change in the month following the police killing of Stephen Clark. They were chosen as embodying key discourse models in the national conversation around policing and criminal justice reform as reflected in trending Twitter hashtags and popular nonfiction books such as *Between the World and Me*, *The New Jim Crow*, and *Chokehold*. A more granular critical discourse analysis is needed to refine these discourse models, but they offer a useful starting point for considering the presence or absence of co-authored truths in the Governor's Council Listening Sessions.
35. *See infra* Part II.A.
36. *See infra* Part III.A, B.1–3.
37. *See infra* Part IV.

II. DISCOURSE THEORY AND DISCOURSE MODELS

In this Part of the Article, I will discuss the discourse theory of democratic legitimacy and its three elements of validity.[38] I will then introduce the concept of discourse models and their potential to supply a critique of power that is often missing from deliberative approaches, but which are essential to discourse around police violence.[39]

A. Discourse Theory of Law

Habermas's discourse principle suggests that legal norms should be set by the citizenry in a discursive process of public reasoning and will formation.[40] The preconditions of the discursive process, open access and accessible reasons, are designed to ensure that law flows from exercises of liberty expressed through a non-dominating process of public deliberation and reasoning by free and equal citizens.[41] Habermas's construction of law as an institutionalization of intersubjectively-shared principles produced through non-coercive discursive processes grounds the legitimacy of law in its expression of the public autonomy of all citizens operating to guarantee their private autonomy.[42] Stakeholder inclusion and the conditional, progressive, and perpetual (re)construction of the normative understandings of society through rational public discourse are essential to this process and are key mechanisms of validating the exercise of state power by securing truth, authenticity, and normative rightness.[43]

Habermas defines the elements that secure legal legitimacy in discursive terms, rooted in the consensual nature of legitimacy within in a democratic system and the ways in which communication presupposes consensus. The first element of legitimacy—truth—requires that factual assertions be defensible with reasons and "able to gain the rationally motivated agreement of the interpretative community as a whole."[44] This suggests that valid laws based on truth require an inclusive understanding of social facts and collaborative construction of national myths (on which such facts are often based) so that they also account for the emic experiences and perspectives of marginalized groups. The second element of authenticity requires that laws express the "authentic

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38. *See infra* Part II.A.
39. *See infra* Part II.A.1.   ,
40. *See* HABERMAS, *supra* note 17, at 103.
41. *Id.* at 418-19.
42. *Id.* at 47-48.
43. *Id.* at xiii, xxiv.
44. *Id.* at 14, 35.

self-understanding of the legal community."[45] Habermasian authenticity seems to mirror Rousseau's concept of autonomy: "A law exists only for the one who has made it himself or agreed to it; for everyone else it is a command or an order."[46] This suggests that laws must be an instantiation of self-restraint flowing from the will of the same citizens that they bind. The third element is normative rightness, in which the only valid norms are those "to which all possibly affected persons could agree as participants in rational discourses."[47] This means that the practices the law upholds as right and just are practices which citizens could voluntarily endorse as right and just through public reasoning. When the law consistently defines as factually just incidents citizens (or a subgroup of citizens) condemn as normatively unjust, its legitimacy in the eyes of those citizens (or subgroup of citizens) is imperiled.

Modern approaches to Habermas's discourse theory, often identified as theories of deliberative democracy, are many and varied, but they retain Habermas's emphasis on an idealized speech situation in which free and equal citizens justify the laws they would impose on one another through "a process in which they give one another reasons that are mutually acceptable and generally accessible."[48] This reason-giving process often presupposes a principle of deliberative equality, which precludes the exclusion of any group due to militancy or the incompatibility of their approach with the aims of deliberation.[49] Their reasons for such deliberative equality underscore its value to discursive efforts aimed at increasing legitimacy. First, exclusion selectively denies some group representation within the democratic process—representation to which they are entitled as co-equal citizens[50] and which is presupposed in making them subject to the law. Second, exclusion reduces the aggregate pool of reasons the deliberative process can draw upon to promote cooperation[51] and thus increases the likelihood of a few curated reasons functioning in hegemonic ways. Finally, exclusion is a poor route to moderation if legitimacy is the aim; for legitimacy to a large extent requires that moderation is achieved through dialogue between competing perspectives[52] rather than by fiat.

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45. *Id.* at 156.

46. *Id.* at 474 (using this quote).

47. *Id.* at 107.

48. AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 7 (2004).

49. Adeno Addis, *Deliberative Democracy in Severely Fractured Societies*, 16 IND. J. GLOBAL LEGAL STUD. 59, 71 (2009).

50. *Id.* at 71-72.

51. *Id.* at 72.

52. *Id.*

The above discussion suggests that deliberation as a tool to improve community perceptions of the legitimacy of police practice has strengths and weaknesses. In the first instance, political autonomy is a foundational element of legal legitimacy.[53] Deliberative approaches that affirm the equal citizenship of marginalized communities while simultaneously affording them opportunities for meaningful input into police policy and practice thus have the potential to positively impact community perceptions of the legitimacy of the law enforcement apparatus.[54] Secondly, the emphasis on the justification of such policies by publicly accessible and acceptable reasons creates space for community co-authorship of the social truths and of norms that inform law enforcement practice.[55] This has the potential to move dialogues about police violence beyond cycles of contestations and reassurance to meaningful consideration of the underlying conflicts over values and social narratives.[56] Lastly, tensions between police and marginalized communities can skew self-selected participation in community forums towards the extremes and may miss entire categories of individuals affected by police practices—such as ex-convicts.[57] The emphasis on inclusion of all perspectives in deliberative approaches can inspire efforts to avoid such selection distortions and ensure that the resultant community norms are reflective of the input of the community as a whole, drawn from both the middle and the margins.

At the same time, however, the limitations of deliberation in the policing context can be mapped on to the limitations of Habermas's theory. Namely, deliberation alone contains no mechanism to prevent the more advantaged and powerful participants in the deliberation from imposing their views on less politically powerful participants.[58] It also contains no mechanism for recognizing or combatting hegemonic distortions in the communicative process, or for indexing framing bias that might place some participations in a position of contestation (rather than deliberation) from the outset, increasing the likelihood of polarization.[59] Discourse models, while not a complete solution, may offer a starting place for addressing these issues.

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53.   HABERMAS, *supra* note 17, at 408-09.
54.   *Id.* at 54.
55.   *Id.* at xiii.
56.   Addis, *supra* note 49, at 71-72.
57.   *Id.*
58.   *Id.*
59.   *Id.*

HOFSTRA LAW REVIEW

B. *Discourse Models and Counterhegemony*

1. Defining Discourse Models

Traditional deliberation is vulnerable to the charge that it fails to consider hidden asymmetries of power even among inclusive groupings and offers no means of addressing dominant discourses that distort communication and elide the difference between rationality and rationalization—even for individuals who believe themselves to be seeking fair terms of cooperation.[60] While many deliberative approaches reject ex-ante exclusion of militant groups, the ex-ante exclusion of the discourse models of these groups is often more violative of deliberative principles. Such exclusion co-opts the deliberative process into a means of manipulating discursive transgressors into submission to more acceptable (dominant) ideologies.[61] Inattention to the valuing and devaluing of discourse models serves to mask the ways in which power transforms negotiations among groups into domination.[62] While some constructions of deliberative democracy limit their goal to a reduction of disagreement rather than to consensus, deliberative processes cannot ignore the pressures toward conformity inherent in the deliberation as a social practice, particularly in deliberations with such entrenched power asymmetries as those between officers and community members.

Discourse model is not a term used by Habermas in his seminal work, but such models are key to the project of reconciling the facts and norms of police violence through deliberation.[63] For, discourse models embody the discursive paradigms that determine the linguistic content of social and individual accounts of those facts and norms. How facts and norms are articulated by citizens, law enforcement, and general participants in public discourse is shaped by individual discourse models that reflect and index socially situated identities and normative presuppositions.[64] Thus, the validation and rejection of discourse models unmask the discursive limits placed on the ability of individuals to enact the identity of a "free and equal" citizen that is required but seldom successfully presupposed, by the deliberative context.[65]

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60. *Id.*

61. *Id.*

62. *Id.*

63. *See, e.g.,* JAMES PAUL GEE, AN INTRODUCTION TO DISCOURSE ANALYSIS, THEORY AND METHOD 27 (Routledge 2d ed., 2005) (explaining the discourse between African-American teenage gang members and the Los Angeles Police).

