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Paul H. Robinson

Jeffrey Seaman

Muhammad Sarahne

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STANDING BACK AND STANDING DOWN: CITIZEN NON-COOPERATION AND POLICE NON-INTERVENTION AS CAUSES OF JUSTICE FAILURES AND CRIME

Paul H. Robinson, Jeffrey Seaman,** and Muhammad Sarahne****

I. INTRODUCTION

It may surprise many that America's justice system fails to find or punish offenders for the vast majority of serious crimes. Failures of justice are the norm, not the exception. Most killers get away with murder. In 2020, there were 24,576 homicides in America, and police solved just 10,115 of those—41.2%.¹ Even worse, usually less than half of these

* Colin S. Diver Professor of Law, University of Pennsylvania. The authors gratefully acknowledge the research assistance of Sarah M. Robinson, Erin Kelly, Catherine Lewis, Dushaun Thompson, Melissa Nong, and Yosef Weitzman. For an account of the criminal justice system's regular failures of justice beyond those discussed in this article, see the forthcoming book *GETTING AWAY WITH MURDER AND RAPE: RETHINKING THE BALANCE OF INTEREST IN CRIMINAL JUSTICE* (Rowman & Littlefield 2024) by the same authors.

** Bachelor of Arts in Philosophy, Politics, and Economics, 2022, and Master of Science in Behavioral and Decision Sciences, 2023, University of Pennsylvania.

*** S.J.D., 2020, and LL.M., 2017, University of Pennsylvania; LL.B. (Law) and B.A. (Psychology), Hebrew University of Jerusalem, 2011. Sarahne is currently an attorney in the Criminal Department of the State Attorney's Office in Israel, representing the state in criminal matters before the Israeli Supreme Court.

1. See *Underlying Cause of Death, 1999-2020 Results: Deaths Occurring Through 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION WONDER, <https://wonder.cdc.gov/controller/datarequest/D76;jsessionid=F40BCB177B9B04859F3B1983F72> [<https://perma.cc/LC3S-YRNU>] (last visited Aug. 12, 2023). Other sources offer slightly different data based off less complete Federal Bureau of Investigation ("FBI") data which indicate there were 21,570 homicides in 2020 with a clearance rate of 54.4%. See Weihua Li & Jamiles Lartey, *As Murders Spiked, Police Solved About Half in 2020*, MARSHALL PROJECT (Jan. 12, 2022), <https://www.themarshallproject.org/2022/01/12/as-murders-spiked-police-solved-about-half-in-2020> [<https://perma.cc/8UYB-NGRA>]; *America's Declining Homicide Clearance Rates 1965-2020*, MURDER ACCOUNTABILITY PROJECT, <https://www.murderdata.org/p/reported-homicide-clearance-rate-1980.html> [<https://perma.cc/42FZ-QLA7>] (last visited Aug. 12, 2023).

solved cases result in a homicide conviction.² Escaping punishment for rape or assault is trivially easy. Of more than 920,000 aggravated assaults annually, only 8.9% lead to a conviction.³ Of 463,000 rapes and sexual assaults annually, 97.2% end in no felony conviction.⁴ Every year, the justice system allows hundreds of thousands of murderers, assaulters, and rapists to walk free. And this situation is only getting worse. The data suggests the national homicide clearance rate dropped by 17.6% between 1980 and 2020,⁵ with the clearance rate for other serious offenses dropping as well.⁶

These low clearance and conviction rates are highly damaging to society. First, failing to identify a criminal perpetrator necessarily means a moral failure where a blameworthy offender escapes punishment. But failing to catch serious offenders also has worrying practical consequences on crime even beyond letting dangerous offenders revictimize their communities. As failures of justice increase, the criminal law's moral credibility with the community decreases, which in turn produces less assistance, cooperation, and internalization of the law's norms and instead provokes resistance, subversion, and vigilantism.⁷ Further, as clearance rates go down, the general deterrent effect of the criminal justice system also goes down, producing more crime, which in turn pro-

2. The government stopped publishing data on state murder conviction rates in 2006. The last year for which public statistics are available is 2006. At that time, there were 17,030 murders annually of which 10,337 were officially cleared, and of those cleared, 6,240 resulted in a homicide conviction. See *America's Declining Homicide Clearance Rates 1965-2020*, *supra* note 1; BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ 226846, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 3 (Dec. 2009), <https://bjs.ojp.gov/content/pub/pdf/fs06st.pdf> [<https://perma.cc/3CLT-JSJR>].

3. See Statista Research Department, *Total Number of Aggravated Assaults Reported in the United States in 2020, by State*, STATISTA (Oct. 26, 2021), <https://www.statista.com/statistics/232535/aggravated-assaults-in-the-us-by-state> [<https://perma.cc/85XG-7F2F>]; FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES, *supra* note 2, at 3.

4. See *Victims of Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/statistics/victims-sexual-violence> [<https://perma.cc/TC76-C6SQ>] (last visited Aug. 12, 2023); *The Criminal Justice System: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/X46H-7LZT>] (last visited Aug. 12, 2023).

5. See *America's Declining Homicide Clearance Rates 1965-2020*, *supra* note 1. See generally Thomas L. Scott et al., *Variability of Crime Clearance Among Police Agencies*, 22 POLICE Q. 82 (2019).

6. See Scott et al., *supra* note 5, at 83; Tricia Ennis, *Crime is Down in CT but so Are Clearance Rates*, CONN. INSIDE INVESTIGATOR (Sept. 26, 2022), <https://insideinvestigator.org/crime-is-down-in-ct-but-so-are-clearance-rates> [<https://perma.cc/EF73-BQHC>].

7. See Paul H. Robinson, *The Moral Vigilante and Her Cousins in the Shadows*, 2015 U. ILL. L. REV. 401, 453 (2015).

duces lower clearance rates, and so on, creating a tragic downward spiral.

Even more troubling, failures of justice disproportionately impact racial minorities and low-income communities, making the issue one of social as well as criminal justice. The recent decline in nationwide murder clearance rates is almost entirely due to failures to solve the killings of Black victims.⁸ Clearance rates for Black homicide victims have dropped by 20% over the past five decades, while clearance rates for White homicide victims have *increased* by 5%.⁹ A 2019 investigation on clearance rates in Chicago showed that homicides where the victim was White were solved 47% of the time, while homicides where the victim was Hispanic were solved about 33% of the time, and homicides where the victim was Black were solved less than 22% of the time.¹⁰

What is causing this increasing flood of justice failures and what can be done to stop it? While the crisis of unsolved crime has many causes, one oft-overlooked reason is that the most important actors in solving crime—community members and police—are increasingly not acting at all. Such inaction is not irrational but the result of strong incentives against citizen cooperation and against active police intervention. When citizens stand back and police stand down, the result is more failures of justice.

This article examines the causes behind this inaction in the face of serious crime, and for each cause explores the extent of the problem, documents public and political reaction to it, and presents a recommendation of what we believe is the most feasible reform. Part II examines the causes and effects of citizen inaction, including citizen silence caused by witness intimidation and no-snitching codes, as well as community non-cooperation caused by legal cynicism and upset over police use of force. Part III considers the causes and effects of police inaction, including de-policing policies and underfunding, as well as anti-police rhetoric and physical attacks that have produced officer demoralization and voluntary police pullbacks out of a sense of self-preservation. In Part IV, we offer our recommendation for the reforms that we believe are most likely to be effective in promoting greater citizen cooperation and greater police engagement.

8. See Thomas K. Hargrove, *Black Homicide Victims Accounted for All of America's Declining Clearance Rate*, MURDER ACCOUNTABILITY PROJECT (Feb. 18, 2019), <https://www.murderdata.org/2019/02/black-murders-account-for-all-of.html> [<https://perma.cc/8LXM-T9RY>].

9. See *id.* (emphasis added).

10. See Conor Friedersdorf, *Criminal-Justice Reformers Chose the Wrong Slogan*, ATL. (Aug. 8, 2021), <https://www.theatlantic.com/ideas/archive/2021/08/instead-of-defund-the-police-solve-all-murders/619672> [<https://perma.cc/3XC2-MSA6>].

II. CITIZEN NON-COOPERATION

Without cooperation and assistance from citizens, police and prosecutors are often helpless to solve or prosecute crimes. Studies show that witnesses are investigators' most useful asset in solving criminal cases, even more so than physical evidence.¹¹ Citizen non-cooperation with law enforcement can result from internal beliefs or external pressure and is a serious and often overlooked cause of justice failures. Citizen non-cooperation stems from a variety of causes, including witness intimidation, the psychological pressure and fear of public shaming that arises from the stop-snitching movement, cynicism over the legal system's ability to do justice, and fear or distrust of police over real or perceived police misconduct in the use of excessive force. We examine each in turn.

A. Witness Intimidation

People often imagine that criminals get away with murder thanks to careful planning, as in avoiding being witnessed in the act. In reality, killers can brazenly shoot their victims in front of crowds of people and still walk away uncaught due to America's epidemic of witness intimidation. Police and prosecutors depend on witnesses to help solve crimes and secure convictions, but witnesses are often too scared to cooperate lest they become the next victim.

Witness intimidation is widespread across America, although when successful, it defies efforts at measurement. But available evidence points to a catastrophe of silence. One study suggests 23% of reported serious crimes are not prosecuted because of witness non-cooperation,¹² and prosecutors in Baltimore and Boston, for example, report witness intimidation in up to 80% of homicide cases.¹³ A National Youth Gang Survey found that 83% of police departments in larger areas reported that witness intimidation was common.¹⁴ Another study found 36% of witnesses who testified in criminal courts in Bronx County, New York,

11. See U.S. DEP'T OF JUST., R-1778-DOJ, THE CRIMINAL INVESTIGATION PROCESS VOLUME III: OBSERVATIONS AND ANALYSIS ix (Oct. 1975), <https://www.ojp.gov/pdffiles1/Digitization/148118NCJRS.pdf> [<https://perma.cc/84MZ-LFYQ>].

12. See Michael H. Graham, *Witness Intimidation*, 12 FLA. STATE UNIV. L. REV. 239, 241 (1984).

13. See David Kocieniewski, *With Witnesses at Risk, Murder Suspects Go Free*, N.Y. TIMES (Mar. 1, 2007), <https://www.nytimes.com/2007/03/01/nyregion/01witness.html> [<https://perma.cc/8PE3-GSFQ>].

14. See U.S. DEP'T OF JUST., OFF. OF JUV. JUST. & DELINQ. PREVENTION, HIGHLIGHTS OF THE 2000 NATIONAL YOUTH GANG SURVEY 1-2 (Feb. 2002), <https://www.ojp.gov/pdffiles1/ojjdp/fs200204.pdf> [<https://perma.cc/P4WN-5K7D>].

received direct threats.¹⁵ Perhaps the single greatest contributor to failures of justice in murder cases is the lack of witnesses willing to testify or cooperate with police. In many if not most of the tens of thousands of unsolved murder cases across America, police know who the likely killer is but are unable to proceed due to a lack of witness cooperation.¹⁶ Witness intimidation is also widespread in rape cases and in any criminal case involving gang members. In a country where witnesses are routinely silent or silenced before, during, and after investigations, it is no wonder so many crimes go unsolved and so many serious offenders walk free.

1. Types of Witness Intimidation

Witness intimidation takes many forms. One report, which surveyed 300 law enforcement agencies, examined the frequency of various types of threats in silencing witnesses. Eighty percent of respondents cited implicit threats as causing witness silence, 63% cited explicit threats of violence, 53% cited actual violence, and 45% cited property damage.¹⁷ The internet has also allowed for more effective and widespread intimidation both by targeting specific witnesses and by threatening whole communities that speaking out will result in retaliation.¹⁸ Gang members have used social media to “put the word out that individuals who cooperated with law enforcement or testified against gang members would be targeted for violence or murder”¹⁹ The silencing effect of threatened versus actual violence is similar because intimidators regularly carry out their threats.

15. See U.S. DEP’T OF JUST., OFF. OF CMTY. ORIENTED POLICING SERVS., No. 42, WITNESS INTIMIDATION 5 (July 2006), https://popcenter.asu.edu/sites/default/files/problems/pdfs/witness_intimidation.pdf [<https://perma.cc/HK5A-D2A8>].

16. See Wesley Lowery & Dalton Bennett, *Witness to the Killing*, WASH. POST (Oct. 17, 2018), <https://www.washingtonpost.com/news/national/wp/2018/10/17/feature/witness-to-the-killing> [<https://perma.cc/TF2X-XY9Q>].

17. See U.S. DEP’T OF JUST., OFF. OF CMTY. ORIENTED POLICING SERVS., THE STOP SNITCHING PHENOMENON: BREAKING THE CODE OF SILENCE 14 (Feb. 2009), <https://portal.cops.usdoj.gov/resourcecenter/RIC/Publications/cops-p158-pub.pdf> [<https://perma.cc/PG47-XSKS>].

18. See generally John Browning, *#Snitches Get Stitches: Witness Intimidation in the Age of Facebook and Twitter*, 35 PACE L. REV. 192 (2014).

19. *Probe into New Jersey Street Gang Ends with 71 Arrests*, CBS NEWS N.Y. (May 20, 2015), <https://www.cbsnews.com/newyork/news/grape-street-crips-arrests> [<https://perma.cc/HR6C-KTJ8>].

2. Case Example: Latasha Shaw

On September 29, 2007, thirty-six-year-old Latasha Shaw and her sister are walking in Rochester, New York, when they observe a crowd at a busy intersection.²⁰ Shaw is horrified to see her twelve-year-old daughter at the center of a mob of mostly teenagers who are tormenting the girl for fun. The mother rushes to intervene and manages to free her daughter, who takes off running with her aunt. The mob, angry at having their fun interrupted, viciously attacks Shaw with anything that comes to hand including bottles, sticks, and knives. As a crowd of observers forms to watch the mob attack, Shaw is thrown to the ground, and the mob jumps on her and kicks her until she dies. The killers make no attempt to conceal themselves, and police hope the case will be easy to solve given the fifty or so witnesses to the murder. For months the police canvass the area trying to get witnesses to come forward, but Rochester is held in the grip of intimidation. The fear is such that no one talks to the police, and Shaw's murderers are never brought to justice.

3. The Nature and Extent of the Problem

Witness intimidation leads to reduced crime reporting, stunted investigations, and unsuccessful prosecutions. Despite being such a serious contributor to justice failures, witness intimidation is rarely punished. The impact of witness intimidation is especially severe in gang-dominated neighborhoods where intimidation prevents almost any successful legal action against gang members. Consider the nature and extent of the problem.

i. Witness Intimidation's Prevalence and Effects

Measuring the effects of witness intimidation across all crimes (including unsolved crime) is difficult, as most successful intimidation does not leave traces for researchers to quantify because the cases are never cleared. Indeed, witness intimidation can lead to there being no official case to begin with when the victim is intimidated from reporting the crime. A fear of reporting the crime is understandable. For example, the

20. See Antoinette DelBel, *Park Dedicated to Latasha Shaw, Mother Murdered More Than a Decade Ago*, WHAM (Sept. 29, 2018, 7:48 PM), <https://13wham.com/news/local/park-dedicated-to-latasha-grayson-shaw-who-was-murdered-more-than-a-decade-ago> [<https://perma.cc/7FGN-5CUF>]; Jordan Mazza, *Eight Years Later: Community Remembers Latasha Shaw*, SPECTRUM LOC. NEWS (Sept. 30, 2015, 6:11 AM), <https://spectrumlocalnews.com/news/2015/09/30/latasha-shaw-death-remembered> [<https://perma.cc/J26Y-272Y>]; *Latasha Shaw, Longtime Food Service Employee, Dies*, UNIV. OF ROCHESTER (Oct. 2, 2007), <https://www.rochester.edu/news/printable.php?id=2995> [<https://perma.cc/8UUH-PXMN>].

Rape Prosecution Unit in Philadelphia reports that 50% of rapists threaten their victims with violence or death if they report the crime.²¹ To get a rough sense of what a dramatic effect non-reporting due to intimidation can have in rape cases, consider this: of the 463,000 rapes and sexual assaults annually,²² 69% are not reported,²³ and 20% of those non-reporting victims explain they failed to report specifically out of fear of retaliation.²⁴ That is over 63,000 sexual assaults a year never reported due to intimidation.

For many crimes where police identify the likely suspect, and so technically “clear” the case, conviction is not possible due to widespread intimidation. A study of 1,547 cleared murder, rape, assault, and burglary cases found that approximately 23% were not prosecuted due to witness non-cooperation, and 28% of all witnesses interviewed expressed a fear of retaliation if they cooperated.²⁵ In other words, intimidation prevented prosecution of a quarter of *solved* serious crimes.

However, witness intimidation occurs in far more than a quarter of cases in many jurisdictions. Research indicates that, in some gang-dominated areas, the level of witness intimidation is 75% to 100% for violent crimes.²⁶ Two-thirds of law enforcement agencies around the country have described witness intimidation as “common.”²⁷ Though witness intimidation occurs everywhere, it is a somewhat greater problem for prosecutors in large jurisdictions.²⁸ Fifty-one percent of prosecutors reported it as a significant problem in large jurisdictions compared to 43% of prosecutors in small jurisdictions.²⁹ The problem is especially acute in urban areas where 88% of prosecutors reported witness intimidation as a serious problem.³⁰ Witness intimidation often causes or exacerbates cities’ poor clearance rates. For example, in Indianapolis, which

21. See Graham, *supra* note 12, at 242.

22. See *Victims of Sexual Violence: Statistics*, *supra* note 4.

23. See *The Criminal Justice System: Statistics*, *supra* note 4.

24. *Id.*

25. Graham, *supra* note 12, at 241.

26. See U.S. DEP’T OF JUST., NAT’L INST. OF JUST., NCJ 163067, PREVENTING GANG- AND DRUG-RELATED WITNESS INTIMIDATION 5 (Nov. 1996), <https://www.ojp.gov/pdffiles/163067.pdf> [<https://perma.cc/QG99-Y3M2>].

27. Katie M. McDonough, Comment, *Combating Gang-Perpetrated Witness Intimidation with Forfeiture-by-Wrongdoing*, 43 SETON HALL L. REV. 1283, 1294 (2013).

28. Large jurisdictions are defined as counties with populations over 250,000 and small jurisdictions are defined as populations between 50,000-250,000. See U.S. DEP’T OF JUST., NAT’L INST. OF JUST., NCJ 151785, PROSECUTING GANGS: A NATIONAL ASSESSMENT 2 (Apr. 1995), <https://www.ojp.gov/pdffiles1/Digitization/151785NCJRS.pdf> [<https://perma.cc/6SV2-GC9F>].

29. See U.S. DEP’T OF JUST., NAT’L INST. OF JUST., NCJ 156555, VICTIM AND WITNESS INTIMIDATION: NEW DEVELOPMENTS AND EMERGING RESPONSES 2 (Oct. 1995), <https://www.ojp.gov/pdffiles/witintim.pdf> [<https://perma.cc/4WFR-6L52>].

30. See Kocieniewski, *supra* note 13.

has seen would-be witnesses murdered, witness non-cooperation seriously contributed to the city's near 35% homicide clearance rate in 2017.³¹ With roughly 150 criminal homicides per year, at least twenty *cleared* cases had to be dismissed between 2015 and 2017 due to witness intimidation.³²

ii. The Failure to Prosecute Witness Intimidation

Witness intimidation is a crime itself but efforts to prosecute it almost always fail. Even those few arrested on charges of witness intimidation are often never convicted, sometimes due to more intimidation. In 2014, only 136 federal arrests were made for “[t]hreatening communication” in violent crimes.³³ At the state and local level, the prosecution of witness intimidation differs greatly depending on the discretion of prosecutors, with many not even bothering to try to bring charges because they are doomed to fail.³⁴ Domestic and international comparisons suggest witness intimidation is extremely difficult to prosecute even in that small percentage of cases where charges are brought.³⁵ While many prosecutors recognize the need to combat witness intimidation,³⁶ it is hard to generate any deterrent effect given how few instances of witness intimidation lead to an arrest or conviction. Deterrence is also difficult because many intimidators have already committed serious crimes that carry lengthy punishments, so they have little to lose by engaging in intimidation to avoid an upcoming prosecution.

31. See Ryan Martin & Tim Evans, *He Helped IMPD Put Away a Killer. Then His Death Became a Warning: Don't Talk to Police*, INDYSTAR (Dec. 11, 2017, 3:55 PM), <https://www.indystar.com/story/news/crime/2017/10/19/dont-snitch-witness-intimidation-witness-protection-indiana-indianapolis-murder-homicide/653056001> [<https://perma.cc/7SBM-VTL5>].

32. See *id.*; Justin L. Mack & Ryan Martin, *Indianapolis Homicides Down for the First Time in Years. Here's Why No One Is Celebrating*, INDYSTAR (Jan. 10, 2020, 3:15 PM), <https://www.indystar.com/story/news/crime/2020/01/08/homicides-indianapolis-down-but-there-no-time-celebrate/2793754001> [<https://perma.cc/ZDJ5-TYD5>].

33. See BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ 250183, FEDERAL JUSTICE STATISTICS, 2014 - STATISTICAL TABLES 4 (Mar. 2017), <https://bjs.ojp.gov/content/pub/pdf/fjs14st.pdf> [<https://perma.cc/GV9C-AAANE>].

34. See PREVENTING GANG- AND DRUG-RELATED WITNESS INTIMIDATION, *supra* note 26, at 14-16.

35. See Margaret O'Malley, *Witness Intimidation in the Digital Age: Part I*, PROSECUTOR 21 (2014), <https://pccinc.org/wp-content/uploads/2015/06/Witness-Cooperation-and-Intimidation-Witness-Intimidation-In-the-Digital-Age.pdf> [<https://perma.cc/YQ5T-5BVC>]; Conor Gallagher, *Just 27% of Witness or Jury Intimidation Cases Result in Conviction*, IRISH TIMES (July 6, 2021), <https://www.irishtimes.com/news/crime-and-law/just-27-of-witness-or-jury-intimidation-cases-result-in-conviction-1.4612182> [<https://perma.cc/7K57-3PJ8>].

36. See VICTIM AND WITNESS INTIMIDATION: NEW DEVELOPMENTS AND EMERGING RESPONSES, *supra* note 29, at 2.

iii. The Special Problem of Gang-Related Witness Intimidation

Some of the main culprits behind witness intimidation are gangs. Gangs foster a culture of fear to suppress any witnesses from interfering with their criminal activities, and witness intimidation occurs in nearly all gang-related cases. In 2004, the District Attorney of Suffolk County testified to the Massachusetts Legislature that witness intimidation occurred in 90% of cases involving gangs and gun violence.³⁷ Other prosecutors estimate that witness intimidation occurs in 75% to 100% of violent crimes in gang-dominated neighborhoods.³⁸ No sane person would choose to testify against gang members who literally hold the power of life and death on their community's streets, and this is one reason why securing convictions is so difficult in gang-infested neighborhoods. As a National Institute of Justice study found, "victim and witness intimidation is *endemic* in neighborhoods infested with gang activity and drug sales and virtually *invisible* to people outside those neighborhoods."³⁹

While police are usually criticized for not solving serious crimes, the lack of arrests and subsequent charges and convictions are often due to a lack of cooperating witnesses.⁴⁰ For example, officials pointed to gangs and intimidation as the reason why a suspect was only identified or arrested in fewer than 30% of Boston's homicides in 2005.⁴¹ Despite the fact that there are typically more witnesses to gang-related murders than there are to non-gang-related murders, those witnesses are less likely to cooperate with law enforcement, resulting in gang- and drug-related murders being cleared 69% less often than other murders.⁴² Even worse, the generalized fear and intimidation the presence of a gang produces is not even an identifiable crime, but it can be far more potent than a direct threat of violence.

37. Julie L. Whitman & Robert C. Davis, *Snitches Get Stitches: Youth, Gangs, and Witness Intimidation in Massachusetts*, NAT'L CTR. FOR VICTIMS OF CRIME 10 (2007), <https://archives.lib.state.ma.us/bitstream/handle/2452/38544/ocn137337215.pdf?sequence=1&isAllowed=y> [<https://perma.cc/EV7S-8KSR>].

38. WITNESS INTIMIDATION, *supra* note 15, at 5.

39. See VICTIM AND WITNESS INTIMIDATION: NEW DEVELOPMENTS AND EMERGING RESPONSES, *supra* note 29, at 2 (emphasis in original).

40. Jim Haner et al., *Cases Crumble, Killers Go Free*, BALT. SUN (Sept. 29, 2002, 3:00 AM), <https://www.baltimoresun.com/bal-te.murder29sep29-story.html> [<https://perma.cc/ZPK3-RMU9>].

41. Whitman & Davis, *supra* note 37, at 10.

42. Anthony A. Braga et al., *The Influence of Investigative Resources on Homicide Clearances*, 35 J. QUANTITATIVE CRIMINOLOGY 337, 360-61 (2019).

4. Public Complaints

Despite witness intimidation being a leading cause of justice failures, the public often overlooks it because it rarely makes headlines when done successfully. Much of the public concern expressed over intimidation comes directly from victims and their families seeking justice. Tosha Braswell, the mother of a slain fifteen-year-old high school football star in Newark, expressed her grief and anger that prosecutors would not move forward on her son's case because of witness intimidation. "How can they leave him out there?" she said of her son's killer.⁴³ Prosecutors often have no choice, however, due to witnesses' justifiable fear. Luis Morales, a resident of Allentown, Pennsylvania, summed up the fear of many city residents who keep silent: "From the young to the old, they know."⁴⁴ He explained, "You have someone here that is so bold and brazen to shoot at someone in front of people If they would go to that extent, this is a person that really doesn't care. If they found out that you opened your mouth, they will get you."⁴⁵ But while victims' families, police, and prosecutors routinely lament the effects of witness intimidation, the issue does not receive the attention it deserves from policymakers or the news media. There is something tragically appropriate about a problem of silence going unaddressed due to public silence on the issue, and more needs to be done to call attention to the witness intimidation crisis.

5. Reforms Attempting to Reduce Witness Intimidation

Reforms attempting to reduce witness intimidation have largely failed to address the problem. One popular response, implemented by about 80% of police departments, is to establish anonymous and secure crime reporting programs via text, phone, or online which allow witnesses to anonymously report crimes or provide tips.⁴⁶ However, while this can help police identify suspects, it does little to help secure convictions where court testimony is required (or the threat of such testimony

43. Kocieniewski, *supra* note 13.

44. *Breaking the Wall of Silence to Fight Crime: Allentown, Like Other Cities Across the Nation, Is Struggling to Break Through the 'Code of the Street' to Solve Homicides and Other Offenses. Authorities Are Turning to Discreet Ways for Cooperation*, MORNING CALL (Oct. 5, 2021, 12:56 PM), <https://www.mcall.com/2007/08/19/breaking-the-wall-of-silence-to-fight-crime-allentown-like-other-cities-across-the-nation-is-struggling-to-break-through-the-code-of-the-street-to-solve-homicides-and-other-offenses-authorities-are-tu> [perma.cc/XY6G-YTNJ].

45. *Id.*

46. See THE STOP SNITCHING PHENOMENON: BREAKING THE CODE OF SILENCE, *supra* note 17, at 18.

is required to induce a plea bargain).⁴⁷ Another response is expanding witness protection programs, but the enormous expense of such programs and the severe burdens they place on the lives of witnesses (as they often involve relocation) make them infeasible as a solution for all but a few cases.⁴⁸

6. Recommendation: Protect Witness Identities in Cases of Likely Intimidation

There is no silver bullet solution to the problem of witness intimidation. To a large extent, it presents a chicken and egg problem: intimidation cannot be effectively controlled until police can reduce the perceived threat of intimidation by offenders, but such progress is only possible with witness cooperation. In the absence of an obvious broader solution, we can only recommend what seems like the best of the more modest feasible reforms.

The single most effective means of fighting witness intimidation may be to allow anonymous testimony from witnesses in cases where intimidation is likely. Allowing witnesses to provide court testimony anonymously through pre-recorded statements would reduce intimidation risks without imposing the extreme personal costs of witness protection programs. Currently, out-of-court statements by witnesses are generally considered hearsay, and therefore are inadmissible as evidence, but our proposal would create a hearsay exception for instances where there is a demonstrated risk to the physical safety of the witness that cannot be addressed by other means. The risk does not have to be posed by the defendant himself as long as there is reason to believe that the witness's fear of intimidation is likely due to the nature of the crime or the defendant. For example, a witness to a gang murder who lives in a neighborhood with active gang members would clearly be at risk even if there was no evidence of a specific direct threat such as a menacing note or a broken window.

For this proposal to be effective, a witness who fears intimidation should be anonymous to all except police, prosecution, and judge during the investigation and trial. Once the witness has been interviewed by investigators and their pre-recorded statements taken, the prosecution would file a motion for an *ex parte* hearing to convince the judge that the witness is likely at risk of intimidation. If the judge is satisfied that the risk exists and cannot otherwise be protected against, they can approve the witness remaining anonymous. If the judge considers the testimony

47. *See id.*

48. *See id.* at 46.

likely reliable and of probative value, the statement would be admitted at trial for consideration by the jury. All non-identifying information and testimony would be shared with the defense. During trial, the defense can (and almost certainly will) raise the anonymous nature of the testimony as reducing its credibility, but the prosecution can (to the extent possible without compromising anonymity) explain the risk posed to the witness if they had their identity revealed in court. The defendant's constitutional right to cross-examination could be honored by allowing defense counsel to cross-examine the witness using a video link that distorts the witness's voice and image (with the prosecution being able to object to any questions designed to identify the witness).

For our proposal to work, it is essential that the witness remains anonymous and that as few people as possible know the witness's identity. While some have proposed restricting video recording of trials or closing them to the public to create more anonymity for a witness, this will inevitably fail as even in a closed trial the defendant will still learn the witness's identity. Some have suggested an alternative proposal under which a prerecorded statement by witnesses could be admitted if the witness is later intimidated or killed. But such a system, which provides no anonymity, is unlikely to encourage witnesses to risk their lives by testifying. The fact that their prerecorded statement can be admitted at trial will provide no comfort to them if they are dead. And gangs and other criminals associated with the defendant have every reason to kill witnesses even after they have testified as a means of taking revenge and promoting the credibility of their threats to future witnesses. Only anonymizing the witness to the defendant will protect witnesses and encourage their testimony where a realistic fear of intimidation exists.

Many may worry that allowing anonymous witnesses would damage the fairness and reputation of the American justice system. However, other Western countries, such as the United Kingdom ("U.K."), already allow similar anonymous testimony.⁴⁹ Anonymous witnesses were first used in the U.K. in 2005 in a case of the murder of two teenage girls; in the end, four men were convicted for the crime. The killers appealed claiming they had not received a fair trial, but the appeal was dismissed due to the rigorous requirements set for cases of witness anonymity that had been applied.⁵⁰ For an anonymous witness to be allowed in the U.K.,

49. See Coroners and Justice Act 2009, c. 25 (UK), <https://www.legislation.gov.uk/ukpga/2009/25/part/3/chapter/2/crossheading/witness-anonymity-orders> [<https://perma.cc/QQ7S-X9N8>].

50. See *Charlene Ellis and Letisha Shakespeare Murders: Legal Challenge of Key Witness*, BBC NEWS (Sept. 21, 2018), <https://www.bbc.com/news/uk-england-birmingham-45601867> [<https://perma.cc/AY77-8RUM>].

the following is required: (1) a full evidential statement from the witness giving their true identity; (2) a redacted version of the witness's full evidential statement with all elements that could identify the witness removed; (3) a statement from the witness setting out their fear about giving evidence if their identity is made known to the defendant, and, where appropriate, whether the witness will not give evidence without anonymity; and (4) a report that includes a full risk assessment undertaken by the police of the reasonableness of the witness's fears and explaining why other protection measures are not adequate.⁵¹ When the use of witness anonymity at trial is granted by a British court, the prosecution is obliged to provide as much information as possible to the defense.⁵² Our proposal is essentially a version of the British system that has proven to work without damaging the right to a fair trial.

The United States Supreme Court has not yet addressed the constitutionality of anonymous testimony, but a host of cases by federal courts have reviewed the issue and concluded that such testimony, under certain circumstances, does not violate the defendant's constitutional rights.⁵³ In *Smith v. Illinois*,⁵⁴ the Court, while highlighting the right of an accused person to confront witnesses under the Sixth Amendment, emphasized the duty to protect witnesses from "questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him."⁵⁵ Justice White remarked, in his concurring opinion, that he would place in that same category "inquiries which tend to endanger the personal safety of the witness[.]"⁵⁶ and many federal courts have followed that interpretation.⁵⁷ Several courts have explicitly upheld the constitutionality of anonymous testimony where the government establishes an actual threat to a witness (not necessarily by the defendant) and where the anonymous testimony does not deprive the defendant of an opportunity for effective cross-examination.⁵⁸

It is easy to see how such a reform would make it easier to bring justice in cases where witness intimidation is likely. Recall the case of Latasha Shaw who was viciously attacked and murdered by a mob after

51. *Witness Anonymity (The Director's Guidance)*, CROWN PROSECUTION SERV. (Dec. 2009), <https://www.cps.gov.uk/legal-guidance/witness-anonymity-directors-guidance> [<https://perma.cc/6W6P-D5FU>].

52. *See id.*

53. *See, e.g., United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1134, 1140 (10th Cir. 2014).

54. 390 U.S. 129 (1968).

55. *Id.* at 133.

56. *Id.* at 133-34.

57. *See, e.g., Gutierrez de Lopez*, 761 F.3d at 1140.

58. *See, e.g., id.* at 1140-41; *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969).

she attempted to free her daughter from their physical harassment.⁵⁹ Any one of the dozens of witnesses to the very public brutal killing could have identified the killers, but the pervasive fear of retaliation prevented them from speaking out. A system of anonymous testimony would likely have led to at least one person among the bystanders being willing to help police.

B. The Stop Snitching Movement and Codes of Silence

In addition to witness intimidation by criminals and gangs, many urban communities are experiencing a troubling and destructive surge in social pressure to “stop snitching.” The stop snitching movement refers to social pressure to stay silent about crimes and refuse to cooperate with police. While similar codes of silence existed before the phrase “stop snitching” emerged, the stop snitching phenomenon gained prominence in 2004 with the release of a popular Baltimore rapper’s “Stop Snitching!”⁶⁰ DVD and the widespread sale of “stop snitchin’” t-shirts and other clothing.⁶¹

What differentiates the stop snitching movement from more direct forms of intimidation is that it operates through a powerful self-enforcing social norm. Adherents to no-snitch codes are not necessarily safer due to their silence—since supporting the alternative of street justice can also be dangerous—but they are silent out of principle. The “code of the street” demands no cooperation with police, and disputes are settled outside the law—often violently.⁶² While it is somewhat understandable why those directly involved in crime might not cooperate with police, the wider effects of the “stop snitching” movement have portrayed police as the enemy and made more citizens who might otherwise have cooperated with law enforcement choose not to. One study of the phenomenon concluded:

But stop snitching broadly writ is more than just witness intimidation: it is an exhortation for the whole community to keep quiet, to not trust in, talk to, or cooperate with law enforcement. In these terms the citizen who calls police because people are dealing drugs on her doorstep

59. See *supra* note 20 and accompanying text.

60. See Rod K. Brunson & Brian A. Wade, “Oh Hell No, We Don’t Talk to Police,” 18 CRIMINOLOGY & PUB. POL’Y 623, 627 (2019).

61. See Rachael A. Woldoff & Karen G. Weiss, *Stop Snitchin’: Exploring Definitions of the Snitch and Implications for Urban Black Communities*, 17 J. CRIM. JUST. & POPULAR CULTURE 184, 189-90 (2010).

62. See McDonough, *supra* note 27, at 1295-96.

may be as much of a snitch as the dealer who coughs up names in exchange for a favorable plea agreement⁶³

While there have been many efforts to curb the movement, it has shown little sign of stopping and has spread online through websites and social media pages devoted to exposing “rats” and “snitches.” These codes of silence are particularly popular among the youth, with 89% of police departments in one survey reporting young people in crime-ridden communities are especially unwilling to report crimes and to cooperate with police investigations.⁶⁴ Codes of silence are also particularly prevalent in poor and minority communities, which often have a troubled history with law enforcement, high levels of legal cynicism, and are worst-affected by serious crime.

These highly destructive norms are epitomized in the last words of a murder victim who told police as he lay dying, “If I knew who shot me, I would not tell you. That’s the way the street works.”⁶⁵ “The way the street works” can be so deeply ingrained in some people that cooperating with the police is seen as betraying one’s community. One study interviewing residents in communities with no-snitching codes found that “being labeled a snitch carries a price, not just of potential violence, but of ostracism by neighbors and peers.”⁶⁶ When “snitches get stitches,” even if only metaphorically, there are fewer snitches and more failures of justice.

1. Case Example: Israel Ramirez

On February 5, 2006, bodyguard Israel Ramirez is protecting rapper Busta Rhymes at a Brooklyn studio while the rapper films a music video featuring the appearances of other rappers such as 50 Cent, DMX, and Mary J. Blige.⁶⁷ Some of 50 Cent’s entourage grow increasingly rowdy

63. Susan Clampet-Lundquist et al., *The Sliding Scale of Snitching: A Qualitative Examination of Snitching in Three Philadelphia Communities*, 30 SOCIO. F. 265, 266 (2015).

64. See THE STOP SNITCHING PHENOMENON: BREAKING THE CODE OF SILENCE, *supra* note 17, at 17.

65. *Id.*

66. Whitman & Davis, *supra* note 37, at 5.

67. See Larry Celona, *Busta’s Gem Guard Slain in Video Shoot – Rap Star & Posse Scatter as Bullets Fly*, N.Y. POST (Feb. 6, 2006, 5:00 AM), <https://nypost.com/2006/02/06/bustas-gem-guard-slain-in-video-shoot-rap-star-posse-scatter-as-bullets-fly> [<https://perma.cc/WB2Q-5WB5>]; Larry Celona, *‘Grieving’ Busta Won’t Rap to Cops About Slay*, N.Y. POST (Feb. 8, 2006, 5:00 AM), <https://nypost.com/2006/02/08/grieving-busta-wont-rap-to-cops-about-slay> [<https://perma.cc/2VX3-28QS>]; Jen Chung, *Did Busta Rhymes Witness Shooting?*, GOTHAMIST (Mar. 7, 2008), <https://gothamist.com/news/did-busta-rhymes-witness-shooting> [<https://perma.cc/H7EU-S3RS>].

and are ordered to leave the studio.⁶⁸ Rhymes, who wants to soothe ruffled feathers, follows them out. An angry confrontation ensues and one of the expelled group draws a gun.⁶⁹ Bodyguard Ramirez is shot in the back and dies at Rhymes' feet as the killer flees.⁷⁰ Despite Rhymes and dozens of others seeing the killer up close, all refuse to cooperate with the police due to the "no snitching" code prevalent in the rap community.⁷¹ After Ramirez's family expresses outrage, Rhymes promises them he will work to bring justice for the man who died protecting him, but in fact Rhymes sticks to the "no snitching" code and does not tell investigators what he knows. The killer is never caught.

2. The Nature and Extent of the Problem

Most people even in high-crime communities are law-abiding with no desire to protect criminality.⁷² However, no-snitch codes have gained widespread traction among the youth and criminal subcultures (such as gangs). For example, studies show young people are much less likely to report crimes to police (53%) than seniors (87%).⁷³

One reason for the adoption of no-snitch codes even by innocent civilians who are likely to be victims of criminality is a belief that police will not truly help (an issue discussed more in the next section on legal cynicism).⁷⁴ In minority neighborhoods especially, many residents have a deep-rooted distrust in law enforcement that makes them more likely to adopt no-snitch codes. This has occurred due to a disheartening combination of perceived police bias, a tragic history of police racism, instances of police misconduct, a belief that violent crime in minority neighborhoods will not be taken seriously, harsh drug laws that are seen as unjust, and the exceedingly low conviction rates for crimes.⁷⁵ In other words, the credibility of the law and law enforcement is already so low that many non-criminals have embraced no-snitch codes out of a belief

68. See *Busta's Gem Guard Slain in Video Shoot – Rap Star & Posse Scatter as Bullets Fly*, *supra* note 67.

69. *See id.*

70. *See id.*

71. *See id.*; 'Grieving' Busta Won't Rap to Cops About Slay, *supra* note 67.

72. See Brunson & Wade, *supra* note 60, at 624.

73. Emily Ekins, *Policing in America: Understanding Public Attitudes Toward the Police. Results from a National Survey.*, CATO INST. 14 (2016), <https://www.cato.org/sites/cato.org/files/survey-reports/pdf/policing-in-america-august-1-2017.pdf> [<https://perma.cc/KD9Q-PFBY>].

74. *See infra* Part II.C.

75. ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* 126-31 (N.Y.U. Univ. Press 2009).

that talking to police can do little good and can bring nothing but trouble.

The effect of no-snitch codes is damaging and widespread. According to a survey of law enforcement, 86% of communities have some type of code of silence that deters individuals from cooperating with law enforcement, and 47% of respondents specifically identified the stop snitching movement as the motivation.⁷⁶ Forty-five percent of respondents also reported stop snitching had reduced crime clearance rates, and 78% said it had made witnesses less likely to testify.⁷⁷ In Baltimore, for example, police claim that the stop snitching movement and mindset is “still one of the biggest problems their officers encounter.”⁷⁸ The effects of no-snitch codes are especially evident in the high number and low clearance rate of street shootings where the victims and perpetrators are likely to come from adherents to a code of silence that calls for settling disputes outside the law. Such reliance on street justice in turn drives up homicide rates, often overwhelming limited investigative resources.

3. Public Complaints

In addition to vocal concerns expressed by police and prosecutors over the existence of codes of silence, activists have also urged their communities to reject the culture of stop snitching. For example, a man who works with children in Harlem lamented how damaging the movement has been to Black communities. He claimed, “It’s like you can’t be a [B]lack person if you have a set of values that say, ‘I will not watch crime happen in my community without getting involved to stop it.’”⁷⁹ Many law-abiding residents are furious or saddened at codes of silence that encourage more crime and lead to failures of justice every day.

But perhaps the most determined players in the struggle to end the stop snitching movement and restore community cooperation with law enforcement are the mothers who have lost their sons to homicide and have been left without answers due to the lack of witness cooperation. Monique Irvis, whose son Eric Woods was shot, felt that Eric’s best friends knew what happened yet refused to come forward with information out of respect for the code of the street. Monique asked her son’s friend: “I mean that light’s so bright where my son was shot at, and you right here, and you don’t see nothing? . . . So you can’t tell me you don’t

76. See THE STOP SNITCHING PHENOMENON: BREAKING THE CODE OF SILENCE, *supra* note 17, at 12.

77. See *id.* at 16.

78. *Id.* at 15.

79. Daniel Schorn, *Stop Snitchin'*, CBS NEWS (Apr. 19, 2007, 12:46 PM), <https://www.cbsnews.com/news/stop-snitchin> [<https://perma.cc/9UPB-7AL8>].

know who did it.”⁸⁰ Despite being an obvious witness, Eric’s friend never helped police.

On her deathbed with cancer after the murder of her son, another mother urged the public to prioritize justice over the stop snitching movement. She pleaded, “I’m sick myself. I got cancer. I wasn’t expecting to bury my son, I was expecting my son to bury me. I need some justice before I lay my head down. I want him caught”⁸¹ Her grieving daughter echoed her sentiments, begging her community:

Don’t be afraid to speak up because it could be your son, it could be your brother, it could be your sister You would want somebody to help you. You would want somebody to say something. So do the same for others that you would want done for you.⁸²

Many such mothers of murder victims are protesting stop snitching and working to end codes of silence in their communities.⁸³ In Nashville, Clemmie Greenlee, another mother of a murdered son, is working with local organizations, including Nashville Peacemakers and Mothers Over Murder, to start community-wide conversations about stop snitching. But such efforts have yet to bear significant fruit, as around North Nashville there are still signs reading “it still ain’t kool 2 snitch.”⁸⁴

4. Reforms Addressing the Stop Snitching Movement

Frustrated police departments have tried to combat the stop snitching movement with publicity campaigns urging cooperation, such as when Baltimore police responded to the original “Stop Snitchin’” DVD in 2004 with a rebuttal video entitled “Keep Talking.”⁸⁵ But police usually lack the required credibility with those being influenced by the stop

80. Kevin McCorry, *Witness Intimidation at “Near Epidemic” Level*, NBC10 PHILA. (Apr. 11, 2013, 5:37 PM), <https://www.nbcphiladelphia.com/news/local/witness-intimidation-near-epidemic-level/2087038> [<https://perma.cc/KFU6-UQYD>].