64. *See id.* at 60-61.

65. *See, e.g., id.* at 83 (explaining that discourse models can be about what is an appropriate belief).

Definitions of discourse models vary, as does the terminology. As used here, however, a discourse model is a form of pattern recognition. It is a largely unconscious theory that interprets and organizes the fact patterns we encounter in the world.[66] These interpretations are always colored by our personal and group experience, making discourse models inherently subjective. In conversation, discourse models embody the assumptions we must attribute to a person in order to make "deep sense" of what they are saying[67]—for example, Officer Wilson's statement that "I shot *it*" in his testimony about the killing of Michael Brown.[68] Discourse models capture the presuppositions about texts and the world that we must ascribe to individuals in order for the claim about the reasonableness (or unreasonableness) of the police action to be intelligible and coherent.[69] Such models flow from experience as well as precept, and index discursive patterns through which individuals enact certain identities or claim membership in particular interpretative communities. They also reflect the ways in which individuals are constructed as inhabiting certain positions by others and serve to define what counts as a "typical" or "normal" instantiation of an identity or concept for individuals and for communities which share discourse models.[70] As such, they create an ongoing subtext of belonging and exclusion in public discourse that has deep implication for the ways in which asymmetrical state sanctioning of violence is discursively justified through laws and processes formally designed to promote and protect equal citizenship.[71] The chasm between the facts and norms of police violence suggest that dominant notions of equality and citizenship are filtered through subjective and subconscious discourse models that often presuppose the very ends such rhetoric disavows. For example, the discourse model of the black "beast"[72] constructs racial difference in

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66. *Id.* at 71.

67. *Id.* at 87.

68. MARC LAMONT HILL, NOBODY: CASUALTIES OF AMERICA'S WAR ON THE VULNERABLE, FROM FERGUSON TO FLINT AND BEYOND 335-36 (2016) (emphasis added).

69. GEE, *supra* note 63, at 71.

70. *Id.*

71. *Id.* at 71-72.

72. Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369, 408 (2018) ("In self-defense and deadly use of force cases, one of the most harmful uses of racial character evidence is emphasis of the centuries-old stereotype of African American victims as black 'brutes' or 'thugs.' Stereotypes of blacks as larger, stronger, and more dangerous than other races serve to justify their killing as reasonable. The racist black 'brute,' 'beast,' 'fiend,' or 'demon' stereotype has a long history in the United States. This stereotype has been proliferated through literature, journalism, and the law from the time of slavery to the present. 'The brute caricature portrays Black men as innately savage, animalistic, destructive, and criminal—deserving punishment, maybe death.'").

policing in ways that produce racially disparate outcomes that defy textual commitments to equal treatment.[73]

If "no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning,"[74] then discourse models also construct (and do not merely reflect) racial difference in law, for discourse models are the source of these narratives. For example, the law punished crack cocaine more severely than powder cocaine because of discourse models that translated social facts about crimes in inner cities into theories of the heightened dangerousness of crack addicts.[75] In this respect, the law is a construction as well as a reflection of the world within which we live and draws its form from the discourse models upon which it is based. When discourse models conflict, as in the conflict between the race-conscious discourse model that underlies Black Lives Matter or the colorblind discourse model that underlies All Lives Matter, there is no way to separate the law's choice of which discourse model to embrace from the power asymmetries in society.[76] At the same time, to choose some discourse models to the exclusion of others is to deny to some citizens the public autonomy to participate in the construction of social truth that lies at the core of democratic legitimacy.[77] Thus, when it comes to discourse models, the law must strive for pentecostal compatibility,[78] sufficiently open-textured that it accommodates the social facts of the vulnerable as well as the powerful and functions equally well as an expression of the public autonomy of the marginalized as well as of the dominant. Deliberative democracy must promote policymaking that is not only inclusive and premised on reasons, but policymaking that is equally authentic across the competing discourse models of a diverse citizenry.

2. Trangressive Discourse Models

In this Subpart, I discuss three discourse models that both reflect and transgress relations of dominations embedded in discussions around police violence. While I am unaware of a systemic critical discourse

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73. *See, e.g., What Happened in Ferguson?*, N.Y. TIMES (Aug. 13, 2014), https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html.

74. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983).

75. Charisse Jones, *Crack and Punishment: Is Race the Issue?*, N.Y. TIMES, Oct. 28, 1995, at 1, https://www.nytimes.com/1995/10/28/us/crack-and-punishment-is-race-the-issue.html.

76. JOHN RAWLS, POLITICAL LIBERALISM 45-46 (Columbia Univ. Press, 1993).

77. *See* HABERMAS, *supra* note 17, at 129-31; *see also* RAWLS, *supra* note 76, at 39-40 (noting that Rawls's concept of overlapping consensus can be applied in terms of social truth).

78. Pentecostal compatibility is a biblical phenomenon in which individuals from different nations heard a speech in a foreign language as if it were their own language.

analysis of the speech of the Movement for Black Lives Activists, the discourse models proffered here lie at the nexus of the trending hashtags of African-American activists in counter public spaces and the high-profile academic works on policing practices and inequalities. These discourse models are: (1) the systemic anti-black racism model, which presupposes the institutionalized devaluation of blackness;[79] (2) the white privilege model, which connects racialized outcomes in policing to the maintenance of white spaces and the control of black bodies;[80] and (3) the injustice by design model, which constructs racial injustice as the intended outcome of the criminal justice system.[81] These three models are transgressive models that violate the colorblind discourse of American criminal procedure and contradict the equality and fairness assumptions that define many American social and legal narratives. As a result, these discourse models are often excluded from the public sphere through the workings of hegemony. The exclusion of these transgressive discourse models from discursive spaces is maintained over time and context, even appearing during processes designed to reflect inclusive deliberative democracy.[82] This exclusion reduces the discursive space necessary for the creation of legal validity and precludes the co-creation of conditional social truths, authenticity, and normative rightness of which such validity is comprised.

These transgressive discourse models have long competed for access to the discursive spaces of truth-telling and democratic decision-making. Indeed, much of the demonization of The Movement for Black Lives is a response to efforts to inject the discourse models of minority counterpublics into the public sphere through non-permissive violations of social norms and legal norms[83]—a form of transgressive communicative action.

a. Systemic Anti-Black Racism

The first discourse model, systemic anti-black racism, is presupposed by the phrase "Black Lives Matter." This phrase, like its underlying discourse model, is highly transgressive. It is not only a

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79. *See infra* Part II.B.2.a.
80. *See infra* Part II.B.2.b.
81. *See infra* Part II.B.2.c.
82. For example, the exclusion of Citizens United Against Police Brutality from the Governor's Council addressing police violence in Minnesota.
83. *See, e.g.*, Peniel Joseph, *How Colin Kaepernick is Bravely Speaking Truth to Power*, CNN (Aug. 29, 2016), https://www.cnn.com/2016/08/29/opinions/colin-kaepernick-protest-joseph/index.html (discussing how Colin Kaepernick's kneeling during the anthem brought forth mainstream dialogue about the Black Lives Movement).

deliberate repudiation of the colorblind norm of U.S. society, but it replaces an unspoken centering of whiteness with a spoken centering of blackness. The discourse model underlying Black Lives Matter presupposes an America in which black life is so uniquely and systematically discounted as subhuman and expendable, that merely stating that black lives matter becomes a controversial act of protest and contestation. This discourse model constructs the facts of the African-American experience in America—constant surveillance (official and unofficial), economic deprivation, and state-sanctioned violence—as the product of institutionalized oppression rather than an individual error. It combines racial disparities in education, health employment, life expectancy, and subjection to police violence into a theme of black expendability. Within this model, the "typical" black person in America is one who is consistently denied humane and equal treatment by state authorities and non-Blacks in almost all areas of human life due to a legalized dehumanization and criminalization of black bodies that has its roots in slavery and state-sponsored terrorism.