81. *Video of Murder Suspect Released as Dying Mother Asks Public to Forget ‘No Snitch Code’, Bring Killer to Justice*, CBS NEWS MIAMI (June 11, 2021, 5:22 PM), <https://www.cbsnews.com/miami/news/murder-suspect-video-dying-mother-no-snitch-code-justice> [<https://perma.cc/KR4K-V5ZN>].

82. *Id.*

83. *See, e.g., Mothers Over Murder*, NASHVILLE PEACEMAKERS, <https://www.nashvillepeacemakers.org/mothers-over-murder> [<https://perma.cc/XFF9-QM5Q>] (last visited Aug. 12, 2023).

84. Levi Ismail, *Grieving Parents Upset Over Signs Promoting a Song About Not Snitching in Nashville*, NEWS CHANNEL 5 NASHVILLE (June 8, 2021, 10:05 PM), <https://www.newschannel5.com/news/grieving-parents-upset-over-signs-promoting-a-song-about-not-snitching-in-nashville> [<https://perma.cc/9DZC-E4RT>].

85. *See* THE STOP SNITCHING PHENOMENON: BREAKING THE CODE OF SILENCE, *supra* note 17, at 31.

snitching movement.⁸⁶ Other attempts to address the problem include organizing boycotts of stop snitching products or promoters and enlisting prominent community leaders or celebrities to lead campaigns designed at encouraging cooperation with police. However, such efforts have so far been too scattered or low-profile to break codes of silence.⁸⁷

5. Recommendation

Unfortunately, there is no simple and effective way to reverse the power of the stop snitching movement. Our recommendation for addressing the problem of no-snitch codes is a combination of two other reforms proposed in this article. The first is the previously mentioned anonymous testimony proposal that would allow some witnesses to testify without fearing violent reprisal, which would also have the effect of protecting them from the social ostracism that violating the no-snitch code would bring.⁸⁸ The other reform is the recommendation we present in Part IV of this article for a police-community oversight commission to improve the relationship between police and community—thereby building police credibility and increasing the likelihood of cooperation from citizens who might otherwise see going to police as pointless or even a betrayal.⁸⁹

C. Cynicism about Criminal Justice Effectiveness

As mentioned in the previous section on codes of silence, some community members have stopped cooperating with police from a belief that the legal system will not help. Such perceptions have been termed by social science researchers as “legal cynicism,” which one study defines as “a cultural frame in which the law and the agents of its enforcement are viewed as *illegitimate, unresponsive, and ill equipped* to ensure public safety”⁹⁰ At its core, legal cynicism is a loss of faith in the police and justice system caused by the belief that the system cannot or will not keep communities safe. A primary driver of such legal cynicism is high crime and low clearance rates that seem to prove the claim that the system is failing. Such legal cynicism is especially widespread in

86. *See id.* at 20.

87. For further information on aspects of this reform, see *id.*; NATAPOFF, *supra* note 75, at 121-38; Ladel Lewis, *Stop Snitching: Hip Hop’s Influence on Crime Reporting in the Inner City* (Apr. 2012) (Ph.D. dissertation, Western Michigan University) (ScholarWorks at WMU).

88. *See supra* Part II.A.6.

89. *See infra* Part IV.

90. David S. Kirk & Mauri Matsuda, *Legal Cynicism, Collective Efficacy, and the Ecology of Arrest*, 49 *CRIMINOLOGY* 443, 444 (2011) (emphasis in original).

poor and minority neighborhoods that are often worst-affected by crime and have some of the lowest clearance rates. Regular failures of justice breed legal cynicism, which is one reason why it is so important for society to place value on doing justice. A criminal justice system's loss of moral credibility with the community leads to less crime reporting, less cooperation with police, and therefore more failures of justice,⁹¹ thus causing more legal cynicism in a vicious cycle. In addition to affecting specific communities, legal cynicism can affect specific crimes, such as rape, where the system seems unable to deliver the justice the community demands.

1. Case Example: Alec Cook

In 2015, Alec Cook, a University of Wisconsin-Madison student, is stalking a female classmate. Because he won't stop, she finally goes to campus police. They tell him to stop but he simply ignores them, and the police do nothing about it.⁹² In fact, Cook is much more sinister than a mere stalker. Between his business classes, he is a serial rapist. In his final year at the university, he rapes a fellow student who goes to authorities. She tells investigators that Cook had her in a "death grip" and assaulted her repeatedly.⁹³

Public reports of her assault have an immediate effect. Ten other women come forward to report that they too were raped by Cook.⁹⁴ They did not report the attacks because they did not think they would be believed and, even if they were, they thought that nothing would be done, so the public exposure and investigation was not worth the cost.⁹⁵ How-

91. See PAUL H. ROBINSON, *INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT* 141-88 (Oxford Univ. Press 2013) (ebook).

92. See Matt O'Connor, *Cook Pleads Guilty to Five Felony Counts, Forced to Register as Sex Offender*, *BADGER HERALD* (Feb. 21, 2018), <https://badgerherald.com/news/2018/02/21/cook-pleads-guilty-to-five-felony-counts-forced-to-register-as-sex-offender> [https://perma.cc/4DWE-R8ZJ].

93. Shaymus McLaughlin, *One Survivor's Story Leads to More Sexual Assault Accusations Against UW-Madison Student*, *BRING ME THE NEWS* (Mar. 8, 2018), <https://bringmethenews.com/minnesota-news/one-survivors-story-leads-to-more-sexual-assault-accusations-against-uw-madison-student> [https://perma.cc/ARN9-GW6S].

94. See Pat Schneider, *Outrage Grows Over 3-Year Sentence for 'Privileged' Alec Cook in Sex Assaults Case*, *CAP TIMES* (June 27, 2018), https://captimes.com/news/local/education/university/outrage-grows-over-3-year-sentence-for-privileged-alec-cook-in-sex-assaults-case/article_86bc27d8-08ed-5fdb-8f09-f93d849b8882.html [https://perma.cc/XGK3-H3QH].

95. See *id.*; Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 *VILL. L. REV.* 907, 909 (2001).

ever, seeing another person report Cook inspired them to come forward.⁹⁶

Cook is facing a prison sentence of over thirty-nine years. Defense attorneys sought probation to “allow Cook to receive counseling for sexual sadism proclivities and treatment for narcissistic personality disorder.”⁹⁷ The prosecutor allows Cook to plead guilty to three counts of third-degree sexual assault, one count of strangulation, and one count of stalking—all felonies—and the judge imposes a sentence of three years.

Outrage at the leniency of the sentence quickly follows. A group of state and local officials join to condemn it: “We are dismayed and outraged by Judge Ehlke’s lenient sentencing of Alec Cook. In just three or fewer years, this predator will be back on the streets, sending a clear message that men like Alec Cook—men with privilege—are above the law”⁹⁸

They argue that the lack of justice for Cook’s victims discourages women who experience sexual assault, violence, or harassment from reporting the crimes. If the eleventh victim had not come forward, Cook’s unpunished rapes would have continued indefinitely due to the legal cynicism of his previous victims.

2. The Nature and Extent of the Problem

Legal cynicism leads to decreased crime reporting and lower clearance rates and particularly affects low-income and minority communities and specific crimes such as sexual assault.

i. Decreased Crime Reporting and Lower Clearance Rates

Legal cynicism’s cost manifests itself in America’s dismal crime reporting rates. In 2004, only 50% of violent crimes were reported to police.⁹⁹ Many victims simply never bothered to involve police out of a belief that it could only make the situation worse. Less crime reporting directly leads to fewer arrests. The more cynical a neighborhood is towards police, the fewer arrests will be made, resulting in higher rates of unsolved violent crime.¹⁰⁰ Legal cynicism is a self-fulfilling prophecy as non-cooperation further ensures no justice will be delivered. Studies have shown that when public faith in law enforcement drops, fewer 911

96. See McLaughlin, *supra* note 93.

97. See Schneider, *supra* note 94.

98. *Id.*

99. See WITNESS INTIMIDATION, *supra* note 15, at 4.

100. See Kirk & Matsuda, *supra* note 90, at 451-52.

calls are placed for police help,¹⁰¹ and fewer arrests are made in violent crimes.¹⁰² As several scholars note, “when residents perceive that the police are unresponsive and that calling the police will do little or nothing to resolve the crime problem endemic to their neighborhood, proportionally more crimes will go unreported and unsanctioned than in neighborhoods where the law and the police are viewed more favorably.”¹⁰³ The problem of resulting lower clearance rates includes even homicide offenses.¹⁰⁴

Distrust in police can also increase crime rates. There is evidence that “neighborhoods where the law and the police are seen as illegitimate and unresponsive have significantly higher homicide rates”¹⁰⁵ Of young people in Chicago neighborhoods with strikingly high homicide rates, only 14% believe that a shooter or murderer is likely to “get caught” and only 13% believe that police were effective at reducing crime.¹⁰⁶ The self-fulfilling prophecy occurs not only from the resulting failures to report but also from the reduced deterrent effect that comes when police are viewed as ineffective. Unsurprisingly, studies have found a correlation in individuals between higher levels of legal cynicism and greater rates of criminality, even when controlling for potential confounding variables.¹⁰⁷

ii. Minority Distrust of Police

In addition to affecting specific neighborhoods, legal cynicism can disproportionately affect whole racial groups. Black Americans are especially prone to legal cynicism. As noted previously, this can result from a tragic history of police racism, as well as a perception—largely correct—that the system presently fails to control crime and do justice in minority neighborhoods. Studies across many decades show that African

101. See Matthew Desmond et al., *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOCIO. REV. 857, 870-73 (2016).

102. See Kirk & Matsuda, *supra* note 90, at 462.

103. *Id.* at 444.

104. See generally Ashley M. Mancik et al., *Neighborhood Context and Homicide Clearance: Estimating the Effects of Collective Efficacy*, 22 HOMICIDE STUD. 188 (2018) (showing that reduced collective efficacy lowers homicide clearance rates).

105. *In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence*, GIFFORDS L. CTR. (Sept. 9, 2021), <https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence> [<https://perma.cc/XLU4-2D9U>] (citing David S. Kirk & Andrew V. Papachristos, *Cultural Mechanisms and the Persistence of Neighborhood Violence*, 116 AM. J. SOCIO. 1190, 1221 (2011)).

106. See *id.*

107. See generally Michael D. Reisig et al., *Legal Cynicism, Legitimacy, and Criminal Offending: The Nonconfounding Effect of Low Self-Control*, 38 CRIM. JUST. & BEHAV. 1265 (2011) (finding that criminal offending is significantly shaped by legal cynicism).

Americans have less favorable views of police than other racial groups. Sixty-eight percent of White Americans, 59% of Hispanic Americans, and only 40% of African Americans have favorable views of police.¹⁰⁸ This means African Americans experience the highest levels of legal cynicism and so suffer its consequences at disproportionately high rates. Unsurprisingly, research has found Black Americans are 20% less likely than White Americans “to say they definitely would report a crime.”¹⁰⁹ In fact, 55% of Black respondents agreed that calling the police often does more harm than good, a perception shared by just 25% of White Americans.¹¹⁰

Part of the reason for this legal cynicism among Black Americans is that they are more likely to live in high-crime, low-clearance-rate neighborhoods. Another reason for their pervasive legal cynicism is that they are far more likely to believe police are not held accountable for misconduct or unjustified shootings (an issue discussed more in the next section on police use of force).¹¹¹ The rise of technology and citizen video journalism, by which citizens can record and upload instances of alleged police misconduct, have only fueled legal cynicism among all racial groups by drawing attention to instances of apparent police wrongdoing.¹¹² Studies also show that such videos increase cynicism among African American viewers the most, thus further exacerbating the racial gap in legal cynicism.¹¹³

iii. Legal Cynicism and the Non-Reporting of Sexual Assault

One of the most striking examples of the effects of legal cynicism, highlighted in the case example above, is the massive underreporting of sexual assault in the United States caused by victims not believing justice will be done. There is a general belief that rapists almost always get away with it, and many view reporting rape as a pointless additional trauma.¹¹⁴ Sexual assault is the most underreported major crime in the United States. While over 60% of robberies and assaults are reported to

108. See Ekins, *supra* note 73, at 1.

109. *Id.*

110. See David Nather, *Axios-Ipsos Poll: Black Americans' Police Experiences Are Getting Worse*, AXIOS (May 22, 2021), <https://www.axios.com/2021/05/22/axios-ipsos-poll-black-americans-police> [https://perma.cc/TTX5-T5MV].

111. See *infra* Part II.D. Sixty-four percent of African Americans say police are generally not held accountable for misconduct, compared to 43% of White Americans. Ekins, *supra* note 73, at 4.

112. See Lana M. Browning et al., *Citizen Journalism and Public Cynicism Toward Police in the USA*, 36 J. POLICE & CRIM. PSYCH. 372, 373 (2021).

113. See *id.* at 374.

114. See, e.g., Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205, 235-36 (2017).

police, only about one-third of rape victims report the crime.¹¹⁵ Furthermore, evidence suggests that rape reporting may be declining. In 2018, according to Bureau of Justice data, only 25% of rapes were reported to police compared to 40% in the year before.¹¹⁶

3. Reforms to Reduce Legal Cynicism

Reforms to reduce legal cynicism usually take the form of attempting to improve the reputation of the justice system with the community. Of course, one of the best ways to do this is simply to deliver more justice and safety by more successful investigation and prosecution—a goal hampered by legal cynicism itself. Legal cynicism has also been targeted by specific local community outreach programs where police establish community-policing strategies and partner with community leaders and grassroots organizations to forge more tangible relationships with citizens who would otherwise be prone to cynicism.¹¹⁷ Over 80% of the public is served by a police department that has some form of community policing strategy in place.¹¹⁸ While the effectiveness of such community policing initiatives and partnerships varies greatly depending on design and implementation, there have been some notable successes at solving crime and reducing cynicism. For example, the Richmond, California police department undertook to train officers to engage in community policing and “build relationships with people in the areas they patrol.”¹¹⁹ The results were significantly better investigations and increased crime deterrence. From 2004 to 2014, homicides decreased from thirty-eight to eleven per year and violent crimes decreased from 1,078 to 833 per year.¹²⁰ The department’s emphasis on strengthening the “human connection” increased community trust, and residents whose

115. While there is no single agreed-upon statistic indicating the percentage of rapes which are reported, all estimates range roughly between 30% to 40%. RAINN (Rape, Abuse & Incest National Network) estimates that 31% of rapes are reported. See *The Criminal Justice System: Statistics*, *supra* note 4.

116. See BUREAU OF JUST. STATS., U.S. DEP’T OF JUST., NCJ 253043, CRIMINAL VICTIMIZATION, 2018 8 (Sept. 2019), <https://bjs.ojp.gov/content/pub/pdf/cv18.pdf> [<https://perma.cc/WJ3Z-ALJY>].

117. See Kyle Peyton et al., *A Field Experiment on Community Policing and Police Legitimacy*, 116 PROC. NAT’L ACAD. SCIS. U.S. AM. 19894, 19894 (2019).

118. See OFF. OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUST., COMMUNITY POLICING (COPS), FY 2017 BUDGET REQUEST AT A GLANCE, <https://www.justice.gov/jmd/file/822291/download> [<https://perma.cc/Z89J-WQL8>] (last visited Aug. 12, 2023).

119. Elizabeth Weise, ‘All Lives Matter’ A Creed for Richmond, Calif. Police, USA TODAY (Sept. 24, 2015, 9:27 PM), <https://www.usatoday.com/story/news/nation/2015/09/23/richmond-community-policing/72563038> [<https://perma.cc/JM9A-D7E7>].

120. See *id.*

calls were once ignored now instead praise the fact that officers even “give out their cellphone numbers”¹²¹

4. Recommendation

Building on the successes of certain police-community outreach initiatives, in Part IV of this article we recommend a police-community oversight commission designed to provide both police accountability and encourage community cooperation.¹²² Such a commission, we argue, could go far toward combatting the problem of legal cynicism by rebuilding trust between police and community.

D. Community Upset Over Police Use of Force: The False Narrative Problem

The legal cynicism and codes of silence discussed above are often caused in part by false narratives around policing and the criminal justice system that paint the law and its agents as racist or enforcers of racial oppression. There is a widespread perception, especially among Black communities, that there is an epidemic of racially motivated police violence in America today, a view which naturally leads to police being viewed as dangerous and illegitimate. Intense media coverage of individual police killings and the rise of social media makes it easier to highlight and exaggerate perceived problems with police behavior. Instead of looking to root out bad actors from police forces, the prevailing narrative among many activists, policymakers, and community members is that American policing is systemically racist, and hence, obviously illegitimate. This has led to many efforts to reform police procedures, with a particular focus on changing use of force policies.¹²³ While making policing more respectful and less violent is a worthy and important goal, as we will show in this section, the heavy focus on police use of force can hurt justice more than it helps.

Available evidence makes clear that most popular perceptions of police use of force are simply wrong and unfounded.¹²⁴ As we show be-

121. *Id.*

122. *See infra* Part IV.

123. *See* Candice Norwood, *Can Use of Force Restrictions Change Police Behavior? Here's What We Know*, PBS NEWS HOUR (July 23, 2020, 11:30 AM), <https://www.pbs.org/newshour/politics/can-use-of-force-restrictions-change-police-behavior-heres-what-we-know> [<https://perma.cc/PM9F-FUZ6>] (describing the movement demanding an end to excessive use of force by police following George Floyd's death).

124. *See, e.g.*, Kevin McCaffree & Anondah Saide, *How Informed Are Americans About Race and Policing?*, SKEPTIC RSCH. CTR. 1 (Feb. 20, 2021), <https://www.skeptic.com/research-center/reports/Research-Report-CUPES-007.pdf> [<https://perma.cc/UB7S-64HF>].

low, police shootings are rare, not racially motivated, and almost always justified. When police do commit an unjustified killing (as in the case of George Floyd), they are prosecuted as civilians would be. There is no epidemic of unjustified police shootings, but there is an epidemic of misinformation that has needlessly and tragically inflamed legal cynicism and undermined citizen cooperation. This diminished cooperation has in turn led to more crime and failures of justice. Unfortunately, the false perceptions have been politicized and entrenched to the point that changing them will be extremely difficult.

To be clear, disrespectful police practices have and do contribute to legal cynicism and must be addressed. It is also true that American policing has historically enforced racial oppression (such as Jim Crow), leading to lingering wounds in the psyches of many minority communities. Moreover, individual police officers have and do, on rare occasions, murder civilians. However, the real epidemic of unjustified violence, sadly ignored by the narrative of racist policing, is the unsolved murder epidemic in America that affects mainly minorities. Young Black men are at high risk of being shot on America's streets—but not by police.¹²⁵ While society's attention has been drawn to a handful of unjustified police killings, thousands of young Black men are murdered each year with no justice being done. Even worse, no real effort is made on the part of policymakers to close the racial disparities in crime and clearance rates. All people who truly care about justice—be it racial, social, or otherwise—should recognize the false narrative problem on police use of force if they wish to make America a safer and more just place for all. It does not benefit communities—particularly minority communities—to perpetuate lies about policing that lead to higher legal cynicism, unsolved crime, and increased violent victimizations.

1. Case Example: The Shooting of Michael Brown in Ferguson, Missouri

Just before noon on August 9, 2014, Michael Brown and Dorian Johnson walk into a convenience store. Brown robs the store of some cigarillos and roughs up the shop clerk who tries to prevent the theft.¹²⁶

125. While Blacks accounted for 13% of the population in 2005, they were the victims of nearly half of all homicides. BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ 214258, BLACK VICTIMS OF VIOLENT CRIME 1 (Aug. 2007), <https://bjs.ojp.gov/content/pub/pdf/bvvc.pdf> [<https://perma.cc/3TN9-KAD3>].

126. U.S. DEP'T OF JUST., DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 6 (Mar. 4, 2015), <https://www.justice.gov/sites/default/files/opa/press->

Moments later, the pair are walking the yellow line in the middle of a relatively busy street in Ferguson, Missouri. Officer Darren Wilson pulls up next to the pair and asks, “What’s wrong with the sidewalk?”¹²⁷ Wilson notices that Brown has a handful of cigarillos in his hands and that Johnson matches the description of a robbery suspect that has just been circulated.¹²⁸ Wilson calls for back-up and parks to block the pair from walking further. Wilson opens his door, but Brown, who is 6’5” tall and weighs 289 pounds, uses his large size to close the door and prevent Wilson from exiting.¹²⁹

Wilson demands that Brown step back but instead Brown “lean[s] into the driver’s window, so that his arms and upper torso [are] inside the SUV.”¹³⁰ Brown assaults Wilson with repeated punches. With the assault ongoing, the only defensive weapon that Wilson can reach is his gun. He unholsters the gun and tells Brown to stop or he will shoot. Brown says, “You are too much of a pussy to shoot”¹³¹ Brown puts his hand over Wilson’s and due to his larger size and superior mobility, given Wilson is sitting, Brown gains control of the gun.¹³²

Wilson regains enough leverage to push the gun away from himself and pulls the trigger. A bullet goes through the car door, glass shatters, and Brown steps back. Wilson witnesses a transformation in Brown who becomes enraged and comes at the seated officer looking “like a demon.”¹³³ Brown reaches back into the car and resumes his assault. Wilson fires again. Brown breaks off the assault and turns to leave.

Brown’s erratic and violent conduct leaves Wilson in no doubt that Brown is a danger to the public. Leaving the car to pursue Brown, Wilson repeatedly tells Brown to get on the ground. When the two men are separated by about twenty-five feet, Brown turns and comes at Wilson. To Wilson, Brown was “appearing ‘psychotic,’ ‘hostile,’ and ‘crazy,’ as though he was ‘looking through’ Wilson.”¹³⁴ (It is later determined that Brown is under the effect of a hallucinogen at the time of the encounter,

releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf
[<https://perma.cc/B34Y-JD3N>].

127. *Id.* at 12.

128. *See id.* at 13.

129. *See id.*; Peter Eisler, *Ferguson Case: By the Numbers*, USA TODAY (Nov. 25, 2014, 7:19 PM), <https://www.usatoday.com/story/news/nation/2014/11/25/ferguson-case-by-the-numbers/70110614> [<https://perma.cc/7REY-U8SE>].

130. DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON, *supra* note 126, at 13.

131. *Id.* at 13-14.

132. *See id.* at 14.

133. *Id.*

134. *Id.*

making his violent and erratic actions more understandable.¹³⁵) When the distance between the two men is down to fifteen feet, Wilson fires multiple rounds. Brown pauses, Wilson again tells him to get on the ground but instead, as an eyewitness recounts, Brown again “charge[s] at” Wilson.¹³⁶ When Brown is no more than ten feet away, Wilson again fires his weapon. Now less than a body’s length away, “Brown lean[s] forward as though he [is] getting ready to ‘tackle’ Wilson”¹³⁷ Wilson fires a final shot, killing Brown.