Through this lens, mass incarceration is identified as the "New Jim Crow"[84] and police killings are modern-day instantiations of lynchings.[85] As a result, the discourse model of systemic anti-black racism constructs a history of expendable black lives stretching from before the founding era into the present moment.[86] Such a construction fundamentally disrupts dominant narratives around the legacy of slavery, questioning the extent of the moral achievements of the civil war and the nature of the "glorious revolution" wrought by the civil rights movement.[87] Thus, the language of citizen protestors seeking *continued* racial progress through democratic means is replaced by the language of unending guerrilla warfare.[88]

At its heart, this discourse model indexes second class citizenship and overlooked humanity. It accuses America of failing to construct black people as the teenagers, high school students, fathers, and citizens that they really are and of failing to recognize African-American males as complex and equally human beings capable of reason and of surrender. In this view, the justification for the summary execution of slaves and family dogs rested on discourse models of bestiality and

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84. *See generally* ALEXANDER, *supra* note 9.
85. *Victim's Sister: Minnesota Police Shooting 'Modern Day Lynching'*, CBS CHI. (July 6, 2018, 6:34 PM), https://chicago.cbslocal.com/2018/07/06/minnesota-police-shooting-modern-day-lynching.
86. *See* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 6 (2017).
87. *Id.*
88. *See supra* text accompanying note 76-77.

irrationality[89]—there can be no reasoning with angry charging beasts. There are no inducements to be offered to a rabid dog who has no concept of language or to a slave who, reduced to bestiality, has nothing to lose by violence but his chains and nothing to gain by surrender but continued oppression. The suggestion, however, that black citizens like Michael Brown are similarly positioned, similarly incapable of reason or of valuing their own lives, is seen as a life-threatening and false stereotype that deprives state coercion of its truth value in eyes of minority communities.

Thus, the discourse model of systemic anti-black racism is often constructed as unmasking the outsized role the "black beast" discourse model has played in state determinations of the need to use deadly force—from Officer Darren Wilson's description of Michael Brown in animalistic terms[90] to Minneapolis police insisting that the threat posed by an unarmed Jamar Clark facing two armed police officers was so great, they had to shoot him in the head to neutralize the threat.[91] The consistent justifications of these types of killings imply that it is not enough for a black man to be unarmed,[92] to have his hands up,[93] or even to be pinned to the ground.[94] Instead, as in confrontations with wild beasts, the danger posed by a black man is not eliminated until he is

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89. *Compare* 2 WILLIAM WALLER HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, 1619, at 270 (Richmond Samuel Pleasants, Jr., printer 1810) ("Whereas the only law in force for the punishment of refractory servants resisting their master, mistress or overseer cannot be inflicted upon negroes, nor the obstinacy of many of them by other than violent means suppressed, Be it enacted and declared by this grand assembly, if any slave resist his master (or others by his masters order correcting him) and by the extremity of the correction should chance to die, that his death shall not be considered a felony.") *with* Julian Borger, *New York on Edge As Police Kill Unarmed Man in Hail of 50 Bullets on His Wedding Day*, GUARDIAN (Nov. 27, 2006, 4:32 AM), https://www.theguardian.com/world/2006/nov/27/usa.julianborger *and* George Solis, *Jury Awards $1.26 Million For Dog Shot, Killed by Police Officer*, CBS BALT. (May 10, 2017, 10:35 PM), https://baltimore.cbslocal.com/2017/05/10/dog-shot-by-cop.

90. *See* HILL, *supra* note 68, at 193.

91. Eliott C. McLaughlin & Ray Sanchez, *Minneapolis Police Clear Officers in Fatal Shooting of Jamar Clark*, CNN (Oct. 21, 2016, 10:34 PM), https://www.cnn.com/2016/10/21/us/jamar-clark-shooting/index.html.

92. *E.g.*, Frances Robles & Jose A. Del Real, *8 Bullets Struck Sacramento Man As He Faced Away*, N.Y. TIMES (Mar. 30, 2018), https://www.nytimes.com/2018/03/30/us/stephon-clark-independent-autopsy.html.

93. *E.g.*, Erik Ortiz, *Cops Shoot Unarmed Man Lying on the Ground with Hands in the Air*, NBC NEWS (July 21, 2016, 11:04 AM), https://www.nbcnews.com/video/cops-shoot-unarmed-man-lying-on-the-ground-with-hands-in-the-air-729615427760 (discussing how police shot therapist Charles Kinsey while he was lying on the ground with his arms in the air).

94. *E.g.*, Jason Hanna, *No Charges Against Officers in Alton Sterling Death; Other Videos are Coming*, CNN (Mar. 27, 2018, 6:22 PM), https://www.cnn.com/2018/03/27/us/alton-sterling-investigation/index.html (discussing how police shot Alton Sterling six times after tackling to the ground).

unarmed, handcuffed, pinned to the ground, and has shown his submission to the arresting officers in the manner sufficiently resembling that of a cowed beast. At the same time, violent white criminals caught in the very act of serial homicide, armed with shotguns and exchanging fire with officers, are perceived as capable of reason and are allowed the humanity of surrender.[95] This contrast lies at the heart of the systemic anti-black racism discourse model and its condemnation of police violence justifications as inherently racist.

b. "To Protect and Serve" White Privilege

Another significant transgressive discourse model with high currency in the counterpublics protesting police violence is the discourse model of police discretion as a central tool in the preservation of white privilege.[96] This discourse model views policing and the unique discretion afforded to police officers as flowing from their historic role in controlling black bodies by criminalizing physical and discursive transgression of racial boundaries. In this view, the police were originally designed to keep black Americans in their "place" in American society by exposing them to the coercive power of the state whenever they are ventured outside of physical spaces constructed as black or outside of the discursive spaces of submission and deference when interacting with white police and citizens.[97] The tracking of "while black" incidents on social media, where police are called upon to interrogate and arrest black people for doing ordinary things like golfing,[98] moving into their own apartments,[99] sleeping in their dorms,[100]

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95. *E.g.*, Simon McCormack, *Cops Bought Dylann Roof Burger King Hours After Charleston Shooting*, HUFFINGTON POST (June 23, 2015, 11:11 AM) https://www.huffingtonpost.com/2015/06/23/dylann-roof-burger-king_n_7645216.html.

96. *See, e.g.*, Abe (@OdehEveryday), TWITTER (May 17, 2018, 6:50 AM), https://twitter.com/OdehEveryday/status/997112115789025280 ("Black people continue to be killed because the police THINK they're armed. She brings a rifle to campus and gets a tv platform. Yet she thinks people using the term 'white privilege' is racist. My head is spinning . . . .") (tweet shared 109,000 times); Shaun King (@shaunking), TWITTER (Apr. 25, 2018, 10:20 AM), https://twitter.com/shaunking/status/989192389183995904 ("SON: Mom, what's white privilege? MOM: *Presses Play* Watch as an angry white woman tells police to shut the fuck up, questions their intelligence repeatedly, waves hands in their faces, moves wherever she wants, defies their requests, and lives another day to tell the story.") (tweet shared 32,000 times).

97. *See* Tyina Steptoe, *Sandra Bland, Black Women, and Texas Law Enforcement*, BLACK PERSP. (July 13, 2018), https://www.aaihs.org/sandra-bland-black-women-and-texas-law-enforcement (discussing similarities between Sandra Bland and police persecution of "biggity" black people in the early twentieth century).

98. Christina Caron, *5 Black Women Were Told to Golf Faster. Then the Club Called the Police.*, N.Y. TIMES (Apr. 25, 2018, 8:03 PM), https://www.nytimes.com/2018/04/25/us/black-women-golfers-york.html.

99. Crystal Hill, *Black Former Obama Aide Was Moving into His NYC Apartment. The Police*

and drinking iced tea[101] is embedded in this larger discourse model of policing and police discretion as a tool for preserving white privilege, sometimes described as the weaponizing of police to maintain white spaces.[102] In this context, white privilege becomes freedom of movement and freedom from the state violence inflicted on black bodies.

The seminal case on police discretion in the context of state violence is *Graham v. Connor*.[103] *Graham* replaces a citizen's "reasonable expectation of the privacy," which the court applies to the constitutionality of searches, with a police officer's reasonable assessment of the need for force, when the context is a seizure.[104] Thus, in *Graham*, the Court does not ask whether an officer—who left a black citizen with a broken foot, wrenched shoulder, lacerated wrist, and a case of tinnitus for leaving a store too quickly[105]—violated the reasonable expectation of bodily security. Instead, the Court asked whether the officer's assessment of the situation was objectively reasonable, *while also specifically eliminating overt racism as a negation of officer reasonableness*.[106] *Graham* presupposes a world in which the police cannot be trusted to set the level of privacy to be accorded to "things" and "places" but in which even racist policemen can be trusted to set the level of bodily security to be afforded to citizens.[107]

In the discourse of digital counterpublics, this duality is by design. The white privilege discourse model asserts that this norm, with its explicit discounting of racist motives, is rooted in an expectation that police discretion in seizure cases will operate in a way that maintains the control of black bodies and liberty of white bodies—not from any expectation that police will use their discretion in race-neutral ways. The insulating of the police from democratic accountability is thus seen to be

Were Called., MIAMI HERALD (May 1, 2018, 5:33 PM), https://www.miamiherald.com/news/nation-world/national/article210227244.html.

100. Cleve R. Wootson, Jr., *A Black Yale Student Fell Asleep in Her Dorm's Common Room. A White Student Called Police.*, WASH. POST (May 11, 2018), https://www.washingtonpost.com/news/grade-point/wp/2018/05/10/a-black-yale-student-fell-asleep-in-her-dorms-common-room-a-white-student-called-police.

101. Michael Futch, *Charges Dismissed in Arizona Iced Tea Arrest Outside Fayetteville Liquor Store*, FAYETTEVILLE OBSERVER (Feb. 5, 2015, 2:40 PM), http://www.fayobserver.com/a4c9072d-e36b-5043-a628-de28a3d78072.html.

102. Carl Takei, *How Police Can Stop Being Weaponized by Bias-Motivated 911 Calls*, ACLU (June 18, 2018), https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/how-police-can-stop-being-weaponized-bias-motivated.

103. 490 U.S. 386 (1989).

104. *Id.* at 396.

105. *Id.* at 390.

106. *Id.* at 397.

107. *Id.* at 396-97.

rooted in duality in the valuation of bodies that is not present in the valuation of places and things. Given the emphasis on unjust violations of bodily security by police officers in police violence incidents, a deliberation premised on the presumption that police officers can be trusted to protect the bodily security of all citizens equally undermines its own legitimacy by excluding the transgressive discourse models of victimized communities a priori and denying them authorship of their own stories.

c. Injustice by Design

A third transgressive discourse model constructs the criminal justice system as a system that is "broke on purpose."[108] In this discourse model, the racial disparities that pervade all aspects of criminal justice from overrepresentation in stops[109] to disproportionate charges by prosecutors[110] to vast racial disparities in sentencing at the hands of predominantly white judges and juries[111] are not isolated failures of justice, but the natural and intended outcomes of a system premised on racial injustice.[112] This presupposes that justice for minorities is not a "real" aim of the current criminal justice system, and that far from being broken, the criminal justice system is functioning exactly as intended—keeping black bodies under control and in their place, while systematically extracting free labor from those bodies for the enrichment of the majority race.[113] In other words, "[c]ops routinely hurt and humiliate black people because that is what they are paid to do."[114] This discourse model replaces the dominant discourse model of a blindfolded and impartial Lady Justice with a Lady Justice that is not only sighted, but deeply and deliberately racist, and is often reflected in the adjuration to "stay woke." It is this discourse model that often informs calls to abolish the police as well as prisons.

Taken together, these three discourse models provide an account of criminal justice that is color-conscious, historically continuous, and

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108. BUTLER, *supra* note 86, at 1.
109. William Y. Chin, *Racial Cumulative Disadvantage: The Cumulative Effects of Racial Bias at Multiple Decision Points in the Criminal Justice System*, 6 WAKE FOREST J.L. & POL'Y 441, 443 (2016).
110. Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 29 (2013).
111. ACLU, RACIAL DISPARITIES IN SENTENCING: HEARING ON RACISM IN THE JUSTICE SYSTEM OF THE UNITED STATES 1, 7, 9-10 (2014), https://www.aclu.org/other/aclu-submission-inter-american-commission-human-rights-racial-disparities-sentencing.
112. *See* BUTLER, *supra* note 86, at 1 (discussing a system "[b]roke on [p]urpose").
113. *See id.* at 2.
114. *Id.*

systemically unjust. These models have largely been relegated to counter public spaces; for, as the Supreme Court itself noted in *McClesky v. Kemp*,[115] the validity of these discourse models would call the entire criminal justice apparatus into question.[116] Instead, the dominant discourse models found in the public sphere promote a view of the criminal justice system that is colorblind, disconnected from past injustices, and marred only by the poor decisions of a few bad apples. In the aftermath of police violence incidents, groups and arguments that reflect the dominant discourse models are often privileged in deliberations, while groups and arguments tainted by transgressive discourse models are stigmatized as radical, racist, or otherwise illegitimate.[117] There can be little doubt that these transgressive discourse models are explosive and contain the potential to be extremely polarizing in non-deliberative contexts. However, if the overarching aim of the dialogue is deliberation, the rejection of these discourse models should rest on their inability to be justified by reasons during the deliberation, not on their exclusion ex-ante. Ex-ante exclusion of transgressive discourse models from the public deliberation not only reduces the discursive space necessary for the creation of legal validity, but may also preclude the co-creation of conditional social truths, authenticity, and normative rightness of which such validity is comprised. For the social truth of a deliberative forum is not a given, but a co-construction that entails the equal participation of all groups and the bifurcation of hegemony and rationality.

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115. 481 U.S. 279 (1987).

116. *Id.* at 314-17.

117. Khaled A. Beydoun & Justin Hansford, *The F.B.I.'s Dangerous Crackdown on 'Black Identity Extremists'*, N.Y. TIMES (Nov. 15, 2017), https://www.nytimes.com/2017/11/15/opinion/black-identity-extremism-fbi-trump.html.

III. THE MINNESOTA GOVERNOR'S COUNCIL COMMUNITY MEETINGS

"At the end of the day, law enforcement didn't support it and you have community groups that don't support it so I am not sure what was accomplished."
– *Council member who voted against the recommendations*[118]

"The report looks like sausage . . . . Little meat and a lot of fat and the recommendations are not as specific as either side would have liked."
– *Council member who voted for the recommendations*[119]

In this Part, I will use Habermas's discourse theory of legitimacy and discourse models to explore and partially explain the limited effectiveness of the communicative efforts of the Minnesota Governor's Council on Law Enforcement and Community Relations in the aftermath of two high profile police killings.

The Governor's Council on Law Enforcement and Community Relations was created by Governor Mark Dayton on October 12, 2016, by Executive Order 16-09.[120] Fourth District Judge Pamela G. Alexander and Grand Rapids Police Chief Scott Johnson were appointed as co-chairs, and the Council was charged with "developing recommendations to build trust and cooperation between law enforcement agencies and the communities they serve, thereby creating a safer and more harmonious Minnesota."[121] In his comments on the Council, Governor Dayton noted that it was "essential that Minnesota's law enforcement and criminal justice systems work for all Minnesotans, including both our law enforcement officers and the communities they bravely serve."[122] As a result, the Council included fifteen voting members,[123] seven of whom

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118. Furst, *supra* note 15.

119. *Id.*

120. Minn. Exec. Order No. 16-09 (Oct. 12, 2016), https://mn.gov/governor/assets/2016_10_12_EO_16_09_tcm1055-259856.pdf.

121. Office of Governor Mark Dayton, *Governor Mark Dayton Establishes Governor's Council on Law Enforcement and Community Relations*, ST. OF MINN. (Oct. 12, 2016), https://mn.gov/governor/newsroom/?id=1055-259855.

122. *Id.*

123. The organizations are: Minnesota Police and Peace Officers Association; Minnesota Board of Peace Officer Standards and Training (POST); Minnesota Chiefs of Police Association; Minnesota Sheriffs' Association; Minnesota Department of Public Safety; National Black, Latino, Asian, and Somali Police Officers Associations; National Association for the Advancement of Colored People (State of Minnesota); Minnesota Tribal Nations; Latino LEAD; Black Ministerial Alliance; Council on American-Islamic Relations; ISAIAH; Black Lives Matter; Minnesota County Attorneys Association; and Minnesota Youth Council. *See id.*

were representatives from police and prosecutor associations.[124] The other eight were representatives of organizations drawn from civil society and comprised of various minority groups.[125] The Council also included seventeen non-voting members, some of which were representatives from the families of Jamar Clark and Philando Castile.[126] The longstanding organization, Communities United Against Police Violence, was excluded from the Council, while the Black Lives Matter representative and the family of Jamar Clark largely declined to participate.[127]

The Council held eight meetings between November 2016 and May 2017, which were not well-publicized or recorded,[128] and created a list of twenty-one recommendations, which they presented to the governor.[129] After this, beginning May 1, the Council held four community "listening" sessions in order to obtain community feedback on the recommendations.[130] After the listening sessions, the Council submitted final recommendations which were largely identical to the original recommendations.