Wilson uses his shoulder mic and radios, “Send me every car we got and a supervisor.”¹³⁸ As backup was already on its way, a sergeant arrives within seconds, and Wilson relates the events. The statements given by Wilson at that time, moments after Brown’s death, and repeated over the numerous investigations and intense scrutiny that follow are all consistent with the physical evidence recovered. Most eyewitness accounts corroborate Wilson’s version of events. All video recordings done by bystanders are consistent with Wilson’s account.¹³⁹ In the many local and state investigations that follow, as well as in a federal investigation by the Obama Justice Department, Wilson’s initial account is found to be accurate and his conduct appropriate under the circumstances.¹⁴⁰

135. *See id.* at 25. Later tests show that:

Brown tested positive for the presence of cannabinoids, the hallucinogenic substances associated with marijuana use. . . . This concentration of THC would have rendered Brown impaired at the time of his death. As a general matter, this level of impairment can alter one’s perception of time and space, but the extent to which this was true in Brown’s case cannot be determined.

Id.

136. *Id.* at 15. *See id.* at 27, for Witness 102’s account.

Witness 102 was in disbelief that Wilson seemingly kept missing because Brown kept advancing forward. Witness 102 described Brown as a “threat,” moving at a “full charge.” Witness 102 stated that Wilson only fired shots when Brown was coming toward Wilson. It appeared to Witness 102 that Wilson’s life was in jeopardy. Witness 102 was unable to hear whether Brown or Wilson said anything.

Id. at 28.

137. *Id.* at 15.

138. *Id.*

139. *See id.* at 16.

Wilson’s account was consistent with those results, and consistent with the accounts of other independent eyewitnesses, whose accounts were also consistent with the physical evidence. Wilson’s statements were consistent with each other in all material ways, and would not be subject to effective impeachment for inconsistencies or deviation from the physical evidence. Therefore, in analyzing all of the evidence, federal prosecutors found Wilson’s account to be credible.

Id.

140. For example, here is a quote from the Obama U.S. Department of Justice Report:

Witness 104 knew that Brown’s arms were inside the SUV, but she could not see what Brown and Wilson were doing because Brown’s body was blocking her view. Witness

A wide range of witness statements are gathered by the Ferguson Police Department, the St. Louis County Police Department, and the FBI, all of whom conducted separate investigations. Witness 102 left the scene within five minutes of the shooting and called 911 the following day. He came forward because “he ‘felt bad about the situation’ . . . he wanted to ‘bring closure to [Brown’s] family,’ so they would not think that the officer ‘got away with murdering their son.’”¹⁴¹ He told investigators that community pressure would make it hard for them to get to the truth. Another man, Witness 103, a man whose own son had been shot by police during a robbery, stated that he feared for his safety if he told the truth.¹⁴² He nonetheless testified that Brown assaulted Wilson and was running at Wilson when he was shot. Witness after witness confirmed the same basic narrative.

But in the immediate aftermath of Brown’s death, a false narrative begins. A person coming on the scene after the shooting claims Brown was shot while he was on the ground, but an actual witness immediately corrects him and explains that Brown was coming back toward the officer. He says he thought the officer must have been missing with his shots because Brown kept coming at him.¹⁴³ But the false rumors gain speed.

The situation is exacerbated when Johnson, who was with Brown during the robbery and the shooting, tells people that “Mike Brown had his hands up”¹⁴⁴ When Al Sharpton addresses a crowd in Clayton, Missouri, he uses the hands-up gesture, and the image becomes part of the narrative.¹⁴⁵

104 saw Brown run from the SUV, followed by Wilson, who “hopped” out of the SUV and ran after him while yelling “stop, stop, stop.” Wilson did not fire his gun as Brown ran from him. Brown then turned around and “for a second” began to raise his hands as though he may have considered surrendering, but then quickly “balled up in fists” in a running position and “charged” at Wilson. Witness 104 described it as a “tackle run,” explaining that Brown “wasn’t going to stop.” Wilson fired his gun only as Brown charged at him, backing up as Brown came toward him. Witness 104 explained that there were three separate volleys of shots. Each time, Brown ran toward Wilson, Wilson fired, Brown paused, Wilson stopped firing, and then Brown charged again. The pattern continued until Brown fell to the ground, “smashing” his face upon impact. Wilson did not fire while Brown momentarily had his hands up. Witness 104 explained that it took some time for Wilson to fire, adding that she “would have fired sooner.”

Id. at 30.

141. *Id.* at 28.

142. *See id.* at 29.

143. *See id.* at 28.

144. Cheryl Corley, *Whether History or Hype, ‘Hands Up, Don’t Shoot’ Endures*, NPR (Aug. 8, 2015, 9:44 AM), <https://www.npr.org/2015/08/08/430411141/whether-history-or-hype-hands-up-dont-shoot-endures> [<https://perma.cc/CGY9-6J8T>].

145. *See id.*

Investigators insist that the crime scene be dealt with extreme care, so Brown's body is not moved for several hours as all aspects of the scene are recorded and all evidence collected. While the body is covered from public view, the delay in moving the body is seen as disrespectful.¹⁴⁶ When it is time for the body to be moved, gunfire rings out causing further delay.

By the following night, stores are looted, windows smashed, and fires set. Two nights after Brown's death, the unrest has grown beyond the ability of the local authorities and the state police are called in.¹⁴⁷ On August 16, Missouri is placed in a state of emergency and a curfew is declared.¹⁴⁸

The media plays a particularly polarizing role during the chaos, misrepresenting facts and providing clear misinformation. In a CNN article issued a few days after the incident, reporters claim that "One thing is sure, though: What police say was self-defense by [Wilson] doesn't jibe with the accounts of those who say they saw the encounter[.]"¹⁴⁹ which later reports by the Department of Justice show to be untrue; in truth, most witnesses corroborate Wilson's account.¹⁵⁰ An article by ABC News claimed that "A gunshot wound to [Brown's] arm could show either that he was hit while walking away from the shooter with his back to the officer, or that he was facing the shooter with his arm up, either in a surrender position, defensive position, or other motion"¹⁵¹—completely disregarding the possibility that Brown was instead charging head on towards Wilson with his arms raised in attack, which later eyewitness testimonies and closed-circuit television footage prove to be the case. That same article claimed that the autopsy results were not immediately released as they contained information incriminating Wilson,¹⁵² inciting public outrage and fueling a narrative of conspiracy between the

146. See *Timeline of Events in Shooting of Michael Brown in Ferguson*, ASSOCIATED PRESS (Aug. 8, 2019), <https://apnews.com/article/shootings-police-us-news-st-louis-michael-brown-9aa32033692547699a3b61da8fd1fc62> [<https://perma.cc/8T8T-XAV3>].

147. See *id.*

148. See *id.*

149. Elliott C. McLaughlin, *What We Know About Michael Brown's Shooting*, CNN, <https://www.cnn.com/2014/08/11/us/missouri-ferguson-michael-brown-what-we-know/index.html> [<https://perma.cc/JYJ4-VLVG>] (Aug. 15, 2014, 12:10 AM).

150. See DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON, *supra* note 126, at 25-36.

151. Colleen Curry & Sabina Ghebremedhin, *Michael Brown Could Have Survived First 5 Shots, Last Shot Killed Him, Autopsy Says*, ABC NEWS (Aug. 18, 2014, 12:16 PM), <https://abcnews.go.com/US/michael-brown-survived-shots-shot-killed/story?id=25017247Curry> [<https://perma.cc/JBS4-KMB4>].

152. See *id.*

government and police officers. In truth, the autopsy and toxicology reports supported Wilson's account and led the grand jury to exonerate him.¹⁵³

On August 20, at the direction of President Obama, Attorney General Holder visits Ferguson.¹⁵⁴ A Missouri grand jury is empaneled. After three months of investigation and deliberation, on November 24, a recommendation of "no charges" is made by the state grand jury.¹⁵⁵ Civil unrest quickly follows; a dozen buildings are burned and officers are hit with flying objects.¹⁵⁶ On March 4, 2015, the Justice Department similarly announces that no federal charges will be brought against Wilson. On March 12, in front of the Ferguson police station, two police officers are shot.¹⁵⁷

In August 2018, Wesley Bell wins the job of St. Louis County prosecutor, largely based on a promise to pursue new charges against Wilson.¹⁵⁸ Bell makes good on the promise and opens a new investigation, which again fails to bring charges. But the third failure to bring charges does not settle the issue for Prosecutor Bell. Although his office is unable to bring charges against Wilson, he nonetheless attempts to defame Wilson by claiming that he has not been exonerated.¹⁵⁹ While he has in fact been exonerated by three separate investigations, Wilson is concerned that his "continued employment may put the residents and police officers of the City of Ferguson at risk"¹⁶⁰ He resigns, giving up his pension. To this day, the lie that Michael Brown was murdered while surrendering is believed by millions and considered ideological orthodoxy to many.

153. See DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON, *supra* note 126, at 17-18, 25.

154. See *Timeline of Events in Shooting of Michael Brown in Ferguson*, *supra* note 146.

155. *Ferguson Riots: Ruling Sparks Night of Violence*, BBC NEWS (Nov. 25, 2014), <https://www.bbc.com/news/world-us-canada-30190224> [<https://perma.cc/7NF2-5HAR>].

156. See *Timeline of Events in Shooting of Michael Brown in Ferguson*, *supra* note 146.

157. See *id.*

158. See *id.*

159. See John Eligon, *No Charges for Ferguson Officer Who Killed Michael Brown*, *New Prosecutor Says*, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/us/michael-brown-darren-wilson-ferguson.html> [<https://perma.cc/SA75-W5QR>].

160. ASSOCIATED PRESS, *Darren Wilson, Former Ferguson Cop Who Shot Unarmed Teen, Won't Receive Severance Package or Pension*, NAT'L POST (Jan. 24, 2015), <https://nationalpost.com/news/darren-wilson-former-ferguson-cop-who-shot-unarmed-teen-wont-receive-severance-package-or-pension> [<https://perma.cc/2DBM-WTYJ>].

2. The Nature and Extent of the Problem

The widespread false public perception of an epidemic of racist police violence has poisoned police-community relations and increased legal cynicism and justice failures, which disproportionately affect minority communities. Setting the facts straight and focusing on solving the real epidemic of violence in minority communities is essential to doing justice.

i. The Perception: Widespread Belief in Regular Racially Motivated Police Killings

The American public increasingly believes there is a major problem with police use of force, and extensive media coverage of police killing Black suspects has created a perception that police are gunning down Black men for racist reasons with impunity. The perception began with the swift growth of the Black Lives Matter movement after the killing of Michael Brown in Ferguson, Missouri (discussed above) and gained majority support after the murder of George Floyd by police in 2020. Floyd's murder, and the belief it reflected widespread police practice, sparked large protests.¹⁶¹ An estimated fifteen to twenty-six million Americans took part in protests in the weeks following the murder of Floyd.¹⁶² There have been vocal calls to defund and even disband police departments in the wake of police shootings, and although these calls do not reflect a broader public desire to end police, public dissatisfaction with police shootings is at a historic high.¹⁶³

Much of this dissatisfaction is driven by wildly inaccurate perceptions of the facts, not just of the Ferguson case described above but of police use of force generally. A nationwide poll in 2021 revealed how shocking these misperceptions are. When asked to estimate how many unarmed Black men were killed by the police in 2019, 39% of self-identified liberals estimated the number as between 1,000 and 10,000 or more (13% of self-identified conservatives also gave this es-

161. Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/F5RV-TUTJ>].

162. *See id.*

163. *See* Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html> [<https://perma.cc/37HV-SKFP>]. *See generally* Zach Goldberg, *Is Defunding the Police a "Luxury Belief"? Analyzing White vs. Nonwhite Democrats' Attitudes on Depolicing*, MANHATTAN INST. (Sept. 2022), <https://media4.manhattan-institute.org/sites/default/files/is-defunding-the-police-a-luxury-belief.pdf> [<https://perma.cc/7GT5-7XPR>].

timate).¹⁶⁴ In reality, in 2021, ten unarmed Black men were killed by police.¹⁶⁵ Only around 20% of self-identified liberal respondents (and around 45% of the conservative ones) guessed anywhere close to the right answer.¹⁶⁶ Similarly, the average survey participants guessed that 50% of those killed by police are Black, while the actual percentage is 25%.¹⁶⁷

These false perceptions have contributed to a drop in public confidence in police performance. A Pew survey taken after Floyd's murder found declines in public perception of police performance in many categories, a testament to the power of high-profile cases to shift public opinion significantly.¹⁶⁸ The data shows the public, though sharply polarized on the issue, widely believes the police to be doing a poor job tackling issues such as use of force, punishing police misconduct, and treating suspects in an equal manner.¹⁶⁹

This perception of the police being violent and unreliable is especially prevalent among Black Americans where distrust of the police is high. A poll of Black Americans taken in May 2021 found that 57% of respondents viewed police unfavorably, 68% believed police treatment of Black people had worsened, and 55% of respondents agreed that calling the police often does more harm than good (a perception shared by only 25% of White and Asian Americans).¹⁷⁰ The belief that police shootings are racially biased is also widespread. An April 2021 poll found that 90% of Black people believe police are more likely to use deadly force against a Black person than a White person (56% of all respondents agreed), and 77% of Black people believe police violence is a

164. See McCaffree & Saide, *supra* note 124, at 1-2.

165. See *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database> [https://perma.cc/JU4A-CXR7] (last visited May 8, 2023). Unarmed, as categorized by *The Washington Post*, "includes suspects grabbing an officer's gun or fleeing in a stolen car with a loaded pistol on the car seat." Heather Mac Donald, *Police Vindicate the 'Thin Blue Line' Patch Every Day*, WALL ST. J. (Aug. 23, 2021, 6:27 PM), <https://www.wsj.com/articles/police-thin-blue-line-shootings-black-homicide-crime-proactive-policing-blm-defund-11629750911>

[https://perma.cc/R9N8-B4RX]. For a complete discussion of the "unarmed category," see HEATHER MAC DONALD, *THE WAR ON COPS 74* (Encounter Books 2016); Heather Mac Donald, *Team Biden Finally Admits There's a War on Cops — Which It's Inflaming*, N.Y. POST (Apr. 28, 2022, 6:58 PM), <https://nypost.com/2022/04/28/team-biden-finally-admits-theres-a-war-on-cops> [https://perma.cc/ZLS3-CQDQ].

166. See McCaffree & Saide, *supra* note 124, at 2.

167. See *id.*

168. *Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, PEW RSCH. CTR. (July 9, 2020), <https://www.pewresearch.org/politics/2020/07/09/qualified-immunity-acknowledgments> [https://perma.cc/KZE9-JPLG].

169. See *id.*

170. See Nather, *supra* note 110.

very serious problem (compared to 45% of the general public).¹⁷¹ One study found that “eight in [ten] African-Americans . . . said that they thought that young [B]lack men were more likely to be shot to death by police than to die in a car accident,” when in reality, Black men are more than fifteen times likelier to die in a car accident than be killed by police.¹⁷²

This perception of unjustified racist police killings translates to fear and bitterness at police among community members. As one Black Baltimore resident put it, “Police shoot [B]lack people for nothing . . . They only kill us because of our skin color and our race. Black people never get to have peace.”¹⁷³

Contrast these widely held perceptions with the reality.

ii. The Reality: Few Unjustified Police Killings, Not Racially Motivated

In fact, the perception of an epidemic of unjustified, racist police killings is simply inconsistent with the facts. As of this writing, between January 2000 and July 2021, there have been 18,368 recorded uses of deadly force by police, and 1,726 recorded uses of non-lethal force that resulted in a death.¹⁷⁴ This amounts to 20,094 total killings by police of

171. See Kat Stafford & Hannah Fingerhut, *AP-NORC Poll: Police Violence Remains High Concern in U.S.*, ASSOCIATED PRESS (May 21, 2021), <https://apnews.com/article/politics-violence-race-and-ethnicity-racial-injustice-death-of-george-floyd-b74d3005500397c850ab3c116cf69ea0> [<https://perma.cc/SGD3-C7QC>].

172. Robert VerBruggen, *Fatal Police Shootings and Race: A Review of the Evidence and Suggestions for Future Research*, MANHATTAN INST. 2 (Mar. 2022), <https://media4.manhattan-institute.org/sites/default/files/MI-VerBruggen-Review-of-Police-Shootings.pdf> [<https://perma.cc/B6ZC-3VRY>]. For the deaths in auto accidents the actual numbers are “Blacks, particularly [B]lack men, were at increased risk of dying relative to [W]hites when traveling in motor vehicles (rate ratio (RR) for [B]lack men=1.48; 95% confidence interval (CI)=1.42-1.54).” Elisa R. Braver, *Race, Hispanic Origin, and Socioeconomic Status in Relation to Motor Vehicle Occupant Death Rates and Risk Factors Among Adults*, NAT’L LIBR. MED. (May 2003), <https://pubmed.ncbi.nlm.nih.gov/12643947> [<https://perma.cc/PCA6-3AKJ>]. Black men in their mid-to-late twenties die in fatal traffic accidents at a rate of 52.1/1,000, and from police-related encounters the rate is 3.4/1,000. See Amina Khan, *Getting Killed by Police Is a Leading Cause of Death for Young Black Men in America*, L.A. TIMES (Aug. 16, 2019, 5:00 AM), <https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-for-black-men> [<https://perma.cc/U6VW-L6FG>].

173. Sarah Butrymowicz et al., “*They Only Kill Us Because of Our Skin Color and Our Race.*,” HECHINGER REP. (Sept. 22, 2016), <https://hechingerreport.org/kill-us-skin-color-race> [<https://perma.cc/EH5K-K9FH>].

174. See *Fatal Encounters: A Step Toward Creating an Impartial, Comprehensive and Searchable National Database of People Killed During Interactions with Police*, FATAL ENCOUNTERS, https://fatalencounters.org/view/person/?gv_search=&filter_2=&filter_41=&filter_42=&filter_10=&filter_13=&filter_46=&filter_16=&filter_1=&filter_28%5Bstart%5D=&filter_28%5Bend%5D=&mode=all [<https://perma.cc/W6PE-GS22>] (last visited June 18, 2023).

people of all races,¹⁷⁵ or about a thousand deaths per year. This number has remained steady over the last two decades.¹⁷⁶ By comparison, 15,000-20,000 people are murdered by other civilians each year across the U.S.¹⁷⁷

Furthermore, the vast majority of the 1,000 or so police killings each year are clearly justified. *The Washington Post* has tracked the number of individuals killed by law enforcement since 2015.¹⁷⁸ Just 6% of suspects killed by police were determined to be unarmed, and of these many still presented an immediate danger to others (as in the case of Michael Brown in Ferguson).¹⁷⁹

In addition to the fact that the vast majority of police killings are of armed individuals, there is no evidence that racial bias accounts for disparities in police shootings. In fact, studies have routinely shown just the opposite: White officers are not more likely to kill Black people, and if anything, are *less* likely to do so, perhaps out of an abundance of caution at sparking a divisive incident.¹⁸⁰ Moreover, studies have established that Black people are “23.5[%] less likely to be shot by police, relative to [W]hites, in an interaction.”¹⁸¹ No scientific study has ever found that Black people are more likely than Whites to be killed by police in a given police-suspect interaction.¹⁸² Yet the well-accepted current narrative pressed by the media, activists, and many politicians is just the opposite.

175. *See id.*

176. *See Fatal Force*, *supra* note 165. Since January 1, 2015, 8,470 people were shot and killed by police, or still about 1,000 people each year. *See id.*

177. *See Table 1: Crime in the United States*, FED. BUREAU INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-1> [<https://perma.cc/QJ63-LL3Z>] (last visited Aug. 12, 2023).

178. *Fatal Force*, *supra* note 165.

179. *See id.*; John Sullivan et al., *Fatal Police Shootings of Unarmed People Have Significantly Declined, Experts Say*, WASH. POST (May 7, 2018, 6:38 PM), https://www.washingtonpost.com/investigations/fatal-police-shootings-of-unarmed-people-have-significantly-declined-experts-say/2018/05/03/d5eab374-4349-11e8-8569-26fda6b404c7_story.html [<https://perma.cc/7L8E-MKUM>].

180. *See, e.g.*, OFF. OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUST., COLLABORATIVE REFORM INITIATIVE: AN ASSESSMENT OF DEADLY FORCE IN THE PHILADELPHIA POLICE DEPARTMENT 32 (2015), <https://www.phillypolice.com/assets/directives/cops-w0753-pub.pdf> [<https://perma.cc/9JD3-7ZBY>].

181. Roland G. Fryer Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210, 1241 (2019).

182. *See generally* VerBruggen, *supra* note 172; Heather Mac Donald, *The Myth of Systemic Police Racism*, WALL ST. J. (June 2, 2020, 1:44 PM), <https://www.wsj.com/articles/the-myth-of-systemic-police-racism-11591119883> [<https://perma.cc/SNZ9-U2PE>]; David Wojick, *Police Use of Deadly Force Is Not About Racism - OpEd*, EURASIA REV. (Oct. 12, 2020), <https://www.eurasiareview.com/12102020-police-use-of-deadly-force-is-not-about-racism-oped> [<https://perma.cc/W3FZ-GH2Y>].

While it is true that Black people comprise 24% of police shooting victims compared to being only 13% of the population, this disparity results from the fact that Black communities have significantly higher crime rates and thus are more likely to generate police confrontations.¹⁸³ Black people comprised over 50% of homicide victims in 2019 compared to comprising just 13% of the population, a horrifying disparity that is even worse for Black people between the ages of fifteen and thirty-four, who are ten times more likely to be murdered than Whites.¹⁸⁴

In other words, a tragic racial disparity is to be found in crime victimization, not in the police response to it. The idea that Black men should have as their greatest fear being killed by police is simply not supported by the facts. Of the 14,554 homicides of Black individuals in 2021,¹⁸⁵ 233 were killed by police¹⁸⁶—just 1.6%.¹⁸⁷

The idea that police primarily kill unarmed Black men is also false. Two percent of killings by police in the past six years have been killings of Black men, who based on a very generous definition of the term, are unarmed.¹⁸⁸ In fact, statistics show “a police officer was 400 times as likely to be killed by a [B]lack criminal in 2021 as an unarmed [B]lack American was to be killed by a police officer.”¹⁸⁹

When these numbers are put in perspective, it is obvious that there is no epidemic of racially motivated police shootings of Blacks, but rather a tragic racial disparity in crime victimization. Politicians and activ-

183. See Dan O’Donnell, *The Truth About Police Shootings in America*, MACIVER INST. (Apr. 14, 2021), <https://www.maciverinstitute.com/2021/04/the-truth-about-police-shootings-in-america> [<https://perma.cc/P2FS-JRL4>].