A. The Council and Deliberation

The deliberations of the Governor's Council on Law Enforcement and Community Relations in Minnesota reflect a laudable attempt by a local government to incorporate deliberation and community participation into discussions of reform of police practice. For example,

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124. *Id.*

125. *Id.*

126. Non-voting members include: representations from Minnesota Department of Public Safety; Office of Governor Mark Dayton and Lt. Governor Tina Smith; Minnesota Department of Human Rights; family of Jamar Clark; family of Philando Castile; Majority Party in the Minnesota Senate; Minority Party in the Minnesota Senate; Majority Party in the Minnesota House of Representatives; Minority Party in the Minnesota House of Representatives; National Baptist Convention (Minnesota); Coalition of Asian American Leaders; Minnesota Council of Non-Profits; League of Minnesota Cities; Minnesota Community Foundation; Minnesota Council on Foundations; Association of Minnesota Counties; and Law Enforcement Labor Services of Minnesota. *Id.*

127. *See id.; see also* Kristoffer Tigue, *State Police-Community Relations Task Force Comes Under Harsh Criticism*, MINNPOST (May 31, 2017), https://www.minnpost.com/community-sketchbook/2017/05/state-police-community-relations-task-force-comes-under-harsh-criticism.

128. YouthLens360, *Governor's Council on Law Enforcement and Community Relations Meeting 5.1.17*, YOUTUBE (May 5, 2017), https://www.youtube.com/watch?v=RqgZbXzbya0; *see* Tigue, *supra* note 127.

129. Governor's Council on Law Enforcement and Community Relations, *Process and Preliminary Recommendations of the Council*, FACEBOOK (Apr. 26, 2017), https://www.facebook.com/notes/governors-council-on-law-enforcement-and-community-relations/process-and-preliminary-recommendations-of-the-council/450203848654491.

130. *See* YouthLens360, *supra* note 128.

the Council was composed of representatives of a cross section of stakeholders drawn from law enforcement, community organizations, and the families of victims of police violence.[131] It sought to promote even greater participation by holding community listening sessions in various areas of the state and providing a forum for community members to comment directly on the work of the Council. Moreover, the thirty-two members of the Council bifurcated their deliberations into whole group deliberations based on majority rule and smaller task force deliberations oriented toward consensus.[132]

The three deliberative elements, discussed in Part II as likely to impact perceptions of police practice,[133] however, were not clearly present in the Council's design. In the first instance, the principle of equal citizenship was undermined by the Council's two-tier structure, which made some members voting members, and others—like the families of those harmed by police violence—non-voting members.[134] In addition, the value of the equality among the voting members was limited by the powerlessness of the Council. The Council's role was limited to creating recommendations, with no clear commitment from the Governor or the Legislature to take the recommendations under advisement.[135] As a result, equal citizenship, to the extent it existed on the Council, was not strongly correlated with political autonomy.

In terms of publicly accessible and acceptable reasons, the "public" aspect of the Council process reflected in the listening sessions was limited in its amenability to reason giving. Community members were given the recommendations, but due to the absence of Council members and experts during the listening sessions, their questions regarding the reasons and rationales for the recommendations—the justifications for the recommendations—often went unanswered.[136] Their critiques and counterarguments were also of limited utility from a deliberative perspective, as Council members were not present to engage in dialogue with the community, and community input was not shared across listening sessions. As a result, the listening sessions tended to produce a dynamic of contestation rather than deliberation, and community members consistently referenced feelings of political powerlessness.

In terms of inclusiveness, the inclusion of the community through listening sessions encountered numerous obstacles related to notice and

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131. *See* Office of Governor Mark Dayton, *supra* note 121.
132. *See id.*
133. *See supra* Part II.A.
134. Office of Governor Mark Dayton, *supra* note 121.
135. *The Governor's Council: Worse Than Doing Nothing, supra* note 28.
136. *Id.*

inaccessibility of the session locations. Participation in the first two listening sessions was quite low, and participants who did attend consistently referenced a lack of notice[137] and suggested that their ability to obtain the time and location of the session was largely a result of chance. The third listening session was the most heavily attended, but this seemed to be the result of advertising by a single organization to its members.[138] Moreover, the session occurred the evening after a mentally ill black teenager, Khaleel Thompson, was shot multiple times by law enforcement at a public park and thus functioned as a forum to collectively process that event.[139] In addition to low levels of citizen inclusion, the Council was also criticized for the exclusion of Citizens United Against Police Brutality ("Citizens United"), an organization which seemed familiar to (and respected by) many community members for its longstanding work on police brutality.[140] Citizens United's critique of the Council's work operated as a form of expert testimony during the listening session on the recommendations and supported the tilt towards contestation over deliberation. Given these difficulties in terms of inclusiveness, autonomy, and reason-giving, the Council struggled to establish its own legitimacy in the eyes of the community, and thus did not make clear headway in improving perceptions of police legitimacy.

B. Discourse Models and the Council

The deliberative shortcomings of the design of the Council were amplified by the clash of discourse models around police violence, present across all the community meetings. Given its context, this clash took its rawest form in the third meeting; community members ripped up copies of the Council's recommendations, called out the minority facilitators for participating in the playacting, and implicitly and explicitly gave the entire process the middle finger.[141]

The rejection of the Council process by the community is no doubt complex, but the comments at various meetings suggest that at least part of the problem lay in deficiencies in the elements of discursive

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137. *See, e.g.*, YouthLens360, *supra* note 128, at 1:10:00-1:12:00.

138. Furst, *supra* note 15.

139. Paul Walsh, *No Charges Against Crystal Police in Shooting of Teen Who Sought Death by Police*, STAR TRIBUNE (Nov. 2, 2017, 11:04 AM), http://www.startribune.com/no-charges-against-crystal-police-in-shooting-of-teen-who-sought-death-by-cop/454707663.

140. Office of Governor Mark Dayton, *supra* note 121.

141. *See, e.g.*, YouthLens360, *Governor's Council on Law Enforcement and Community Relations Meeting 5.25.17*, 1:48:30-1:49:25, YOUTUBE (June 4, 2017), https://www.youtube.com/watch?v=fu9WvJ46Mjk.

validity—truth, authenticity, and normative rightness—flowing from the exclusion of transgressive community discourse models.

1. Truth

The effect of the exclusion of transgressive discourse models on the possibility of the development of consensual social truth was evident from the very first listening session. Numerous community members denounced the community relations goal of the Council as a false framing. For example, Communities United Against Police Brutality argued that:

> The entire premise of the Governor's Council starts with the goal of improving "police-community relations." However, this is a false framing. This framing proposes that if police and the community could somehow just get along better, trust would be built and the problem would be solved. It also places half the responsibility for the problem on the community, when we have little control over police conduct that undermines trust.[142]

Throughout the listening sessions, community members consistently framed the problem, not as one of mutual trust, but as one of police brutality, depicting police violence as a systemic problem rooted in the history of American racism. For example:

> The system that's set up is a Jim Crow era system. Still existing. They changed a few things here and there . . . but it's the same thing. And that's what's going on. . . . It's a system issue. It's not just the police. It's the whole system . . . people are dying when their car breaks down.[143]

> I would like to start with accountability, but it's like we can't even start there because we don't have a real agreement on what the problem is . . . . In these recommendations, I don't have an acknowledgement of what the problem is . . . I understand that objective was to try to rebuild or establish trust but we really need to talk about why that trust isn't there. I would venture to guess it's because of police brutality. But I would also venture to guess, it's because of the historic role police have played in different communities [mentioning slave catchers and forced relocations of Native peoples].[144]

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142. *The Governor's Council: Worse Than Doing Nothing, supra* note 28.

143. YouthLens360, *Governor's Council on Law Enforcement and Community Relations Meeting 5.15.17*, 48:25-48:35, 56:07-56:14, 57:24, YouTube (May 30, 2017), https://www.youtube.com/watch?v=OwJZPdlKXXw.

144. YouthLens360, *supra* note 128, at 35:43-37:50.

These comments implicate all three transgressive discourse models, suggesting that the problem of police violence is rooted in the design of the institution itself and the racist elements that remain in that design. These discourse models, however, were precluded not only by the framing of the conversation but also by the Council's refusal to modify or update the recommendations rooted in that framing. As a result, the validity and legitimacy of the deliberative process were constantly rejected by community members. In one telling comment, a community member noted:

> I think that [another community member] had a good point that we do have systemic racism within our government, um, and the police department, uh, our police department Chief Todd Axtell made a public statement saying that he was offended that somebody would even say such a thing. So how, how is it that we trust that you guys are actually working towards doing something when we can't even admit that we have an actual problem? I think that that would be a good place to start. If we can have some people stand up and take some accountability—like we all have to do in our everyday lives—these people who are in charge of running things, who make our lives look one way or another, should have to be more so in a position to have some accountability. And say, "Okay, this is what's going on. We accept that, and we're going to address it." But if they can't even say that that's the issue, and that's what we're up against, how exactly are we supposed to come to a solution?[145]

While the community's discourse presupposed anti-black racism and systemic injustice, the Council's framing presupposed a mysteriously broken relationship that both sides had to work to repair. Though the Council's framing was continuously criticized and rejected by community members,[146] the Council was unable to make space for injustice discourse models in its framing of the problem, due perhaps to the power of law enforcement on the Council and the threat of the power of the unions over legislative considerations of the final recommendations.[147]

The Council's static insistence on a framework of mutual trust, without also considering the causes of distrust, consistently delegitimized discourse models of injustice and systemic racism ex-ante, foreclosing in large part the creation of consensual conditional social truth and driving community participation into a discourse of contestation rather than of consensus orientated deliberation. Consensual

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145. YouthLens360, *supra* note 141, at 44:06-44:16.
146. *See, e.g.*, *supra* notes 141-44 and accompanying text.
147. YouthLens360, *supra* note 143, at 33:34-35:20, 35:43-37:50.

social truth does not mean negating the importance of trust in favor of injustice, but rather seeking a truth that acknowledges both discourse models—a truth that recognized both the importance of trust and the rationality of the communities' distrust. This might have produced an "earned trust" framing of the problem that was a better reflection of social facts than trust or injustice standing alone. Moreover, such framing may have made it easier to incorporate the accountability measures so important to the community, without the strident denunciations of the police that often alienated law enforcement.

2. Authenticity

The exclusion of community discourse models also hampered efforts to increase the authenticity of the deliberative process. Authenticity requires the generation of a collective self-understanding rooted in the equal political autonomy of the participants.[148] This means the definition of a social problem must encompass the self-understanding of a cross section of stakeholders in addition to providing such stakeholders opportunities to participate in meaningful deliberation about solutions. In this respect, the Council's design and the organization of the listening sessions were incompatible with the goal of authenticity and collective self-understanding. For one, the inclusion of groups in the original recommendation process seemed skewed towards organizations with positive views of the police, and there was no avenue for ordinary citizens or groups with transgressive discourse models to play a meaningful role in shaping the articulations of the problem or influencing the nature of the proposed solution. For example, Citizens United argued that: "The Council is stacked with elected officials, police leaders and other cheerleaders for the cops. Most of these people on the Council have had no direct experience with police brutality. The few community representatives on the Council have felt tokenized and are not even voting members."[149]Another community member noted that the Council included

> almost the whole alphabet of representatives from particular organizations. And I realize that, very much like all these papers that you have passed out, this looks good in theory. This does not represent the communities that have been very adversely affected by white supremacy, by police brutality, use of excessive force.[150]

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148. *See* HABERMAS, *supra* note 17, at 474.

149. *The Governor's Council: Worse Than Doing Nothing, supra* note 28.

150. YouthLens360, *supra* note 128, at 1:10:00-1:13:00.

The problem of non-representativeness was compounded by the inflexibility of the Council's original recommendations which did not change despite repeated contestation and pushback from the community regarding justice not trust as the key concern. Despite the Council's verbal assurances of the value of community participation, the problem and solution were all permanently predefined before the community at large was invited to participate.[151] In addition, the community input on the predefined solutions was not solicited directly, but rather in a process by which the input would be collected by unaffiliated third parties and then "summarized" for Council members. As a community member observed:

> You know—I think it's interesting—the Governor's Council is not here. Uh, I don't know how many law enforcement officers are here. I did see a couple of people in uniform here. They didn't stay. I don't know if they were here to make us feel like, um, you know, if they thought that there was going to be a protest outside and so to be defensive. Um, but so to start there, the relationship is already not there because we're the only ones who showed up (Crowd: "mhmm"). And so who actually is listening? If, if you guys are a third party, I'm not even sure exactly d-do you even live around here? Do you live within the cities? Do you know what's going on? Um, and if not, why are they putting you in front of us, if you can't tell us anything? It's all— then it's being relayed and synthesized and put into somebody else's words rather than coming directly from the community.[152]

Despite the extent to which community input was cabined, tamed, and sometimes excluded, the Council recommendations themselves were nevertheless designed to be non-binding with no commitment to further action by any branch of government.[153] Indeed, in the final report, the Council Committee on Implementation did not even pretend otherwise. Despite continuous community requests to develop strategies for implementation, this committee, designed specifically to develop strategies for implementation, merely listed the organizations that would influence implementation, without a single suggestion of a method or tactic that might help facilitate the implementation of the

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151. *Compare* GOVERNOR'S COUNCIL ON LAW ENFORCEMENT & CMTY. RELATIONS, GOVERNOR'S COUNCIL ON LAW ENFORCEMENT AND COMMUNITY RELLATIONS INITIAL REPORT (Oct. 12, 2016) [hereinafter INITIAL REPORT], *with* GOVERNOR'S COUNCIL ON LAW ENFORCEMENT & CMTY. RELATIONS, GOVERNOR'S COUNCIL ON LAW ENFORCEMENT AND COMMUNITY RELATIONS FINAL REPORT 18 (Sept. 29, 2017) [hereinafter FINAL REPORT] (summarizing select community input, but absent of any meaningful changes to the original recommendation in line with that input).

152. YouthLens360, *supra* note 141, at 46:45-48:15.

153. *See* INITIAL REPORT, *supra* note 151, at 1-5.

recommendations.[154] Community members viewed the powerlessness of the Council, both in its design and in its subordination to the power of police unions, as a function of systemic anti-black racism and white privilege.[155] More than one community member noted that if the state really cared about black and brown bodies piling up in the street, their solution would have been more than listening sessions on non-binding recommendations that did not even mention the words "police accountability" and that demanded no change in current policing practices.[156] Thus, community members rejected the Council process, not only due to the non-consensual social truth it affirmed, but also in condemnation of its failure to make provision for the exercise of political autonomy by minority communities or to incorporate their discourse models in the collective understanding of the problem.

In excluding discourse models that recognized the connection between racial bias in policing and white privilege, the Council was also forced to exclude the community from meaningful participation in the process. As a result, the Council missed an opportunity to address the failures of authenticity implicated in precinct protests and demands for the abolition of police departments. It also missed a key opportunity to recognize and embrace masterless citizenship which extends beyond being equally subject to the discretionary authority of law enforcement and includes the collective right to define what types of discretion are permissible and what dimensions of equality are relevant. The exclusion of the communities discourse models meant that the Council never reached the question of authenticity, of which communal distrust of law enforcement was merely a symptom.

3. Normative Rightness

The exclusion of minority discourse models also prevented the co-creation of norms of rightness. The force of law in a democracy does not rest on bare coercion but depends in large part on citizen recognition of the law as embodying principles all citizens "ought" to follow.[157] The legitimacy challenges in Minnesota thus flowed at least in part from the difficulty of justifying the summary execution of a citizen whose second amendment right frightened an officer.[158] Most citizens would agree that

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154.   *See* FINAL REPORT, *supra* note 151, at 18.
155.   *See* Tigue, *supra* note 127.
156.   *See generally* YouthLens360, *supra* note 141.
157.   GUTMANN & THOMPSON, *supra* note 48, at 7.
158.   Mark Berman, *What the Police Officer Who Shot Philando Castile Said About the Shooting*, WASH. POST (June 21, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting/?utm_term=.bc058380bb64.

such killings "ought not" to be done, but the legal framework in Minnesota justified and legalized this outcome and was perceived as just one in a long line of such justifications.