184. See *id.*; STATISTA RSCH. DEP’T, *Number of Murder Victims in the United States in 2019, by Race/Ethnicity and Gender*, STATISTA (Oct. 1, 2020), <https://www.statista.com/statistics/251877/murder-victims-in-the-us-by-race-ethnicity-and-gender> [<https://perma.cc/5SQT-2RNX>]; Marissa Edmund, *Gun Violence Disproportionately and Overwhelmingly Hurts Communities of Color*, CTR. FOR AM. PROGRESS (June 30, 2022), <https://www.americanprogress.org/article/gun-violence-disproportionately-and-overwhelmingly-hurts-communities-of-color> [<https://perma.cc/3WRV-5WZ5>].

185. See *Underlying Cause of Death, 2018-2021, Single Race Results: Deaths Occurring Through 2021*, CTRS. FOR DISEASE CONTROL & PREVENTION WONDER, <https://wonder.cdc.gov/controller/datarequest/D158;jsessionid=E96B9D5DDA2684EB1AABEEB014E6> [<https://perma.cc/D5SX-7YJE>] (last visited Aug. 12, 2023).

186. See STATISTA RSCH. DEP’T, *Number of People Shot to Death by the Police in the United States from 2017 to 2023, by Race*, STATISTA (June 5, 2023), <https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race> [<https://perma.cc/4AXL-Z23P>].

187. The 1.6% is derived by dividing the number of Black individuals killed by the police by the number of Black homicides in 2021. See *Underlying Cause of Death, 2018-2021, Single Race Results: Deaths Occurring Through 2021*, *supra* note 185.

188. See O’Donnell, *supra* note 183.

189. *Team Biden Finally Admits There’s a War on Cops — Which It’s Inflaming*, *supra* note 165.

ists who accuse the police of being systemically racist in shootings are either ignorant of the facts or intentionally misrepresenting the facts for their political or ideological purposes. To claim that racist police shootings is one of the major problems facing Black communities is to distract and mislead, making it less likely that real crime problems in such communities will be solved. Crime in Black communities is the serious problem, and police shootings are an inevitable tragic consequence of that problem. Placing the blame on police is blaming a symptom and missing the disease. Focusing on police use of force prevents progress in reducing crime that would in turn reduce police killings. Additionally, far from being a growing problem, police shootings have been dropping over time. While nationwide historical data is unavailable, jurisdictions that have kept records show a clear decline in police killings. For example, in 1971, police killed around ninety people in New York City.¹⁹⁰ In 2017, they killed around ten.¹⁹¹

None of this is to say that police do not, on rare occasions, unjustifiably kill or murder suspects. George Floyd is a tragic example of a murder of an unarmed Black man by police. But in such cases, the killers are usually tried and convicted, as was Floyd's killer, Derek Chauvin.¹⁹² There is no reason to believe police killings are under-prosecuted based on legal definitions of murder and manslaughter. If anything, the evidence suggests prosecutors are willing to prosecute cases against police even when they know they are unlikely to win, simply as a means of publicly demonstrating that they invest proportionally more resources in prosecuting police homicides than they do other homicides.¹⁹³ The low conviction rate of police officers has more to do with

190. See Keith Humphreys, *How Fatal Shootings by Police Were Cut in Half — and How We Might Do It Again*, WASH. POST (July 9, 2018, 11:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2018/07/09/how-fatal-shootings-by-police-were-cut-in-half-and-how-we-might-do-it-again> [<https://perma.cc/5WKS-NR2S>].

191. See Jack Moore, *NYPD Officers Shot the Lowest Number of People Ever In 2017*, NEWSWEEK (Dec. 24, 2017, 6:40 AM), <https://www.newsweek.com/nypd-officers-shot-lowest-number-people-ever-2017-758205> [<https://perma.cc/NRY6-M3T2>].

192. See Eric Levenson & Aaron Cooper, *Derek Chauvin Found Guilty of All Three Charges for Killing George Floyd*, CNN, <https://www.cnn.com/2021/04/20/us/derek-chauvin-trial-george-floyd-deliberations/index.html> [<https://perma.cc/5M7J-5XRF>] (Apr. 21, 2021, 12:13 PM).

193. Since 2005, 139 officers have been arrested on charges of murder or manslaughter due to an on-duty shooting, representing an arrest rate of 1% or 2% of police shootings each year. Of those officers arrested, forty-four were convicted while forty-two cases remain pending. See German Lopez, *Police Officers Are Prosecuted for Murder in Less Than 2 Percent of Fatal Shootings*, VOX, <https://www.vox.com/21497089/derek-chauvin-george-floyd-trial-police-prosecutions-black-lives-matter> [<https://perma.cc/FWW3-Y7GP>] (Apr. 2, 2021, 11:30 AM). Prosecutors normally work very hard to try only cases that they believe they will win, and yet when prosecuting police-involved deaths, more cases fail than succeed, suggesting that prosecutors are pursuing cases they know they cannot win. See, e.g., Amelia Thomson-DeVeaux et al., *Why It's So Rare for Police Officers to*

the circumstances of most police killings, where the chaos of a confrontation invites reasonable mistakes in making quick judgments, than with prosecutorial indifference to “killer cops.”

It is difficult to overstate the falsity of the view that there is an ongoing epidemic of police violence in America. Even beyond shootings, police use of force against suspects occurs in only about 0.78% of arrests, and in 98% of those cases where force is used, the arrested person, even suspects actively resisting arrest, sustains no injuries or only minor ones.¹⁹⁴ Given that police routinely have to confront the most dangerous members of a highly armed society, the fact that in making 10,000,000 arrests a year only about 1,000 people are killed by police—0.0001%—could be considered significantly low.¹⁹⁵

In fact, more police officers are murdered each year by suspects than even a generous estimate of the number of unarmed suspects murdered by police. Eighty-four police officers were killed in 2021 from a felonious assault while on duty,¹⁹⁶ compared to an average of only around sixty unarmed people killed by police each year, many of whom were dangerous despite being unarmed.¹⁹⁷ However, public perception is quite the opposite. After twenty-two-year-old New York Police Department (“NYPD”) detective Jason Rivera was murdered by a suspect in January 2022 and given a funeral that involved closing several streets, one New York resident, actress Jacqueline Guzman, posted online: “We do not need to shut down most of Lower Manhattan because one cop died for probably doing his job incorrectly. They kill people who are under [twenty-two] every single day for no good reason and we don’t shut down the city for them”¹⁹⁸

Face Legal Consequences, FIVETHIRTYEIGHT (June 4, 2020, 6:00 AM), <https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct> [https://perma.cc/U6EW-AD5V]. In a 2015 Washington Post article, Doug Friesen, a defense lawyer, stated: “Anytime you have politicians that have to make charging decisions, realistically [race] is part of their decision-making process They are asking themselves, ‘Is there going to be rioting out in the streets?’” Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <https://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted> [https://perma.cc/Z3XM-C75Q].

194. See O’Donnell, *supra* note 183.

195. See *id.*

196. Leila Mitchell, *Intentional Police Deaths at 20 Year High Due to Distrust and Other Factors*, KMIZ (Mar. 29, 2022, 8:05 PM), <https://abc17news.com/news/2022/03/29/intentional-police-deaths-at-20-year-high-due-to-distrust-and-other-factors> [https://perma.cc/2AA6-YEYY].

197. See Sullivan et al., *supra* note 179.

198. Tina Moore et al., *Actress Fired After Ranting About Street Closures for NYPD Detective Jason Rivera’s Funeral*, N.Y. POST (Jan. 29, 2022, 9:33 PM), <https://nypost.com/2022/01/29/actress-fired-after-ranting-about-street-closures-for-jason-riveras-funeral> [https://perma.cc/B3GD-ABT3].

While the callous ignorance of such a comment is unfortunate, the true tragedy is that it captures a perception of police shootings held by many. It is no wonder that many police officers have come to feel demoralized and embittered when faced with such routine false beliefs portraying them as killers when police are exposing themselves to a greater risk of being murdered in order to protect a community that regularly demonizes them.¹⁹⁹

How did so many Americans come to have such a false view of police shootings? The main reason may be the disproportionate media coverage of unjustified killings as well as the increasing exploitation of police shootings for political purposes. When the media covers police killings, it is almost entirely to focus on the potentially unjustified nature of the killing, and this causes the fallacious generalization on the part of the public that most police killings are unjustified and that the problem is much larger than it is. Much of the news media and activists also rush to pronounce judgement on a killing before the relevant facts are known. For example, the national outrage over Michael Brown's killing, discussed earlier, was in large part created by inaccurate reporting by journalists and activists.²⁰⁰ Even when the facts in multiple official reports later showed the killing was justified, most protest leaders and media figures were simply unwilling to admit their mistake and continued to press what was then a clearly false narrative. Indeed, it has become a litmus test of ideological purity among some to affirm Michael Brown was murdered. This embrace of false "alternative facts" is highly damaging to police-community relations. Studies have found that exposure to negative media coverage of police has as negative an effect on people as an actual negative interaction with police.²⁰¹ As another study concluded, "The current data suggest that, at least on the issue of fatal police shootings, actual events are not a primary driving force [in public perceptions]"²⁰²

3. Pushing Back Against Community Misperceptions Regarding Police Use of Force

While overshadowed by the enormous public attention paid to claims of unjustified police killings and calls for police reform, there has

199. For more about this, see *infra* Part III.C–D.

200. See *supra* Part II.D.1.

201. See Lisa M. Graziano, *News Media and Perceptions of Police: A State-of-the-Art-Review*, 42 POLICING: AN INT'L J. 209, 216 (2018).

202. Christopher J. Ferguson, *Negative Perceptions of Race Relations: A Brief Report Examining the Impact of News Media Coverage of Police Shootings, and Actual Fatal Police Shootings*, SOC. SCI. J. 1, 6 (2021).

been some pushback against the common misperceptions. Numerous independent-minded journalists and researchers, such as Heather Mac Donald²⁰³ and Roland Fryer,²⁰⁴ have noted the falseness of the prevailing narrative on police violence. Daring to speak the truth can exact a high price, however. When Professor Fryer, a well-respected economics scholar at Harvard, who happens to be Black, published empirical research that pushed back against the notion that police are racist killers, Fryer's ideological opponents within the university administration took the next available opportunity to shut down his research lab and suspend him from teaching.²⁰⁵

Ordinary citizens have also complained about the lopsided attention paid to police killings compared to the problem of crime, especially in Black communities. For example, after Minneapolis police in July 2022 killed an armed Black man who was attempting to kill a mother in front of her two children, protesters and activists quickly began criticizing police for the shooting.²⁰⁶ The mother who had been saved by police, Arabella Foss-Yarbrough, responded by begging protesters to consider the facts: "This is not a George Floyd situation. George Floyd was unarmed. This is not OK He [the man police killed] tried to kill me in front of my kids."²⁰⁷ Foss-Yarbrough also questioned whether demonstrators would have cared if she had been killed. "I have Black children. I am a woman of color," she said. "If I would have lost my life, would you guys do this for me?"²⁰⁸

4. Reforms Addressing Community Upset Over Police Use of Force

The most popular reforms relating to community upset over police use of force are to add new rules or restrictions aimed at increasing police accountability and decreasing use of force incidents. For example,

203. See generally MAC DONALD, *supra* note 165.

204. See Robert Evans, *Why Harvard's Canceling of Roland Fryer Matters*, FOUND. AGAINST INTOLERANCE & RACISM (June 13, 2022), <https://fairforall.substack.com/p/roland-fryer-harvard> [<https://perma.cc/XNN8-8FEZ>]; Good Kid Productions, *Harvard Canceled Its Best Black Professor. Why?*, YOUTUBE (Mar. 9, 2022), https://www.youtube.com/watch?v=m8xW0lk3WIw&ab_channel=GoodKidProductions [<https://perma.cc/Q5N9-YDGB>]. See generally Fryer, *supra* note 181.

205. See Alex Koller & Simon J. Levien, *Harvard Restores Prof. Fryer's Teaching, Research Roles After Two-Year Sexual Harassment Suspension*, HARV. CRIMSON (July 7, 2021), <https://www.thecrimson.com/article/2021/7/7/fryer-returns-from-suspension> [<https://perma.cc/K53C-PHDV>].

206. See Rav Arora, *Feelings Over Facts*, CITY J. (July 21, 2022), <https://www.city-journal.org/article/feelings-over-facts> [<https://perma.cc/E5WQ-MRRE>].

207. *Id.*

208. *Id.*

after the murder of George Floyd in 2020, all fifty states and the District of Columbia “introduced legislation addressing some aspect of policing policy, largely focused on accountability and oversight.”²⁰⁹ But while banning chokeholds, reducing no-knock warrants, or mandating body cameras may produce some marginal benefits, such reforms do not address the problem of false public perceptions because some incidents of mistaken police use of force will always occur, no matter the regulations, and these incidents will be used to make false generalizations. In fact, the number of police killings since implementing new policing regulations has remained largely steady.²¹⁰ Moreover, polls show these attempts at reform have failed to restore public confidence in police.²¹¹ With 10,000,000 arrests a year, it is essentially guaranteed that, no matter what policing procedures are in place, some officers somewhere will make a mistake in the use of force—not to mention that a few criminal police officers will continue to abuse their power. Since the problem is one of narrative and not statistical facts, even useful reforms—such as making it easier to fire officers for abuse complaints—are unlikely to change community perceptions of police on their own. As a result, the most effective reforms to address community non-cooperation caused by police use of force are those that will restore police credibility with the community by combatting politicized misperceptions around policing and creating and publicizing accountability mechanisms so the public knows truly guilty police officers will not escape justice.

5. Recommendation

Our recommendation is to create a police-community oversight commission, composed of civilians and police, specifically tasked with improving police-community relations and providing accountability. The details of the proposed commission are discussed in Part IV.

III. POLICE NON-INTERVENTION

The first half of this article examined the problem of citizen non-cooperation with police and its many causes. This second half examines a similar and mirrored dynamic of police non-intervention, in which police pull back and do not engage in proactive policing or investigative measures, thus allowing criminals to escape justice and incentivizing more crime. Just as community members or witnesses may be re-

209. Amber Widgery, *One Year After George Floyd's Death, Work Continues on Policing Policy*, NAT'L CONF. STATE LEGISLATURES (May 20, 2021), <https://perma.cc/2J8H-HUPS>.

210. See *Fatal Force*, *supra* note 165.

211. See Nather, *supra* note 110.

luctant to participate in crime investigations due to a mistrust of police, police can similarly be reluctant to effectively respond to crime due to negative attitudes from the public or governmental policies limiting their resources or capabilities. Police non-intervention also can be driven by demoralization and voluntary pullback or by orders to de-police (as was the case during much of 2020 when police budgets were slashed, police-free zones were created, and police were ordered to stand down in the face of often violent protests).

Each of the four sections below explore one of the main facets of the problem of police non-intervention, considering both causes and effects. First are anti-police rhetoric and physical attacks, which make policing more difficult. Second is de-policing caused by anti-police policies such as defunding or no-go zones. Third is the issue of police demoralization and problems with hiring and retaining officers. Fourth is the so-called “Ferguson Effect” where police voluntarily pull back from policing to avoid confrontations (such as the one that ended with the justified shooting of Michael Brown in Ferguson). As this part of the article shows, less police intervention in communities almost always leads to more failures of justice and more crime.

A. Anti-Police Rhetoric and Physical Attacks on Police

In the wake of high-profile police use of force incidents, public figures frequently use their platforms to harshly criticize police. While there are certainly legitimate criticisms that can be made, there is also a disturbing trend of politicians and activists stirring anti-police hatred for personal or political gain. Such anti-police rhetoric is often absurdly false and unfounded, as with the Michael Brown shooting in Ferguson, discussed above, but is then repeated and amplified enough to seem legitimate. For example, after George Floyd’s murder in 2020, perhaps seeking to take advantage of the social unrest to rise in prominence, Congressman Bobby Rush attacked Chicago’s largest police union as the “organized guardians of continuous police lawlessness” and accused the police of “stand[ing] shoulder to shoulder with the Ku Klux Klan”²¹² Allegations that the Chicago police are a force of hooded racists slaughtering Black men are demonstrably false, but they might seem credible when they come from a U.S. Congressman. Rhetoric accusing police of being racist killers has been widely used to rile up the public, with resulting donations, votes, and fame for those willing to en-

212. Justin Wise, *Bobby Rush Likens Chicago Police Union to KKK: ‘Racist Body of Criminal Lawlessness,’* HILL (June 15, 2020, 8:45 AM), <https://thehill.com/homenews/house/502709-bobby-rush-likens-chicago-police-union-to-kkk-racist-body-of-criminal> [https://perma.cc/34J4-PJU4].

gage in such conduct. While individual actors may benefit from using this hate rhetoric, it harms ordinary citizens by increasing legal cynicism and police demoralization, and produces more crime and failures of justice—the negative consequences of which typically fall disproportionately on the high-crime minority neighborhoods that the demagogues are hoping to rile. The opportunity for principled reform often gets quashed by the highly political anti-police sentiments that are neither principled nor based in fact.

Some argue that anti-police rhetoric is an understandable reaction to emotionally charged police killings, some of which, like the murder of George Floyd, are indeed outrageous and criminal. However, since rhetorical attacks on police have practical real-world consequences—in reducing the moral credibility of the justice system and increasing legal cynicism—politicians and activists ought to fit their rhetoric to the facts. This is not a matter of going easy on police wrongdoing, but rather a recognition that disseminating disinformation and voicing false claims undermines law enforcement and inevitably leads to more crime and lower clearance rates, thus damaging the lives of hundreds of thousands of innocent Americans, particularly in poor and minority neighborhoods. Many police officials and commentators have pointed to wildly irresponsible anti-police rhetoric for helping to incite the orgy of murder and lawlessness that swept across American cities in the wake of George Floyd's murder.²¹³

Anti-police rhetoric has also had the disturbing effect of increasing physical attacks on police. According to FBI data, the number of felonious police deaths increased by 58.7% from 2020 to 2021 and represents the highest number of such killings in the past decade.²¹⁴ Part of this increase in killings is due to anti-police hatred as unprovoked attacks accounted for 32.9% of killings of police in 2021 compared to 4.3% of killings of police in 2020, indicating a rise in targeted assassinations of police.²¹⁵ Police Benevolent Association President Patrick Lynch responded to the unprovoked stabbing of an officer in June 2020 by commenting, “Are we surprised? . . . Did we doubt because of the rhetoric we’re hearing, the anti-police rhetoric that’s storming our streets, are we

213. See, e.g., Alana Goodman, *Incitement: Johnson Blames Deadly Kenosha Riots on Barnes's Anti-Police Rhetoric*, WASH. FREE BEACON (Oct. 7, 2022), <https://freebeacon.com/latest-news/incitement-johnson-blames-barness-anti-police-rhetoric-for-deadly-kenosha-riots> [<https://perma.cc/8Z66-HSU3>].

214. See *Law Enforcement Officer Deaths 01/01/2021-12/31/2021*, FED. BUREAU INVESTIGATION (Jan. 1, 2022); Mitchell, *supra* note 196.

215. See *Law Enforcement Officer Deaths 01/01/2021-12/31/2021*, *supra* note 214; *Law Enforcement Officer Deaths 01/01/2020-12/31/2020*, FED. BUREAU INVESTIGATION (Jan. 1, 2021).

surprised that we got this call? I'm not. We said it's going to happen"²¹⁶

Anti-police rhetoric, coupled with the community hostility and anti-police violence it generates is a major cause of police demoralization and voluntary pullback discussed later in this article. Recognizing anti-police rhetoric as a serious contributing cause of poor police-community relations should not be a partisan issue, and indeed, there have been bipartisan calls for more responsible rhetoric.²¹⁷

1. Case Example: Al Sharpton

In 1987, Tawana Brawley, a Black teenager, falsely accuses a group of White men, some of whom are New York police officers, of committing horrible crimes against her, including rape.²¹⁸ Activist Al Sharpton capitalizes on the hoax to rise in relevance by leading protests, flinging accusations of racism at the police, and defaming the men (who successfully sue Sharpton for defamation after a grand jury finds the accusations are a hoax).²¹⁹ Far from being deterred from stirring up lies and hatred, Sharpton doubles down on his strategy of hate and division, even extending beyond the police to attack New York's Jewish community after a Black child is killed in an ordinary car accident where the vehicle is driven by a Hasidic Jew. Sharpton threatens violence against Jews and leads a protest where one banner reads: "Hitler did not do the job."²²⁰

Sharpton's divisive rhetoric carries him to political fame, and he makes an unsuccessful bid for the Democratic presidential nomination in

216. *Union Head Blames Anti-Police Rhetoric After NYC Cop Stabbed in Neck*, CBS NEWS (June 4, 2020, 5:13 AM), <https://www.cbsnews.com/news/union-head-blames-anti-police-rhetoric-after-nyc-cop-stabbed-in-neck> [https://perma.cc/F7ZL-KW37].

217. See, e.g., Press Release, Victoria Spartz, Anti-Police Rhetoric Must Stop and We Have to Support Our Police Officers on the Frontlines Daily (Aug. 22, 2022), <https://spartz.house.gov/media/press-releases/spartz-anti-police-rhetoric-must-stop-and-we-have-support-our-police-0> [https://perma.cc/7YDT-ZAXV].

218. See Mark Memmott, *15 Years Later, Tawana Brawley Has Paid 1 Percent of Penalty*, NPR (Aug. 5, 2013, 1:17 PM), <https://www.npr.org/sections/thetwo-way/2013/08/05/209194252/15-years-later-tawana-brawley-has-paid-1-percent-of-penalty> [https://perma.cc/UR7W-RLLD]; Alexandra Hutzler, *Who Is Tawana Brawley? As Al Sharpton Feuds with Trump, False Rape Accusation Against Law Enforcement Officials Resurfaces*, NEWSWEEK (July 29, 2019, 2:06 PM), <https://www.newsweek.com/tawana-brawley-al-sharpton-rape-1451599> [https://perma.cc/F46U-6SJY].

219. See Memmott, *supra* note 218.

220. Corey Dade, *The Rev. Al Sharpton, in Six True-False Statements*, NPR (Jan. 19, 2013, 5:28 PM), <https://www.npr.org/2013/01/19/169734710/the-rev-al-sharpton-in-six-true-false-statements> [https://perma.cc/JS83-3BMU]; Steven J. Allen, *Al Sharpton: Liar, Liar, Cities on Fire*, CAP. RSCH. CTR. (Oct. 6, 2015), <https://capitalresearch.org/article/al-sharpton-liar-liar-cities-on-fire> [https://perma.cc/3C8J-EEDM].

2004. Sharpton returns to prominence with his old tactic of attacking police when Michael Brown is killed in Ferguson in 2014. Although a dozen witnesses, Black and White, confirm that Brown attacked the police officer, as discussed previously, Sharpton “reimagines” the story as the teenaged-gentle-giant Brown being gunned down by police as he had his hands raised in surrender. Sharpton organizes protests and helps lead the Black Lives Matter movement, spreading false information about an epidemic of racist police killings in the process. Even though a grand jury, which includes Blacks and Whites, finds no grounds to indict the officer who killed Brown, Sharpton is undeterred and continues to spread false information about the case. Sharpton also latches onto the death of Eric Garner at the hands of New York City police to lead protests where some chant: “What do we want? Dead cops!”²²¹

Ismaaiyl Brinsley, a mentally unstable man, attends a protest and is inspired by this anti-police rhetoric to give his life some purpose.²²² On December 20, 2014, Brinsley posts online, “I’m Putting Wings On Pigs Today[,]” and walks up to a parked NYPD police car and shoots two officers dead through the open window.²²³ Even during the funerals of the officers murdered as a direct result of unrelenting anti-police rhetoric, Sharpton refuses to hold off on arranging anti-police protests, and he continues to spread false information.²²⁴

Reverend Jesse Lee Peterson, a prominent member of New York’s Black religious community, makes his views clear on Sharpton’s culpability for the deaths of the two officers:

My prayers and thoughts go out to the families who lost their family members in the shooting. I have to tell you [], I blame Mayor de Blasio, I blame Al Sharpton, and I blame the so-called civil rights leaders because they have been encouraging this type of hatred toward police officers for years now. . . . Sharpton, since the Tawana Brawley situation . . . has been encouraging anger and racism from Black Americans toward White cops and White people at large. So now they have blood on their hands²²⁵

221. Allen, *supra* note 220.

222. See Jonathan Allen & Laila Kearney, *New York Mayor Calls for Pause in Protests After Police Killings*, REUTERS (Dec. 22, 2014, 11:58 AM), <https://www.reuters.com/article/uk-usa-police/new-york-mayor-calls-for-pause-in-protests-after-police-killings-idUKKBN0K01HZ20141222> [<https://perma.cc/T4PW-CNPC>].

223. Benjamin Mueller & Al Baker, *2 N.Y.P.D. Officers Killed in Brooklyn Ambush; Suspect Commits Suicide*, N.Y. TIMES (Dec. 20, 2014), <https://www.nytimes.com/2014/12/21/nyregion/two-police-officers-shot-in-their-patrol-car-in-brooklyn.html> [<https://perma.cc/38TU-2DCD>].

224. See Allen & Kearney, *supra* note 222.

225. Jesse Lee Peterson, *NYPD Shootings: ‘Mayor Bill de Blasio and Sharpton Have Blood on Their Hands,’* YOUTUBE (Apr. 14, 2015),

Sharpton has continued his anti-police rhetoric to this day without regard for the facts or consequences.²²⁶ Stunningly, many powerful politicians such as former Presidents Obama and Clinton, former New York City Mayor Bill de Blasio, and former Attorney General Eric Holder have praised and associated themselves with Sharpton, lending his divisive lies credibility.²²⁷

2. The Nature and Extent of the Problem

While Sharpton remains a preeminent example of a professional anti-police agitator, his rhetoric is hardly unique.²²⁸ A cynical campaign of anti-police hatred, relying upon false information about particular incidents as well as about claims of systemic police racism generally, has advanced the political and economic fortunes of many politicians and activists at the cost of creating unfounded cynicism and active police hatred that simply increases criminal victimization and failures of justice within minority communities.

i. Persistent and Pervasive Anti-Police Rhetoric

Not all criticism of the police is necessarily destructive to the credibility of the justice system. Criticisms that are measured, fact-based, and reform-oriented can enhance the credibility of the system by publicly acknowledging and condemning police abuses and ultimately leading to

<https://www.youtube.com/watch?v=cpmfUhjucQw&list=PLpSkvyhrlXraQf8-D8629P6pz1eIRn8QS&index=67> [https://perma.cc/E8XE-7NZU].

226. See Seth Mandel, *Al Sharpton Is Not a Lifelong Fighter for Justice*, WASH. POST (Aug. 1, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/08/01/al-sharpton-is-not-lifelong-fighter-justice> [https://perma.cc/R2QC-7QXV].

227. See Frank James, *Obama and Al Sharpton: An Odd Couple Who Make Political Sense*, NPR (Apr. 10, 2014, 7:38 PM), <https://www.npr.org/sections/itsallpolitics/2014/04/10/301458435/obama-and-al-sharpton-an-odd-couple-who-make-political-sense> [https://perma.cc/UXZ9-6WPL]; Ross Barkan, *Defying Critics, Bill de Blasio Embraces Al Sharpton on His Home Turf*, OBSERVER (Jan. 19, 2015, 2:22 PM), <https://observer.com/2015/01/defying-critics-bill-de-blasio-embraces-al-sharpton-on-his-home-turf> [https://perma.cc/9F39-D2CJ]; Robert W. Wood, *Eric Holder Defends Al Sharpton's Ties to White House, Despite Tax Debts*, FORBES (Feb. 28, 2015, 9:48 AM), <https://www.forbes.com/sites/robertwood/2015/02/28/eric-holder-defends-al-sharptons-ties-to-white-house-despite-tax-debts/?sh=6f93c2df2551> [https://perma.cc/C2GZ-S2XG]; Michael Gartland, *NYC Mayor Adams Lauds Rev. Al Sharpton for his Friendship, Advocacy Work*, N.Y. DAILY NEWS (Apr. 6, 2022, 6:45 PM), <https://www.nydailynews.com/news/politics/new-york-elections-government/ny-nyc-mayor-eric-adams-rev-al-sharpton-nan-20220406-6x26vqxftjgpnbfzkn4s7vzra-story.html> [https://perma.cc/5XHC-LWfy].

228. See, e.g., Scott A. Davis, *'Defunded' Minneapolis to Bring in Outside Help to Deal with Surge in Violence Amid Police Shortage*, L. ENFT TODAY (May 24, 2021), <https://www.lawenforcementtoday.com/minneapolis-to-bring-in-outside-help-to-deal-with-surge-in-violence> [https://perma.cc/R2UZ-U9EU].

better policing. However, anti-police rhetoric has become an ideological and political staple for many activists and politicians regardless of the actual facts. False anti-police rhetoric is always destructive to justice as it causes people to hold seriously inaccurate views of the justice system with damaging results on their compliance with the law and cooperation with enforcement agencies. Recall the earlier discussion of the public's massive overestimate of the number of police shootings, with many guessing thousands of unarmed Black men were killed by police. According to the *Washington Post* database, *ten* unarmed Black men were killed by police in 2021—and under the categorization scheme of the *Washington Post*, “unarmed” suspects include “suspects grabbing an officer’s gun or fleeing in a stolen car with a loaded pistol on the car seat.”²²⁹

How did so many in the public come to hold such distorted views of reality? The answer is that activists, commentators, and politicians have consistently pushed a false anti-police narrative according to which American policing is deeply, perhaps irreparably, marked with patterns of racist killings. While the evidence disproves such a view, advocating it can be politically useful as it allows individuals to ride a wave of misplaced ire to fame, fortune, or power.

For example, the founders of the Black Lives Matter organization took in a windfall of \$90 million in donations in 2020 while promoting numerous inaccuracies, and fabrications, about American policing.²³⁰ (A portion of this money went into buying private real estate and paying the lavish salaries of family or friends of the founders.)²³¹ From Al Sharpton forward, it is clear that anti-police rhetoric pays handsomely. Politically, candidates espousing anti-police messages gained significant prominence in the Democratic Party first in 2014 in the wake of the Black Lives Matter movement going mainstream and later more broadly in 2020 after the murder of George Floyd. In the 2020 Democratic primary, candidates competed for the anti-police vote by making numerous false statements on policing, with candidates Kamala Harris, Tom Steyer, and Elizabeth Warren falsely affirming that Michael Brown was “murdered”²³² and Joe Biden calling for redirecting funds from policing to

229. *Fatal Force*, *supra* note 165; *Police Vindicate the ‘Thin Blue Line’ Patch Every Day*, *supra* note 165.

230. See Nicholas Kulish, *After Raising \$90 Million in 2020, Black Lives Matter Has \$42 Million in Assets*, N.Y. TIMES (May 17, 2022), <https://www.nytimes.com/2022/05/17/business/blm-black-lives-matter-finances.html> [<https://perma.cc/WEV6-D3SX>].

231. *See id.*

232. See William Saletan, *Democratic Candidates Are Misrepresenting Michael Brown’s Death*, SLATE (Sept. 20, 2019, 5:08 PM), <https://slate.com/news-and-politics/2019/09/warren-michael-brown-ferguson-misrepresenting-death.html> [<https://perma.cc/CD4U-WT5D>].

other services.²³³ Biden also affirmed that there was “absolutely” a problem of systemic racism in policing, a claim often repeated but inconsistent with available data.²³⁴ Other figures in the Democratic Party have gone farther, with prominent progressive Congresswoman Ilhan Omar calling police “beyond reform” and Congresswoman Ayanna Pressley comparing police to “slave patrols.”²³⁵ On a local level, some activists have inflamed anti-police hatred to win elections, such as Indira Sheu-maker, a twenty-seven-year-old Black Lives Matter activist who successfully ousted a moderate incumbent for a Des Moines City Council seat in 2021 on a defund the police platform.²³⁶

In academia, the anti-police narrative has become so entrenched that attempts to disprove the rhetoric with empirical evidence are met with harsh backlash. The authors of a study showing that White police officers were less likely to shoot Black suspects were forced to withdraw their study after intense criticism despite nothing being wrong with the data or methodology.²³⁷ As mentioned in the previous section, Roland Fryer, a leading Black economist at Harvard, published a study showing police are actually less likely to shoot Blacks than Whites in a given situation, winning him the ire of anti-police academics at Harvard who subsequently took the next opportunity to have him stripped of funding and suspended from teaching.²³⁸

In popular culture, anti-police rhetoric has become an accepted and normalized response to any police use of force. For example, after police fatally shot Ma’Khia Bryant, a Black teenager, in April 2021, LeBron

233. See Ronn Blitzer, *Biden Has Called to Redirect Police Funding, but Stopped Short of ‘Defund’ Embrace*, FOX NEWS (July 20, 2020, 2:38 PM), <https://www.foxnews.com/politics/biden-has-called-to-redirect-funding-from-police-but-stopped-short-of-defund-embrace> [<https://perma.cc/EZ5A-A6X9>].

234. Ryan Mills, *Where Have All the Officers Gone?*, NAT’L REV. (Sept. 16, 2021, 11:31 AM), <https://www.nationalreview.com/magazine/2021/10/04/where-have-all-the-officers-gone> [<https://perma.cc/HB74-7V6C>].

235. *Id.*

236. See Tyler Kingkade, *Black Lives Matter Activist Wins in Iowa on a ‘Defund the Police’ Platform*, NBC NEWS (Nov. 4, 2021, 10:12 AM), <https://www.nbcnews.com/news/us-news/black-lives-matter-activist-wins-iowa-defund-police-platform-rcna4460> [<https://perma.cc/BWV4-GCU4>].

237. *Retraction for Johnson et al., Officer Characteristics and Racial Disparities in Fatal Officer-Involved Shootings*, PNAS (July 10, 2020), <https://www.pnas.org/doi/10.1073/pnas.2014148117> [<https://perma.cc/2753-U6E7>].

238. The opportunity was provided by a Title IX investigation into sexual harassment allegations against Fryer. An investigation by Harvard recommended Fryer merely receive workplace conduct training. However, the committee that actually decided the punishment was staffed with academics who had been outspoken against Fryer’s work, and they chose to punish Fryer far more harshly, even attempting to have his tenure revoked. See Rob Montz, *Why Did Harvard University Go After One of Its Best Black Professors?*, QUILLETTE (Apr. 15, 2022), <https://web.archive.org/web/20220416125312/https://quillette.com/2022/04/15/why-did-harvard-university-go-after-one-of-its-best-black-professors> [<https://perma.cc/N7Z4-2Z8P>].

James tweeted an image of one of the responding police officers to his millions of followers with the caption “YOU’RE NEXT #ACCOUNTABILITY.”²³⁹ The tweet was widely seen as inviting violence against the officer for the shooting, which was later proven to be justified as Bryant was shot while charging another woman with a knife.²⁴⁰ The fact that James and millions of others would so quickly leap to anti-police conclusions about the case and feel comfortable sharing threats against police shows how pervasive anti-police rhetoric has become.

Despite the claims of many activists that they are merely speaking up for oppressed communities, anti-police rhetoric has not served to enhance racial justice, as the communities most severely impacted by the resulting legal cynicism and police pullbacks are minority communities. The result is more crime and more failures of justice disproportionately and negatively affecting African Americans.

ii. Physical Attacks on Police

Anti-police rhetoric has also inspired an increasing number of violent attacks on police, exacerbating the problems of police demoralization and voluntary pullback discussed later in this article. Some of those who have been led to believe police are a systemically racist killing machine are likely to retaliate with violence. For example, a 2016 protest against police in Dallas turned into a massacre when a Black Army veteran seeking “payback” for supposedly racist police killings murdered five White police officers and wounded seven others.²⁴¹ The intensification of anti-police rhetoric after the murder of George Floyd has predictably led to an increase in attacks on police. According to FBI data, from January 1, 2021 to September 30, 2021, fifty-nine police officers were killed in the line of duty.²⁴² That number represents a 51% increase in the number of police officers killed when compared to the same period

239. Paulina Dedaj, *LeBron James’ Sponsors, Lakers, NBA Silent in Wake of Controversial Tweet Targeting Ohio Cop*, FOX NEWS (Apr. 22, 2021, 11:27 AM), <https://www.foxnews.com/sports/lebron-james-sponsors-lakers-nba-silent-tweet-ohio-cop> [<https://perma.cc/G8C4-7CZM>].

240. *See id.*

241. Manny Fernandez et al., *Five Dallas Officers Were Killed as Payback, Police Chief Says*, N.Y. TIMES (July 8, 2016), <https://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html> [<https://perma.cc/L2WX-WKJL>].

242. Melinda Urbina & Katie Chaumont, *FBI Releases Statistics for Law Enforcement Officers Assaulted and Killed in the Line of Duty*, FED. BUREAU INVESTIGATION (Oct. 22, 2021), <https://www.fbi.gov/contact-us/field-offices/dallas/news/press-releases/fbi-releases-statistics-for-law-enforcement-officers-assaulted-and-killed-in-the-line-of-duty> [<https://perma.cc/U93B-Z3EB>].

in 2020.²⁴³ According to a report from the National Fraternal Order of Police (“NFOP”), 346 officers were shot while performing their duties in 2021, marking a 10% increase from 2020 and an 18% increase from 2019.²⁴⁴ This increase in attacks continued into 2022, with police shootings as of April 2022 jumping an additional 43% compared to the same period in 2021.²⁴⁵ While some of these increases are simply a result of increased violent crime, the NFOP report documented that 103 “ambush-style and other calculated attacks on law enforcement” occurred in 2021, up 115%—more than double—such targeted attacks in 2020.²⁴⁶ This increase in premeditated attacks on police strongly suggests that anti-police sentiment, and not just increased crime, is responsible for the increasingly dangerous conditions police face. Many experts have pointed specifically to anti-police rhetoric as a cause behind the increased attacks.²⁴⁷ For example, Maria “Maki” Haberfeld, a professor of police science at John Jay College of Criminal Justice in New York, concludes: “There was a history of anti-police sentiment over the years that was correlated to deaths in the line of duty but it was more local. Right now, we are seeing it all over the country, total disrespect of police officers.”²⁴⁸

Further evidence pointing to anti-police rhetoric as a major reason behind the attacks is that many of the attacks have occurred in the context of protests or riots against police.²⁴⁹ For example, in St. Louis in

243. *Id.*

244. See Patrick Yoes & Jim Pasco, *Monthly Update: Law Enforcement Officers Shot and Killed in the Line of Duty*, NAT’L FRATERNAL ORD. OF POLICE (Apr. 1, 2022), <https://national.fop.net/report-shot-killed-20220401> [<https://perma.cc/2SNP-GDK5>].

245. See *Team Biden Finally Admits There’s a War on Cops — Which It’s Inflaming*, *supra* note 165.

246. Harold Hutchison, *Ambush Attacks on Officers Up 115% from 2020*, DAILY CALLER (Jan. 4, 2022, 3:56 PM), <https://dailycaller.com/2022/01/04/national-fraternal-order-police-attacks> [<https://perma.cc/TDM9-ZRHX>].

247. See, e.g., Josh Dulaney, *Why Are Attacks on Cops in Oklahoma and the Nation on the Rise?; Says One Expert: ‘It’s Escalating to the Point of No Return.’*, DAILY OKLAHOMAN, Dec. 18, 2021, at A1; GianCarlo Canaparo & Amy Swearer, *Ambush Attacks on Police: Sadly Predictable Result of Lies, Overheated Rhetoric*, HERITAGE FOUND. (Sept. 29, 2020), <https://www.heritage.org/crime-and-justice/commentary/ambush-attacks-police-sadly-predictable-result-lies-overheated> [<https://perma.cc/ZN5A-MXKR>].

248. Dulaney, *supra* note 247.

249. See, e.g., Ken Ritter & Michelle L. Price, *Vegas Officer on Life Support After Attack During Protests*, SEATTLE TIMES (June 2, 2020, 6:24 PM), <https://www.seattletimes.com/nation-world/nation/vegas-officer-on-life-support-after-attack-during-protests> [<https://perma.cc/6H8W-B7VJ>]; James Gordon, *Man Is Charged with Attempted Murder for Throwing Molotov Cocktails at Police During Last Summer’s Portland Protests After He Left Evidence on Unexploded Bomb*, DAILY MAIL (Apr. 6, 2021, 3:32 PM), <https://www.dailymail.co.uk/news/article-9439465/Malik-Fard-Muhammed-Molotov-cocktail-thrower-lobbed-firebombs-directly-Portland-police-arrested.html> [<https://perma.cc/E36D-RWU5>].

2020, four officers standing in a police line were shot and injured after someone opened fire at a protest.²⁵⁰ In Louisville, two police officers were shot during protests in the aftermath of the announcement that only one of the three officers involved in Breonna Taylor's death would be prosecuted.²⁵¹ In Seattle, more than fifty police officers were injured in riots where protesters were calling for the abolition of the police.²⁵² In New York, more than 350 officers were injured in the two weeks of protests and rioting that followed George Floyd's murder, with rioters using weapons such as Molotov cocktails.²⁵³ In Los Angeles, two police officers were shot in their car in what appeared to be a targeted ambush, with protesters shouting anti-police slogans and blocking the entrance to the emergency room where the officers were taken.²⁵⁴

Policing has always been a dangerous job, fraught with risks and challenges, and too often thankless. But irresponsible anti-police rhetoric has only made it more dangerous and less appreciated, leading to police hiring shortages and voluntary pullback, as discussed later in this article.²⁵⁵

iii. Public Complaints About Anti-Police Rhetoric and Attacks on Police

There is a deafening silence amongst some parts of the public regarding anti-police rhetoric and violence. Even though killings of police officers were up over 50% in 2021 compared to 2020,²⁵⁶ these police killings received little to no media coverage, especially in comparison to the mass media coverage of the comparatively less frequent mistaken police killings of civilians. For example, during an eleven-month period

250. See Ritter & Price, *supra* note 249.

251. See Lucas Aulbach, *Arrest Citation Details Charges Against Larynzo Johnson, Suspect Accused in LMPD Shooting*, LOUISVILLE COURIER J. (Sept. 24, 2020, 6:07 PM), <https://www.courier-journal.com/story/news/local/breonna-taylor/2020/09/24/larynzo-johnson-charged-shooting-louisville-police-officers-protest/3514621001> [<https://perma.cc/4DXP-5NCX>].

252. See KIRO 7 News Staff, *47 Arrested, 59 Officers Injured in Seattle Protests That Turned Violent*, KIRO 7 NEWS (July 25, 2020, 3:19 PM), <https://www.kiro7.com/news/local/thousands-gather-capitol-hill-solidarity-with-demonstrations-portland/STVDEK5XUJHWLL2HQZT2NWDYVY> [<https://perma.cc/4YHS-9YNN>].

253. See Tom Winter & Jonathan Dienst, *Nearly 400 NYPD Cops Hurt During NYC's Two Weeks of Protest Over George Floyd's Death*, NBC N.Y. (June 11, 2020, 4:09 AM), <https://www.nbcnewyork.com/news/local/nearly-400-nypd-officers-hurt-during-nycs-two-weeks-of-protest-over-george-floyds-death/2455285> [<https://perma.cc/764S-QU5K>].

254. See *Los Angeles Police Officers Shot in 'Ambush'*, BBC NEWS (Sept. 13, 2020), <https://www.bbc.com/news/world-us-canada-54137838> [<https://perma.cc/KB49-C3EW>].

255. See *infra* Part III.C–D.

256. See Urbina & Chaumont, *supra* note 242.

in 2021, 9.6 police officers per 100,000 were feloniously killed.²⁵⁷ Over the same period, only four unarmed Black people (including violently resisting suspects) were killed by police officers, which represents less than 0.01 a person killed by police per 100,000 Black people.²⁵⁸ In 2021, a police officer was about 400 times more likely to be killed by a Black civilian than an unarmed Black civilian was to be killed by a police officer.²⁵⁹ If one simply noted media coverage, however, one would be justified in thinking it was the opposite.