Consistent justification of laws that run counter to the citizen's conception of normative rightness can only occur when a democratic government has experienced a significant breakdown. The most common such breakdown, of course, is when the institutions of democracy have been so subverted, they are merely window dressing for dictators and oligarchs.[159] In such cases, systematic domination ensures that the only norms the law need reflect are the norms aligned with the self-interest of the dictator and oligarchs. A similar, often less noticed breakdown, however, is domination focused on particularly vulnerable social groups rather than society at large.[160] This targeted domination occurs when the law consistently justifies a violation of societal norms when the violation is limited to marginalized groups within society.[161] When domination replaces publicly acceptable reasons as the justification for state violence against marginalized groups, it inevitably loses the luster of law and begins to take on the shadow of oppression and illegitimacy.

Thus, one of the most significant stumbling blocks to a restoration of legitimacy through deliberation on the Council and with the community was the Council's rejection and marginalization of the community's norms of rightness. Over and over again, the community sought an acknowledgement that norms of rightness had been violated, that injustice had been (and was being done). As one community member noted:

> People's human rights are being violated. You talk about community relations. Lot of language in there about community relations . . . . And in order to mend a relationship once, um, a violation has happened. Any of y'all who go to church, what is it that we have to do? (Other Community members: Repent) We got to repent, right? We have to repent. Ask for forgiveness. Repent and turn away from those behaviors. Right? That means I'm, I'm not going to do that again. But [footage cut] Anything wrong in your mind? This system refuses to repent, to admit that they are killing people unlawfully. (Other Community members: That's right.) They're shooting people without a

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159. *See, e.g.*, Akbar Ganji, *The Transformation of American Democracy to Oligarchy*, HUFFINGTON POST (Aug. 6, 2016), https://www.huffingtonpost.com/akbar-ganji/the-transformation-of-ame_1_b_7945040.html.

160. *See, e.g.*, JORGE E. BRENNA, SOCIAL EXCLUSION AND DEMOCRACY: ACES OF THE AGENDA FOR THE FTAA? 15 (2001), http://www.yorku.ca/drache/talks/2001/pdf/brenna.pdf.

161. *See id.*

weapon and killing them. (Other Community members: That's right.) . . . . If, if real community relation—if, if, if that's like something like that people really want to happen, you got to repent, man. You, you gotta ask for forgiveness. Turn away from that. And then we can begin to sit down and have a conversation about how we begin to work together. But if you ain't even acknowledging that you have offended, harmed, killed, all of those. If you can't even admit that, we can't have a conversation (Crowd: "mmhmm").[162]

That acknowledgement, however, was not one the Council was willing or able to give. As noted previously, the Council's "mutual trust" language and the recommendations flowing from that language sidestepped issues of norms and justice.[163] Though the Council's final report suggested that it was formed in response to the police killings of Jamar Clark and Philando Castile, few (if any) of the recommendations could function to reduce the likelihood of continuous repeats of similar tragedies.[164] Indeed, the Council's recommendations can be reduced to three—data collection, training, and diversity hiring.[165] While these are all laudable suggestions, they are in many respects cookie cutter recommendations applicable to almost any issue in a multicultural society. As one community member noted: "Looking at these recommendations, it is unclear how they are going to address the specific issue of police shootings, police violence and accountability . . . . They are still beating around the bush as far as getting to the root level issue."[166] Another community member noted that while for cops the issue was one of bad press, the community has "bodies piling up."[167] Another noted the issue was murder.[168]

There is little in the Council's report, however, to suggest that the problem it was tasked to solve was one of life and death for marginalized communities. Instead, the report speaks of communities "negotiating issues of trust, mutual accountability and transparency"[169] and implicates both citizens and police with the language of "violent incidents between law enforcement and civilians."[170] For the community members, however, the norm that was violated is the most basic norm of civil society—instead of being protected by the state (the textbook

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162. YouthLens360, *supra* 141, at 1:26:57-1:27:53, 1:29:26-1:29:58.
163. *See supra* Part III.B.1.
164. *See generally* FINAL REPORT, *supra* note 151.
165. *Id.* at 11-18.
166. YouthLens360, *supra* note 141, at 12:34-13:05.
167. *Id.* at 38:00.
168. *Id.* at 17:00.
169. *Id.* at 3:00.
170. *Id.*

justification for presuming consent to enter society), they found themselves in the position of needing protection from the state.[171] For example, a community member noted that: "When I get stopped by a police officer, my wife cries. . . . She doesn't even know yet if it's a good cop, bad cop, whatever."[172] Another community member noted that "[a]s far as public health goes, public safety, your police are a public health and public safety problem. That's what's happening."[173]

The Council, however, changed the charge "[i]nnocent people are being murdered by the state" to "two groups in society need to get along better," erasing the norm at the heart of the communities' sense of illegitimacy and thus removing an essential element for restoring validity. To many in the community, this refusal to engage with police brutality as a violation of the state's promise of protection is explained by the overarching discourse models mentioned earlier—black lives do not matter in America, the police exist to protect white people and control black people and the government keeps failing to fix the system because the system is "broke on purpose."[174]

The lack of any one element of validity at any given time poses a significant challenge to the social recognition of law enforcement as a valid exercise of state power. When failings appear in all three areas at once, however, it creates a crisis of validity that generates seemingly revolutionary calls to revoke the state's monopoly on coercive power. Deficiencies in all three areas limited the efficacy of the Governor's Council and prevented it from producing recommendations that could truly improve the validity of law enforcement in the eyes of the citizenry.

IV. FROM DELIBERATION AND INCLUSIVE DISCOURSE MODELS TO LEGITIMACY

In this Part, I suggest the types of best practices that might be introduced at the local level in order to ensure that deliberations around police reform in the aftermath of police violence incidents actually work to promote increased legal validity along these axes.

In the first instance, the difficulties encountered by the Council in designing an inclusive deliberative process marked by political autonomy, equality among participants, and reason-giving may be reflective of the highly polarized and political nature of the issue as well

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171. *Id.*
172. YouthLens360, *supra* note 143, at 55:25-55:34.
173. *Id.* at 1:08.
174. BUTLER, *supra* note 86, at 1.

as the difficulties of overcoming self-selection bias—at least some of which may be reflective of the reluctance of some communities to engage in dialogue with police. In such contexts, mini-publics constructed through random sampling techniques have often proven successful in securing the basic preconditions for deliberation.[175] Thus, rather than defining and constructing an advisory group comprised of individuals from the opposite ends of the police-community spectrum, states and municipalities seeking to restore the legitimacy of law enforcement through deliberation might be well-served to convene a representative mini-public through the techniques that have proven so effective in deliberate polling. In such a context, police and activist organizations, rather than debating with each other across the gulf that divides them, would present their evidence and definitions of the problem to a randomly selected cross-section of the community. The fact that policing policies and techniques vary across communities, however, suggests that in the first instance, such mini-publics should not be drawn from the entire city or state, but rather drawn to be representative of the smaller communities defined by the geographic boundaries of police precincts.

The snapshot of the deliberative process provided by consideration of the Governor's Council, however, suggests that improving deliberation around police practice is not only a matter of who is at the table, but also a matter of which ideas are welcome and the ways in which these ideas are evaluated. This means that deliberations must be framed in ways that do not prejudge or exclude transgressive discourse models, as these models are necessary for the co-creation of social truth, the securing of authenticity, and the development of inclusive norms of rightness.

In the case of co-created truth, it is important that deliberative fora do not implicitly deny the truth of national transgressive discourse models, as these macro discourse models are often taken up and revised in local transgressive discourses. For example, systemic anti-black racism is a discourse model that transgresses normative social truths of colorblindness and race neutrality.[176] In order for deliberative fora to be framed in ways that do not preclude this discourse model, they must take place against a backdrop of transparency about the role of race in police stops, arrests, and uses of force as well as charging, plea bargains, and sentencing. Failing to collect this information in the first instance marginalizes the systemic anti-black racism discourse model by

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175. *See generally* JAMES FISHKIN, DEMOCRACY WHEN THE PEOPLE ARE THINKING (2018).
176. *See supra* Part II.A.2.a.

presupposing that there is no "there there." Minnesota has taken steps toward such transparency, providing access on its webpage to information on police stops and arrests.[177] This creates an empirical foundation for the debate over social truths about race-conscious injustice, rather than one that relies solely on political or economic power. However, the mere existence of such a database is insufficient. Deliberative fora must also be spaces in which communities can define and interpret these empirical findings for themselves and have their interpretations given due weight in policymaking. The truth of society is constantly under construction and always contested. Conjunctive approaches that seek to reconcile rather than selectively reject the discourse models of competing communities are more likely to lead to conditional truths embraced by a cross-sectional majority of society, thus supplying an element of validity to the laws that presuppose such a truth.