Citizens who do speak out about anti-police ideologies are regularly silenced by more vocal anti-police protesters. One of many examples of media and public silence about police killings was the 2021 assassination of Baltimore police officer Keona Holley by a felon awaiting trial.²⁶⁰ A bystander recording the aftermath of the shooting urged his followers to not report the incident.²⁶¹ As he had hoped, major news outlets like *The New York Times* failed to run a single story on the shooting despite publishing several articles on shootings by police officers in the meantime.²⁶² Another example is found in the *Washington Post* practice of tracking every person shot and killed by police, including those that are justified, yet has no such interest in police officers killed by civilians.²⁶³

As police killings continue to rise, this lack of media attention is increasingly inexcusable and has been called out by some government officials. FBI Director Christopher Wray warned in 2022 that the problem of police killings “doesn’t get enough attention” given that a police officer is murdered nearly once every five days in the U.S.²⁶⁴

B. De-Policing: Defunding Police and Police Exclusion Zones

False anti-police narratives sometimes lead politicians and activists to pursue policies of de-policing such as cutting police budgets or creat-

257. See Heather Mac Donald, *Where Is the Outrage Over the Killing of Baltimore Police Officer Keona Holley?*, N.Y. POST (Dec. 29, 2021, 6:56 PM), <https://nypost.com/2021/12/29/where-is-the-outrage-over-the-killing-of-keona-holley> [<https://perma.cc/K3WC-SP55>].

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. See Aleksandra Bush & Dan Abrams, *Why No Nationwide Protests When Police Officers Are Killed?*, NEWSNATION (Jan. 24, 2022, 9:02 PM), <https://www.newsnationnow.com/danabramslive/why-no-nationwide-protests-when-police-officers-are-killed> [<https://perma.cc/7S2V-AY7S>].

264. *Team Biden Finally Admits There’s a War on Cops — Which It’s Inflaming*, *supra* note 165.

ing police exclusion zones, areas where police are not allowed to enter even when they receive 911 calls. Such forcible de-policing was a common response of politicians and activists after the murder of George Floyd. Such policies proved disastrous and have since largely been abandoned with an increasing bipartisan recognition that expanding policing rather than decreasing it is necessary to combat crime and secure justice.

Of course, cutting back on some aspects of policing is not always a mistake. It may make sense to recognize that “mission creep” has led many city administrators to dump an increasing number of non-criminal law enforcement responsibilities on police (such as the handling of mentally ill persons), responsibilities that are better served by social service or psychological counseling personnel.²⁶⁵ Police administrators would likely be pleased to have police relieved of non-criminal justice responsibilities.²⁶⁶ But initial police contact with the mentally ill, for example, is commonly because citizens have reported violence or threats, and it is police, not psychotherapists, who are immediately available and have the training and the means to deal with ongoing violence.

While the term “de-policing” has been used by some commentators to refer to a variety of police non-intervention forms, from voluntary pullback to budget cuts, this article uses the term to refer only to external pressures on the police that prevent them from doing their job effectively. De-policing is a cautionary tale of how false rhetoric and ideological decision-making can lead to catastrophic policies mostly hurting the very communities they were supposed to help.

1. Case Example: Police-Free Zone in Minneapolis

On May 25, 2020, George Floyd, a Black man, is murdered by Derek Chauvin, a White police officer, in Minneapolis. A video of Floyd’s slow suffocation under Chauvin’s knee is posted online and sparks massive protests across the country. Perhaps taking a page from the Occupy Wall Street playbook, protesters in Minneapolis quickly create a four-block-wide police-free zone around the site where Floyd died.²⁶⁷ Checkpoints are erected around “the Free State of George Floyd” to keep police out, and Minneapolis Mayor Jacob Frey orders po-

265. See Paul H. Robinson, *Why Police Should See the ‘Defund’ Movement as a Golden Opportunity*, NEWSWEEK (July 21, 2020, 8:00 AM), <https://www.newsweek.com/why-police-should-see-defund-movement-golden-opportunity-opinion-1519099> [<https://perma.cc/ATT9-EZA5>].

266. See *id.*

267. See Tim Arango & Matt Furber, *Where George Floyd Was Killed: Solemn by Day, Violent by Night*, N.Y. TIMES (Aug. 11, 2020), <https://www.nytimes.com/2020/07/29/us/george-floyd-memorial.html> [<https://perma.cc/4UNG-FNVG>].

lice to stand down, even when rioters spread looting and arson throughout the city and burn down a police precinct.²⁶⁸ As police stand down, the murder rate doubles while the clearance rate dives. Within the police-free zone, an expectant mother and her unborn child are gunned down, a teenager is murdered, and another young man is killed.²⁶⁹ Even with the rampant criminality, city officials intercede to prevent the police from removing the occupiers. Police are unable to answer 911 calls within the area. Crime victims must find their way out of the zone to get help. People who are unable to make their way out to the police do not receive help, including children who are threatened by domestic violence. Reported violent crime increases by 122% in the Minneapolis Ward containing the zone, compared to 34% citywide.²⁷⁰ Unreported increases in crime were likely much higher, as reporting crime was of little help when police are not allowed to enter the zone. On March 6, 2021, one of the zone's leaders is shot to death.²⁷¹ True to the zone's principles, occupiers lug the bodies outside the zone for police to pick up and refuse to allow them to enter to investigate.²⁷² After a disastrous thirteen

268. See Samir Ferdowsi, *Inside the Now 'Cop-Free' Zone Where George Floyd Was Killed*, VICE NEWS (Mar. 12, 2021, 2:16 PM), <https://www.vice.com/en/article/epdedn/inside-cop-free-autonomous-zone-minneapolis-george-floyd-photos> [<https://perma.cc/UET8-35L8>]; John Eligon & Tim Arango, *Ten Months After George Floyd's Death, Minneapolis Residents Are at War Over Policing*, N.Y. TIMES (Oct. 29, 2021), <https://www.nytimes.com/2021/03/28/us/minneapolis-george-floyd.html> [<https://perma.cc/A7J6-66VK>]; ASSOCIATED PRESS, *As Minneapolis Burns, Mayor Takes Heat for the Response*, MPR NEWS (May 30, 2020, 1:23 PM), <https://www.mprnews.org/story/2020/05/30/as-minneapolis-burns-mayor-takes-heat-for-the-response> [<https://perma.cc/BSB2-755G>].

269. See Arango & Furber, *supra* note 267; Tim Harlow, *Pregnant Woman Fatally Shot in South Minneapolis; Baby Delivered*, STAR TRIB. (July 6, 2020, 11:10 PM), <https://www.startribune.com/pregnant-woman-fatally-shot-in-south-minneapolis-baby-delivered/571641972/?refresh=true> [<https://perma.cc/6HCC-FNEU>]; Melissa Turtinen, *Teenager Killed Near George Floyd Memorial Is Id'd*, BRING ME THE NEWS (July 29, 2020), <https://bringmethenews.com/minnesota-news/teenager-killed-near-george-floyd-memorial-is-idd-minneapolis> [<https://perma.cc/7BP3-XE8S>]; Mohamed Ibrahim, *Officer's Trial Could Reopen Intersection Where Floyd Died*, ASSOCIATED PRESS (Mar. 6, 2021, 10:05 AM), <https://apnews.com/article/trials-coronavirus-pandemic-minneapolis-racial-injustice-derek-chauvin-43e0ec34e2e817a9f2b4d9ae09905390> [<https://perma.cc/MWE7-S6MP>].

270. See Megan Burks, *George Floyd's Square Offers an Alternative to Police – Though Not All Neighbors Want One*, MPR NEWS (Dec. 11, 2020, 7:37 PM), <https://www.mprnews.org/story/2020/12/11/george-floyds-square-offers-an-alternative-to-police-though-not-all-neighbors-want-one> [<https://perma.cc/B2GL-4AMU>].

271. See Imez Wright, *Fatally Shot in George Floyd Square, Was 'One of the Leaders of Change'*, CBS MINN. (Mar. 16, 2021, 6:59 PM), <https://www.cbsnews.com/minnesota/news/shantaello-christianson-charged-with-second-degree-murder> [<https://perma.cc/SBD8-AWS5>].

272. See Eligon & Arango, *supra* note 268.

months, in June 2021, Mayor Frey finally allows the zone cleared and re-policed.²⁷³

2. Case Example: De-Policing in Portland

In 2018, Portland, Oregon was the big city with the lowest murder count, with only twenty-seven murders.²⁷⁴ On May 29, 2020, over a thousand protesters take to the streets in Portland to protest against racism and police brutality in the wake of George Floyd's murder four days earlier. The protest turns into a five-hour riot with looters robbing malls and arsonists burning banks. The city removes twenty-seven million dollars from the police budget²⁷⁵ and at the same time enacts legislation limiting the powers of police to intervene to stop looting and violence.²⁷⁶

As the daily protests and nightly riots continue through July, they cause millions of dollars in damage.²⁷⁷ Portland quickly becomes "one of the most violent cities in America."²⁷⁸ By 2021, the homicide count is

273. See David Griswold, *Traffic Resumes at George Floyd Square*, KARE 11 (June 21, 2021, 2:07 AM), <https://www.kare11.com/article/news/local/george-floyd/traffic-resumes-at-george-floyd-square/89-8c7d1e73-b8a7-422d-b459-027659f36a9b> [<https://perma.cc/C74B-VFC5>].

274. See Nigel Jaquiss, *Portland on Pace to Record Fewest Number of Murders Among Nation's 30 Largest Cities*, WILLAMETTE WEEK (Dec. 22, 2018, 2:46 PM), <https://www.wweek.com/news/2018/12/22/portland-on-pace-to-record-fewest-number-of-murders-among-nations-30-largest-cities> [<https://perma.cc/4B6Z-BUD3>].

275. Jim Redden, *Council Cuts Portland Police by \$27 Million*, PORTLAND TRIB. (June 17, 2020), https://www.portlandtribune.com/news/council-cuts-portland-police-by-27-million/article_aa4ee782-0f85-5e14-b349-dae49ca6ac6e.html [<https://perma.cc/ML2A-T8PT>].

276. See Sara Cline, *'Lawless City?' Worry After Portland Police Don't Stop Chaos*, ASSOCIATED PRESS (Oct. 15, 2021), <https://apnews.com/article/fires-oregon-george-floyd-portland-1de227091103e86a5844c36fac0cfc7c> [<https://perma.cc/ENE3-EDRZ>].

Portland Police Bureau officials say that's because of legislation passed by Oregon lawmakers this year, which restricts the tools they can use to confront people vandalizing buildings and causing mayhem. "The reason that we did not intervene goes back to . . . House Bill 2928 and the restrictions placed on us in a crowd control environment," KOIN reports that Portland Police Lt. Jake Jensen said in a neighborhood meeting Thursday.

Id.

277. See Everton Bailey Jr., *\$23 Million Cited as Portland Protest Damages Was Mostly Tied to Coronavirus Closures*, OR. LIVE (July 10, 2020, 6:09 PM), <https://www.oregonlive.com/portland/2020/07/coronavirus-closures-inflated-23-million-reported-in-downtown-portland-protest-damages.html> [<https://perma.cc/BC5C-8RJ6>]. The constant riots and protests are devastating to city businesses and terrifying to residents. By the end of 2021, one report estimates that since 2019, Portland's metropolitan area has lost 10,000 tourism jobs, at least in part due to the seemingly constant protesting. See Taypayers Association of Oregon, *Portland Loses 10,000 Tourism Jobs Due to Riots, Homeless Camps*, OR. CATALYST (Nov. 16, 2021), <https://oregoncatalyst.com/56087-portland-loses-10000-tourism-jobs-due-riots-homeless-camps.html> [<https://perma.cc/YB5K-VM5Q>].

278. Jarrett Stepman, *Anarchy Reigns in Portland*, DAILY SIGNAL (Oct. 27, 2021), <https://www.heritage.org/progressivism/commentary/anarchy-reigns-portland> [<https://perma.cc/Y96T-KT5N>].

ninety-two—a 240% increase in three years—with an additional 900-plus non-fatal shootings.²⁷⁹ 2022 continued the upward trend to set a new record, with 101 homicides.²⁸⁰ As could be expected, these killings hit Portland’s small Black community the worst. Despite making up just less than 6% of Portland’s population, Black residents make up about half of all homicide victims, with the number of Black murder victims rising by 250% between 2019 and mid-2021.²⁸¹

Unrest in Portland leads to not only an increase in murders but also economic devastation. It becomes difficult to run a business. As shop owner Saadi Nikoo explains, “Our windows got broken seven times, and our merchandise was damaged and thrown on the street. We’ve been dealing with this, no protection. We’re on our own . . . It’s a dilemma, no one is doing anything.”²⁸² One progressive business owner, Loretta Guzman, tries to start a “Coffee with a Cop” event for citizens to bring their complaints directly to a police officer. Her shop is quickly attacked and vandalized.²⁸³

On a regular basis, large groups take over neighborhoods for street-racing events.²⁸⁴ When people are shot near these events, emergency crews are unable to respond due to the antagonistic crowds.²⁸⁵

279. See Maxine Bernstein, *Portland’s 101 Homicides in 2022 Set New Record: ‘At Some Point, We Have to Be Tired of Burying Our Children,’* OR. LIVE (Feb. 22, 2023, 9:27 AM), <https://www.oregonlive.com/crime/2023/01/portlands-101-homicides-in-2022-set-new-record-at-some-point-we-have-to-be-tired-of-burying-our-children.html> [https://perma.cc/BE3N-3XPB]; Adriana Diaz & David Averre, *‘Lawless’ Portland Sets New Homicide Record with Over 66 Killings This Year and More Than 1,000 Shootings: Helpless Cops Blame Defund the Police Movement for Mass Resignations,* DAILY MAIL (Oct. 19, 2021, 11:16 AM), <https://www.dailymail.co.uk/news/article-10106211/A-dangerous-time-Portland-Oregon-sees-record-homicides.html> [https://perma.cc/WHX5-JN5V].

280. See Bernstein, *supra* note 279.

281. Hannah E. Meyers, *Public Safety on the Ballot in Portland,* CITY J. (Oct. 28, 2022), <https://www.city-journal.org/public-safety-on-the-ballot-in-portland-oregon> [https://perma.cc/J3P7-RC6Q].

282. Liz Burch, *Business Owners Implore City Leaders to Do More to Fix ‘Lawless’ Portland After Protest,* KOIN 6 (July 6, 2022, 6:32 PM), <https://www.koin.com/news/portland/business-owners-implore-city-leaders-to-do-more-to-fix-lawless-portland-after-fourth-of-july-protest> [https://perma.cc/39S6-2LU7].

283. Laurel Duggan, *‘No Consequences:’ Residents Reveal How Portland Has Become Plagued by Crime, Filth and Fear,* DAILY CALLER (Oct. 18, 2022, 3:30 PM), <https://dailycaller.com/2022/10/18/portland-oregon-crime-filth-drugs-residents> [https://perma.cc/3VUS-LF39].

284. See Jared Cowley, *Multiple People Shot Near Illegal Street-Racing Takeovers in Portland,* KGW8 (Aug. 29, 2022, 4:52 PM), <https://www.kgw.com/article/news/crime/shootings-illegal-street-racing-portland-oregon/283-b0e27fee-0372-47f4-9a41-2a110c51b3fe> [https://perma.cc/MT5P-L9T4].

285. See *id.*; Alma McCarty, *Portland Man Left with Head and Face Injuries Amid Illegal Street Takeover on NE Sandy,* KGW8 (Sept. 3, 2022, 2:19 PM),

People far from the action of street-racing also have grown fearful. There is a “substantial increase in fear of violence and crime’ due to aggressive people lingering in the area. Police say open-air drug sales, threats, acts of violence and property crimes are all part of the problem.”²⁸⁶ Portland’s shattering decline from a leading example of lawfulness to a violent disaster zone to many seems a predictable result of the city’s ideologically motivated de-policing policies.

3. The Nature and Extent of the Problem

De-policing has most commonly been achieved through the creation of police exclusion zones and through defunding police departments to reduce the number of officers that are put on the street.

i. “No-Go Zones” and “Police-Free Zones”

The most drastic and visible examples of de-policing have been the temporary establishment of “police-free zones” or “no-go zones,” as in the Minneapolis example discussed above. Such “autonomous zones” or “police-free zones” were established in cities across the country, where the founders claimed citizens could create “self-governing utopia[s]” and inspire a “summer of love” within their communities.²⁸⁷ After all, if police are the problem, as some reasoned, no police might be the solution. Police were commonly ordered to stand down by local officials eager to appease protesters or to avoid confrontation with armed patrols of anti-police militants. This “summer of love” soon turned into a “summer of blood” as shootings surged in affected cities with the epicenters of violence often being the police-free zones. Such no-go zones also prevented proper police investigations from bringing many of the perpetrators to justice.

In Seattle, a six-block radius in the city named the Capitol Hill Autonomous Zone, or Chaz, soon turned deadly. In a ten-day period in June 2020, a total of four shootings left two people in the police-free zone dead.²⁸⁸ Victims as young as fourteen and sixteen years old were shot and injured, and sexual assault allegations and mental health problems

<https://www.kgw.com/article/news/local/portland-man-assaulted-illegal-street-racing-sandy-blvd/283-8043ebc1-2a39-415d-9a41-cfff5e6aa51> [https://perma.cc/R6CU-NNRX].

286. Zane Sparling, *Rising ‘Fear of Violence’ in Old Town, Pearl Spurs Patrols*, PORTLAND TRIB. (May 12, 2020), <https://pamplinmedia.com/pt/9-news/466367-377925-rising-fear-of-violence-in-old-town-pearl-spurs-patrols> [https://perma.cc/2DZF-857H].

287. Ashitha Nagesh, *This Police-Free Protest Zone Was Dismantled – But Was It the End?*, BBC NEWS (July 12, 2020), <https://www.bbc.com/news/world-us-canada-53218448> [https://perma.cc/P5XX-V42K].

288. *Id.*

swept through the area, quickly disheartening the zone's earliest supporters, including Seattle Mayor Jenny Durkan.²⁸⁹ A murder victim's mother filed a lawsuit against the city over her son's death in the autonomous zone, arguing that the medics and Seattle Fire Department were unable to safely enter the zone to save her son.²⁹⁰ The Seattle Fire Department claimed that the crime scene was too risky to "commit [their] crews to respond in without a police escort."²⁹¹ With police excluded from the zone, no medical response to the life-threatening violence was possible. The police were also unable to investigate the crime scene, as they were unable to "collect evidence, map out the location, take photos or videos, or talk" with witnesses.²⁹² Ms. Sinclair, the victim's mother, expressed her distress over the no-go zone: "I know my son needed the police at that time, and my son needed the paramedics. Why [would we] ever have an event where there was no police available? That's lawless."²⁹³ While the shooter of one of the victims has been apprehended and convicted recently of second-degree murder, no arrests have been made with respect to the shooting of the other victim and the murderer is still free.²⁹⁴ Having been "undermined by violence,"²⁹⁵ Chaz proved a fatal and dangerous failed experiment, and police were finally allowed to dismantle the zone on July 1, 2020.²⁹⁶ Seattle's experience was not unique. In addition to Minneapolis, discussed above, police-free zones sprang up in many major cities across the U.S., including Washington, D.C.; Portland; and Philadelphia.²⁹⁷

Without question, police exclusion zones are an inexcusable failure on the part of a city government that has a moral and legal obligation to provide public safety and justice. Such zones justifiably foster legal cynicism among residents who are literally abandoned by law enforcement on the orders of city officials. Fortunately, the disastrous examples pro-

289. *Id.*

290. See Jillian Kay Melchior, *A Black Life Lost in Seattle's No-Cop Zone*, WALL ST. J. (May 7, 2021, 2:34 PM), <https://www.wsj.com/articles/a-black-life-lost-in-seattles-no-cop-zone-11620412478> [<https://perma.cc/42ZE-Z4K4>].

291. *Id.*

292. *Id.*

293. *Id.*

294. See *id.*; Priscilla DeGregory, *Dad of Teen Fatally Shot in Seattle's 'Organized Protest' Zone Blames City for Encouraging 'Lawlessness': Suit*, N.Y. POST (June 8, 2023, 3:54 PM), <https://nypost.com/2023/06/08/dad-of-slain-seattle-chop-teen-files-wrongful-death-suit> [<https://perma.cc/JP27-GGR3>]; FOX 13 News Staff, *Man Sentenced to 14 Years in Prison for Deadly Shooting Inside Seattle's CHOP*, FOX 13 SEATTLE (June 30, 2023), <https://www.fox13seattle.com/news/man-sentenced-to-14-years-in-prison-for-deadly-shooting-inside-seattles-chop> [<https://perma.cc/3B28-CF7H>].

295. Nagesh, *supra* note 287.

296. See *id.*

297. *Id.*

vided by such zones in 2020 have shifted public and governmental opinion against their future creation. However, they remain an example of just how destructive false anti-police rhetoric and narratives can be when they play out unchecked in practical policy.

ii. Defunding the Police

Another predictably disastrous de-policing policy implemented in many jurisdictions after the murder of George Floyd was defunding police departments, often through diverting police department funds to social programs. In fact, twenty-four of the largest fifty cities in America either cut their police budgets for 2021 (compared to 2020) or refused to approve regular yearly increases (thus amounting to an effective cut given inflation and increased demands from increased crime).²⁹⁸ These include cities such as Philadelphia, New York, and Los Angeles. Such cuts had almost universally negative effects, especially in poor and minority neighborhoods. After Milwaukee reduced its law enforcement staff by 120 officers, murders increased by 98%.²⁹⁹ When the city of Portland reduced the Portland Police Bureau's budget, as discussed in the case example above, shootings more than doubled.³⁰⁰ Late in 2021, Portland City Council added \$5.2 million back into the police budget.³⁰¹

Inadequately funding police naturally leads to failures of justice through reducing the amount of time police can spend on each criminal investigation as well as reducing budgets for training and implementing best practices. While some activists support defunding patrol officers more than detectives, it is important to understand that defunding a police department will affect criminal investigations both directly through resources being cut from investigative budgets as well as indirectly through the increased crime overwhelming even uncut investigative capabilities. Ironically, such budget cuts likely make it even harder to hold police accountable for unjustified shootings or killings as those too are

298. See Fola Akinnibi et al., *Cities Say They Want to Defund the Police. Their Budgets Say Otherwise.*, BLOOMBERG (Jan. 12, 2021), <https://www.bloomberg.com/graphics/2021-city-budget-police-funding> [<https://perma.cc/L85R-4G57>].

299. Jason Johnson, *Why Violent Crime Surged After Police Across America Retreated*, USA TODAY (Apr. 9, 2021, 6:00 AM), <https://www.usatoday.com/story/opinion/policing/2021/04/09/violent-crime-surged-across-america-after-police-retreated-column/7137565002> [<https://perma.cc/9Y83-STSK>].