In the case of authenticity, minority discourse models are key to ensuring that law enforcement authority promotes citizenship rather than domination, government by law rather than by men. For example, the citizenship implications of the bifurcation of authority and accountability suggest a need to link deference to policing practices to levels of community participation in policymaking around those practices rather than to police expertise alone, for police expertise has traditionally hinged on police discretion, the presumptive neutrality of which has been consistently rejected by affected communities.[178] Such policy deference would require evidence that the discourse models and life narratives of highly-surveilled communities were identified and taken seriously in deliberations over appropriate police practices. This would place an affirmative obligation on police departments to organize their policymaking processes in inclusive ways that actively promote the engagement of overlooked and vulnerable communities. Mini-publics representing the inhabitants of a particular precinct might be one way to achieve this, especially as such random sampling would not erect barriers to participation by those who have been sanctioned by the criminal justice system. The discourse models of those who have suffered state-sanctioned violence, the criminal justice corollary of free speech dissenters, are a crucial source of system validity.

This is particularly the case when the discourse models embedded in policing policies are drawn almost exclusively from those socially constructed as potential victims—law enforcement officers and property

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177. Minneapolis Police Department, *Crime Maps & Dashboards*, CITY OF MINNEAPOLIS, http://www.ci.minneapolis.mn.us/police/statistics/index.htm (last visited Feb. 3, 2019).

178. HABERMAS, *supra* note 17, at 32-33.

owners, with little input from the poor and vulnerable communities constructed as perpetrators. This is not to deny the legitimacy or importance of the discourse models of and co-authorship rights of potential victims. It is rather a recognition that the socially constructed category of victims is exclusive and incomplete. It often denies the co-authorship rights of potential victims who are poor and of color while also failing to recognize an unaccountable executive as an equally threatening perpetrator.[179] The remedy for these biases and distortions is the inclusion as co-authors of all those deeply affected by policing laws and policies in order to create policies that are rational from the perspective of both the accuser and the accused.[180] This cannot be done without giving great weight to the discourse models of vulnerable communities, who often have the unique double consciousness of being socially constructed as the accused even when they are the accusers. The proliferation of e-participation technologies and the degree of internet penetration in this nation offer numerous avenues for police departments to engage marginalized communities in co-authorship of policies that will be applied in those communities.

Lastly, one of the key sources of legal invalidity at the local level is the disjunction between the legal norms drawn from the Supreme Court precedent and the sense of rightness and justice in highly-surveilled communities. Transgressive discourse models are needed to facilitate alignment between the norms of criminal law and the sense of normative rightness in these communities. There are currently three primary sources of discourse models that determine the norms of criminal law at the local level. The first are the discourse models embodied in the judicial precedent.[181] The second are discourse models found in union contracts and police training manuals.[182] The third are discourse models of high-status communities.[183] Neither of these are an accurate barometer of the normative understanding of highly-surveilled communities, particularly not for those police departments whose manuals are developed by private companies like Lexipol. A central purpose of deliberative democracy, however, is to reduce the space between legal norms and the social understandings of the citizens subjected to those norms.[184] Legal norms that accord with the conceptions of normative rightness of affected citizens, however, cannot

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179. Addis, *supra* note 49, at 64.
180. *Id.* at 71.
181. *See supra* Part II.A.2.
182. *See supra* Part II.A.2.
183. *See supra* Part II.A.2.
184. HABERMAS, *supra* note 17, at 19-21.

be found in judicial opinions nor extrapolated from the views of police and high-status communities. They must instead be conditionally constructed through the deliberative process of a free, equal, and engaged citizenry. Thus, one implication of the injustice by design discourse model is the suggestion that the norms of justice itself are unjust, a critique that cannot be separated from the non-inclusive sources of local community norms.[185] In this respect, the legitimacy of criminal justice norms at the local level depends in large part on the voices and discourse models taken seriously in the creation of those norms.

   Thus, one step the discourse model approach suggests in improving the validity of criminal law is ensuring that the communities most affected by criminal justice norms play a significant role in the creation of those norms. For example, if citizen review boards are recognized as flowing from the concerns related to the lack of community voice in norm setting, the debate over the power of these boards is reframed. For norms are not about redressing individual complaints of injustice, but rather about setting the standards for procedural justice for the community. This framing would require a representative sampling of the citizenry with the power to influence police norms in the community, which provides an alternate way of conceptualizing the composition and powers of civilian boards. For, the criminal injustice norm discourse model presupposes that marginalized communities are not only denied a voice in the creation of the laws and policies that most closely affect them, they are also denied a voice in the articulation of the normative standards by which those laws are evaluated.[186] This exclusion is particularly problematic given that continuing racial stratification and bias in American society often cause police officers and prosecutors and even white jurors to view black criminal defendants and victims as representing a foreign community and thus to apply a different set of "community" norms than they apply to white defendants and victims.[187] Legal validity in the element of normative rightness has proven elusive because a communal sense of normative rightness has proven elusive. Multicultural norms of criminal justice have to be created and the composition of citizen review boards must be reevaluated with that imperative in mind.

   For those areas in which community norms have habitually been treated as irrelevant to legal norms, such as in judicial interpretations of the legal norms governing plea bargains, warrant applications, and the

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185.   *See* Addis, *supra* note 49, at 64.
186.   *See supra* Part II.A.2.
187.   *See supra* Part II.A.2.b.

"reasonableness" of government seizure, the same holds true—improved validity at the local level requires community involvement under conditions that promote inclusive deliberation.[188] Giving weight to citizens' deliberations in procedural justice norm setting has the potential to not only increase the accuracy of judicial efforts to define reasonableness, but also to increase the use of deliberative democracy throughout society, with corresponding benefits for democratic decision-making and citizen engagement.[189] Thus, rather than judicial review being pitted against the political autonomy of the citizenry, it could function instead to promote improved political decision-making across society and the use of public autonomy to secure and define private autonomy. In this way, the judicial process itself could facilitate the narrowing of the gap between the facts and norms of police violence.

V. CONCLUSION

In conclusion, the exploration of the deliberations of the Governor's Council reveals deficiencies in truth, authenticity, and normative rightness, traceable in large part to the exclusion of transgressive discourse models.[190] These deficiencies greatly limited the efficacy of the Council and prevented it from developing recommendations that could produce meaningful improvements in the validity of law enforcement in the eyes of the community. This exploration also, however, suggests three best practices for designing deliberative fora that are open textured in terms of discourse models, and that thus can offset entrenched power asymmetries.

First, deliberative fora that are open to transgressive discourse models of policing must have a backdrop of transparency about the issues in dispute—for example, the role of race in police stops, arrests, and uses of force as well as charging, plea bargains, and sentencing. Failing to collect this information in the first instance prejudges the truth by assuming that there is no "there there," marginalizing discourse models that suggest otherwise. In addition to ensuring an empirical foundation for debates over social truth in criminal justice, deliberative fora must also be spaces in which communities can define and interpret the empirical findings for themselves—places in which their transgressive discourse models of systemic racism are treated as equally valid as the "individual bad apple" models of officers.

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188. HABERMAS, *supra* note 17, at 28-29.
189. *Id.* at 19-21.
190. *See supra* Part III.

Second, deliberative fora that are open to transgressive discourse models must take steps to promote the inclusion of vulnerable groups and their discourse models in the self-governing collective as a function of authenticity. This means that deliberations about police violence should begin as deliberations among a cross section of the lay citizenry, and only after some version of consensus or understanding is reached in that process, should deliberation between the citizenry and law enforcement take place. This approach creates space for transgressive discourse models that critique police power to be discursively connected to wider community discourses of freedom and equal citizenship, before being subjected to the "othering" hegemony of police authority. In the citizen deliberative fora, while consensus should be the goal, alternatives short of full consensus but more than bare majority rule should be available—for example, including multiple representatives of key social groups and requiring at least forty percent of the members of all groups to approve decisions.

Third, communities which are particularly polarized around the issue of police violence may consider deliberative polling, as its use of random sampling and balance presentations by experts and in briefing materials often produce mini-publics characterized by deliberation rather than contestation.[191]

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191.   *See generally* FISHKIN, *supra* note 175.

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