300. See *id.*

301. Adam Manno, *Portland REFUNDS the Police: Department Gets an Extra \$5.2M as City Faces Greatest Cop Shortage in Decades and Record Number of Homicides After Slashing \$15M from the Budget Over Defund the Police Movement*, DAILY MAIL (May 1, 2022, 10:52 AM), <https://www.dailymail.co.uk/news/article-10214459/Portland-US-cities-looking-refund-police.html> [<https://perma.cc/Q9NE-GB7H>].

expensive criminal investigations that might be sacrificed due to a lack of resources.

And, as will be discussed in more detail in a later section concerning police hiring difficulties, defunding inevitably produces not only fewer officers but also substandard officers. That is, as the attractiveness of the job diminishes, be it from lower salaries, stress from understaffing, or anti-police rhetoric, fewer people who would make good police officers are attracted to the job and departments are increasingly compelled to hire people who they normally would have rejected as unsuitable. Of course, this simply condemns the community to a downward spiral of an increasing number of unsuitable police recruits producing an increasing number of instances of improper conduct further sparking anti-police sentiment. (Note, for example, that the five Black officers who recently beat to death a Black motorist in Memphis were all hired in the past three to six years.)³⁰²

Fortunately, as with the creation of police-free zones, aggressively defunding police departments has largely fallen out of favor after its disastrous results materialized,³⁰³ although it remains common that police departments continue to be woefully understaffed, as discussed in the subsequent section.³⁰⁴

4. Changing Views on De-Policing

The effects of de-policing seem obvious and predictable to many people, as a matter of common sense. Reducing the presence of law enforcement does not make for a safer community, a fact that is readily apparent to residents of crime-ravaged neighborhoods but apparently less clear to those living in gated communities. Studies show that the most serious offenses (“index crimes”) are reduced with each new officer added to a police force.³⁰⁵ Consequently, larger police forces deter potential criminals, leading to fewer index crimes even without necessarily arresting and incapacitating additional offenders.³⁰⁶

302. Marlene Lenthang et al., *What We Know About the 5 Memphis Police Officers Charged with Beating Tyre Nichols to Death*, NBC NEWS (Jan. 27, 2023, 6:28 PM), <https://www.nbcnews.com/news/us-news/what-we-know-about-memphis-police-officers-tyre-nichols-death-rcna67861> [<https://perma.cc/MWX9-BEYM>].

303. See Steve Friess, *‘Defund the Police’ Is Dead but Other Reform Efforts Thrive in U.S. Cities*, NEWSWEEK (May 24, 2022, 5:30 AM), <https://www.newsweek.com/2022/06/24/defund-police-dead-other-reform-efforts-thrive-us-cities-1709393.html> [<https://perma.cc/TPM3-MER9>].

304. See *infra* Part III.C.

305. Aaron Chalfin et al., *Police Force Size and Civilian Race* 42 (Nat’l Bureau of Econ. Rsch., Working Paper No. 28202, 2020).

306. *Id.* at 12.

The obvious need for an effective police force had been publicly pressed by many in the communities that would be directly affected by de-policing. For example, Sybrina Fulton, the mother of Trayvon Martin, a Black teenager who was killed by a neighborhood watchman in 2012, has spoken about her disapproval of defunding police departments and instead advocates for better police standards and training.³⁰⁷ Reverend Harriet Walden of Seattle said that she “supported reforms that made it easier to fire officers who violate policies or brutalize people, but that she didn’t want fewer police overall.”³⁰⁸ Others claim that involving police in community-wide development is essential and that excluding police from responses to community violence is “unfair and unrealistic.”³⁰⁹

The general public clearly does not support defunding police. A poll published in 2021 found that only 18% of Americans support the “defund the police” movement (still a shockingly high number given its obvious disastrous consequences), and 58% said that they affirmatively oppose the movement.³¹⁰ Sixty-seven percent of White Americans actively oppose the movement and 84% of Republicans oppose it.³¹¹ But while people’s views are influenced to some extent by political affiliation, only 28% of Black Americans and 34% of Democrats support the movement, proving that along racial and party lines, support for defunding the police is a decidedly minority view.³¹² Unsurprisingly given that minorities bear the cost of defunding police, surveys show rich White Democrats support defunding police more than less privileged Blacks or Hispanics.³¹³ Defunding police may seem morally virtuous to those who

307. Sam Levin, *These US Cities Defunded Police: ‘We’re Transferring Money to the Community,’* GUARDIAN (Mar. 11, 2021, 11:03 AM), <https://www.theguardian.com/us-news/2021/mar/07/us-cities-defund-police-transferring-money-community> [<https://perma.cc/3Z7X-TQDC>].

308. *Id.*

309. Abené Clayton, *Distrust of Police Is Major Driver of US Gun Violence, Report Warns,* GUARDIAN (Jan. 21, 2020, 6:00 PM), <https://www.theguardian.com/us-news/2020/jan/21/police-gun-violence-trust-report> [<https://perma.cc/5542-NRMV>].

310. Sarah Elbeshbishi & Mabinty Quarshie, *Fewer Than 1 in 5 Support ‘Defund the Police’ Movement, USA Today/Ipsos Poll Finds,* USA TODAY (Mar. 8, 2021, 6:10 PM), <https://www.usatoday.com/story/news/politics/2021/03/07/usa-today-ipsos-poll-just-18-support-defund-police-movement/4599232001> [<https://perma.cc/V4GN-8AMW>].

311. *Id.*

312. *See id.*

313. *See* Zach Goldberg, *Is Defunding the Police a “Luxury Belief”? Analyzing White vs. Nonwhite Democrats’ Attitudes on Depolicing,* MANHATTAN INST. (Sept. 8, 2022), https://www.manhattan-institute.org/is-defunding-the-police-a-luxury-belief?utm_source=mailchimp [<https://perma.cc/DBM7-J6U8>].

live in gated communities, but it is disastrous to communities where safety and justice is already tenuous at best.³¹⁴

In November 2021, the majority of Minneapolis voters demonstrated their opposition to the defund movement by rejecting a ballot initiative seeking to replace the police department with a “Department of Public Safety.”³¹⁵ Many are now realizing in the midst of soaring violent crime that strong police forces are a necessity. For example, a poll in July 2020 found that 63% of Portland residents supported cutting funding to the police department.³¹⁶ Less than a year later, in April 2021, a poll conducted by the same company found that close to half of Portland residents wanted to *increase* police presence.³¹⁷ Similarly, a poll conducted in June 2020 found that only 38% of Democrats have at least “a little”³¹⁸ trust in law enforcement; by March 2021, that number was up to 56%, as many realized police are necessary to fight crime and deliver justice.³¹⁹ While African Americans are more mistrusting of police than White Americans, “one primary grievance African Americans have with the criminal justice system is that [B]lack neighborhoods are paradoxically underpoliced.”³²⁰ The lack of effective police intervention in poor and minority neighborhoods contributes to much of the legal cynicism and citizen non-cooperation discussed in the previous sections. In a national study, increased policing finds wide support among Black and Latino communities, with 60% of African Americans, 65% of Latinos, as well as 74% of Whites supporting a proposal to increase police presence in high-crime areas.³²¹

While a broad consensus has formed against de-policing policies such as defunding or creating exclusion zones, many political and social leaders refused to stand up to the de-policing movement at its beginning and even encouraged de-policing before its disastrous effects became so

314. *See id.*

315. Heather Mac Donald, *Minneapolis Voters Saw Life Without Police – and Soundly Rejected a Defund Ballot Initiative*, N.Y. POST (Nov. 3, 2021, 8:48 PM), <https://nypost.com/2021/11/03/minneapolis-voters-soundly-rejected-a-defund-ballot-initiative> [https://perma.cc/6TG5-3N6V].

316. Ailan Evans, *Rising Crime Forces Liberals to Reckon with Their Stance on the Police*, DAILY CALLER (June 25, 2021, 8:30 PM), <https://dailycaller.com/2021/06/25/defund-the-police-george-floyd-minneapolis-police-department-washington-square-park> [https://perma.cc/NR7E-TY3A].

317. *Id.*

318. *Id.*

319. *See id.*

320. Matthew Yglesias, *The Case for Hiring More Police Officers*, VOX (Feb. 13, 2019, 9:00 AM), <https://www.vox.com/policy-and-politics/2019/2/13/18193661/hire-police-officers-crime-criminal-justice-reform-booker-harris> [https://perma.cc/HRG8-3DR8].

321. *Id.*

undeniable. While progressives such as the “squad” in Congress quickly and loudly aligned themselves with defunding, many top Democratic officials and Congress members similarly supported efforts to reduce police funding in favor of funding other community programs.³²² Prominent Democratic mayors such as Los Angeles’s Eric Garcetti and New York City’s Bill de Blasio proposed slashing their police department budgets to political applause from much of their party’s leadership.³²³

Once the effects of defunding police became undeniable, however, Democratic leaders largely dropped the issue and reversed course. While she once called for a decrease in the police budget after the murder of George Floyd, San Francisco Mayor London Breed has since reversed her position. In December 2021, she called for an end to the “reign of criminals who are destroying [the] city” by arguing the city should be “more aggressive with law enforcement” and by increasing funding for the city’s police.³²⁴

Mayors around the country have made similar policy reversals due to increased crime. In 2021, Chicago Mayor Lori Lightfoot pledged to increase police funding to “recruit the next generation of police officers” and respond to the city’s 60% rise in murders since 2019.³²⁵ Lightfoot’s previous budget proposal ordered the Chicago Police Department to leave vacant positions unfilled and reduced the department’s budget by millions of dollars.³²⁶ Similarly, Mayor Ted Wheeler of Portland addressed the need to hire additional police officers to combat rising crime, reversing his attitudes toward the department just one year prior.³²⁷ In Seattle, Mayor Jenny Durkan requested that the city council unfreeze \$7.5 million that had previously been unavailable to the police department.³²⁸ While such reversals are desirable, the initial defunding policies were so obviously wrong that it is hard to avoid the conclusion that sup-

322. See Reid J. Epstein, *These Top Democrats Go Further Than Biden on Diverting Police Funds*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/06/26/us/politics/defund-police-protests-democrats.html> [<https://perma.cc/W6L3-LKRR>].

323. See Michael Balsamo, *When Protesters Cry ‘Defund the Police,’ What Does it Mean?*, NBC L.A. (June 7, 2020, 1:38 PM), <https://www.nbclosangeles.com/news/when-protesters-cry-defund-the-police-what-does-it-mean/2376366> [<https://perma.cc/S5JD-774A>].

324. The Wall Street Journal Editorial Board, *Refunding the San Francisco Police*, WALL ST. J. (Dec. 16, 2021, 6:48 PM), <https://www.wsj.com/articles/refunding-the-san-francisco-police-london-breed-crime-11639696468> [<https://perma.cc/D685-9V26>].

325. Sarah Westwood, *Refund the Police: Cities Backtrack on 2020 Clarion Call Amid Crime Spikes*, WASH. EXAM’R (Aug. 24, 2021), https://gazette.com/refund-the-police-cities-backtrack-on-2020-clarion-call-amid-crime-spikes/article_2787b0f3-6ccf-5d4d-9ab9-710426b8d45f.html [<https://perma.cc/9RUN-CYTX>].

326. *Id.*

327. *Id.*

328. *Id.*

port for them was guided primarily by expedient political interests and blind ideology rather than a genuine belief that such policies would make the lives of their citizens better.

Opposition to defunding the police is now a bipartisan position. Democratic House Speaker Nancy Pelosi explicitly stated, in February 2022, that the movement to defund the police is “not the position of the Democratic Party”³²⁹ President Biden worked to squash the “defund the police” slogan at his March 2022 State of the Union address by saying to bipartisan applause: “We should all agree the answer is not to defund the police; it’s to fund the police”³³⁰

The tragic lesson of the de-policing policies pushed in 2020 is that ideology and political pandering often prevent politicians from either recognizing or speaking the obvious truth on issues as simple as valuing enforcing the law and doing justice. Neither leaders nor commentators who value human life should have seriously considered supporting or even tolerating proposals to defund police or to create police-free zones, but when it seemed politically expedient, they did so. The price of that political expediency was an enormous cost in human lives and suffering.

C. Police Demoralization: Early Retirements, Increased Hiring Difficulties, Decreased Hiring Standards, and Understaffing

Anti-police rhetoric, violent attacks, and anti-police policies have taken a significant toll on America’s police forces. The resulting widespread demoralization has made it difficult to staff police departments and motivated much of the voluntary pullback from proactive policing (discussed in the next section on the “Ferguson Effect”). Police officers are already under stress from having to engage in daily confrontations with often violent suspects. But normally, police receive support for keeping the public safe and serving justice. When that support turns to widespread criticism and demonization, as well as accusations of racism and murder, police are predictably disheartened. Such demoralization has resulted in almost 90% of America’s police departments facing a wave of retirements and difficulties in officer hiring, which results in understaffing and forces departments to lower their hiring standards. Of course, this only makes the job less appealing, triggering a downward

329. David Cohen, *‘Defund the Police’ Is Not the Policy of the Democratic Party, Pelosi Says*, POLITICO (Feb. 13, 2022, 10:21 AM), <https://www.politico.com/news/2022/02/13/pelosi-defund-police-democrats-00008449> [<https://perma.cc/M6HQ-4U7E>].

330. Aaron Blake, *Biden Tries to Nix ‘Defund the Police,’ Once and for All*, WASH. POST (Mar. 2, 2022, 11:39 AM), <https://www.washingtonpost.com/politics/2022/03/02/biden-nix-defund-police/> [<https://perma.cc/4N6S-G4FK>].

spiral of more stress and demoralization, resulting in more crime and less justice.³³¹

1. Case Example: Minneapolis Police Shortages and Demoralization

In 2011, Minneapolis has 860 uniformed police and thirty-two murders.³³² In the next decade, the population of the city increases by approximately 50,000 (about 15%), but the city government keeps the size of the police force unchanged, partially as a result of an anti-police ideology that views police as the enemy.³³³

By 2014, the city knows that it has a desperate problem of police understaffing. Officers are furious at city leadership for “dangerously” low staffing levels.³³⁴ Many officers see the staffing levels as “well beyond dangerous” and “near catastrophic.”³³⁵ One officer writes: “We’re holding the street together with spit and duct tape.”³³⁶ The city government ignores the warnings and lets staffing levels continue to decline.

The shortage of officers has become so acute by 2019 that the city is unable to respond to 6,776 Priority One 911 calls,³³⁷ which typically include reports of shootings, stabbings, and sexual assaults. Some Priority Zero calls, such as “baby not breathing,” also get a delayed response.

At the start of 2020, the Minneapolis police force is staffed with approximately 825 police officers.³³⁸ With a city government clearly

331. See Scott McClallen, *Judge Rules Minneapolis Residents Have Standing to Sue Over Police Reduction*, CTR. SQUARE (Nov. 24, 2020), https://www.thecentersquare.com/minnesota/judge-rules-minneapolis-residents-have-standing-to-sue-over-police-reduction/article_efb8fc60-2e61-11eb-b580-eb7eb7185558.html [<https://perma.cc/T2A3-XM2U>]; Charles Fain Lehman, *America’s Shrinking Police Forces Could Spell Trouble for Our Safety*, N.Y. POST (Feb. 9, 2020), <https://www.manhattan-institute.org/americas-shrinking-police-forces-could-spell-trouble-for-our-safety> [<https://perma.cc/2RFU-DDBQ>].

332. See Curtis Gilbert, *Documents Show Rift Between Minneapolis Police, Top Brass*, MPR NEWS (Feb. 25, 2015, 4:00 AM), <https://www.mprnews.org/story/2015/02/25/minneapolis-police-survey> [<https://perma.cc/HPV9-F8ZV>]; FED. BUREAU INVESTIGATION, *Crime in the United States 2011*, https://ucr.fbi.gov/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table8statecuts/table_8_offenses_known_to_law_enforcement_minnesota_by_city_2011.xls [<https://perma.cc/HLF9-PDPC>] (last visited Aug. 12, 2023).

333. See McClallen, *supra* note 331; *QuickFacts: Minneapolis City, Minnesota*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/minneapoliscityminnesota/POP010220#POP010220> [<https://perma.cc/6VHP-72G3>] (last visited Aug. 12, 2023); *Minneapolis Police Officer Shortage Reaching Crisis Level*, FOX NEWS (Aug. 28, 2019), <https://www.foxnews.com/video/6078470807001> [<https://perma.cc/Q9T7-KTS4>].

334. Gilbert, *supra* note 332.

335. *Id.*

336. *Id.*

337. *Minneapolis Police Officer Shortage Reaching Crisis Level*, *supra* note 333.

338. McClallen, *supra* note 331.

hostile to them, police are exhausted and demoralized well before the 2020 murder of George Floyd by a Minneapolis police officer. Derek Chauvin, the officer who killed Floyd, has a record as a problem officer with at least twenty-two complaints or internal investigations against him in his nineteen years of service, including excessive force complaints, with one resulting in disciplinary action.³³⁹ But in a department desperate for officers, it is no surprise that such an officer is not dismissed. Keeping only fully reliable officers is a luxury that the understaffed department cannot afford.

During the violent protests that follow Floyd's murder, city officials order police to abandon much of the city, including a police precinct station, to the rioters. The de-policing orders have a serious effect in further degrading police morale. As one officer explains, "I got a pit in my stomach at that point . . . I had zero confidence in our upper echelon of leadership."³⁴⁰

The rhetorical attacks on police continue, and two weeks after the Floyd killing, nine of the thirteen City Council members stand on stage before a large crowd. Arrayed at their feet in large block letters is the sign: "defund police."³⁴¹ There are calls for reducing the funding of the police department by \$45 million.³⁴² Some members of the Council seek to shut down the department entirely.³⁴³ A group of residents sue the city for illegally diverting funds from the police and failing to meet the police staffing level required by the charter.³⁴⁴

In the following two months, 200 Minneapolis officers (almost a quarter of the force) file the paperwork to leave the force, some retiring and some simply quitting.³⁴⁵ In exit interviews, "an overwhelming num-

339. Jamiles Lartey & Abbie VanSickle, *'That Could Have Been Me': The People Derek Chauvin Choked Before George Floyd*, MPR NEWS (Feb. 5, 2021, 1:39 PM), <https://www.mprnews.org/story/2021/02/05/that-could-have-been-me-the-people-derek-chauvin-choked-before-george-floyd> [<https://perma.cc/6DLE-ZHXT>].

340. *Former Minneapolis Police Officer Talks About His Decision to Leave: 'I Did It Out of Principle'*, CBS MINN. (May 16, 2021, 6:25 AM), <https://minnesota.cbslocal.com/2021/05/16/former-minneapolis-police-officer-talks-about-his-decision-to-leave> [<https://perma.cc/KK9Y-PB7G>].

341. Matt Sepic, *A Year After George Floyd's Death, Plans for Minneapolis Police Reform Have Softened*, NPR (May 25, 2021, 5:20 PM), <https://www.npr.org/2021/05/25/1000298293/a-year-after-george-floyds-death-plans-for-minneapolis-police-reform-have-soften> [<https://perma.cc/YR76-9JK9>].

342. Deena Winter, *Minneapolis Council Member Says He 'Got Got' at 'Defund Police' Rally*, MINN. REFORMER (Oct. 8, 2021, 3:16 PM), <https://minnesotareformer.com/2021/10/08/minneapolis-council-member-says-he-got-got-at-defund-police-rally> [<https://perma.cc/2L56-LEJU>].

343. See Davis, *supra* note 228; McClallen, *supra* note 331.

344. McClallen, *supra* note 331.

345. See *id.*; Davis, *supra* note 228.

ber [of departing officers] cited a lack of support, and felt left to fend for themselves during the riots.³⁴⁶ As one officer explains, “All of a sudden it was, ‘The Minneapolis Police Department is rotten to the root. Everybody with that uniform is a killer and a racist’”³⁴⁷ Academic research finds that across the board “key factors driving police turnover include loss of trust and confidence in leadership . . . and sustained negative attention”³⁴⁸

As discussed previously, the lack of police takes a devastating toll as crime surges. In 2021, the city sees more than 600 people treated for gunshot wounds,³⁴⁹ and ninety-six murders, sixty-four more than in 2011.³⁵⁰ Most victims are Black.³⁵¹ In addition to the shootings, in 2021 there are 9,457 violent crimes,³⁵² as compared to 3,722 a decade earlier.³⁵³ Some rich communities in Minneapolis take to hiring private security to protect themselves, but poor communities cannot do the same as safety and justice become a luxury good.³⁵⁴

As the City Council debates hiring more officers, crime continues to surge and many of the residents in the most hard-hit areas see little to debate. George Saad, a Minneapolis resident, explains:

Since the unjustified and unfortunate death of George Floyd, the city council has engaged in rhetoric that has emboldened criminals, the proof of which is in the unprecedented spike in crime You guys have had years to address any culture problems within the Minneapolis Police Department You have failed to do so. Instead, you embark on a campaign against your own police department, fighting and demonizing an entire internal city organization instead of making it better.³⁵⁵

346. *Former Minneapolis Police Officer Talks About His Decision to Leave: ‘I Did It Out of Principle,’* *supra* note 340.

347. *Id.*

348. Scott M. Mourtgos et al., *Elevated Police Turnover Following the Summer of George Floyd Protests: A Synthetic Control Study*, 21 CRIMINOLOGY & PUB. POL’Y 9, 12 (2022).

349. Andy Mannix & Jeff Hargarten, *Minneapolis Closes in on Homicide Milestone at End of Violent Year*, STAR TRIB. (Dec. 30, 2021, 5:39 PM), <https://www.startribune.com/a-most-violent-year-in-minneapolis/600131444> [<https://perma.cc/V34L-EPK4>].

350. *See id.*; *Crime in the United States 2011*, *supra* note 332.

351. *See* Mannix & Hargarten, *supra* note 349.

352. *Most Dangerous Cities in Minnesota*, POPULATIONU.COM, <https://www.populationu.com/gen/most-dangerous-cities-minnesota> [<https://perma.cc/5KMG-WBQ5>] (last visited Aug. 12, 2023). “Violent crime” comprises rape, robbery, aggravated assault, and murder. *Id.*

353. *Crime in the United States 2011*, *supra* note 332.

354. *See* Emma Freire, *Police by Another Name*, CITY J. (Sept. 16, 2022), <https://www.city-journal.org/in-minneapolis-private-security-replaces-police> [<https://perma.cc/94W3-7S8Y>].

355. Bill Otis, *Defunding the Police, Minneapolis Edition*, NEWSTEX BLOGS: CRIME & CONSEQUENCES (Nov. 16, 2020, 9:25 PM), <https://perma.cc/84J9-H4D2>.

On May 15, 2021, nine-year-old Trinity Ottoson-Smith is jumping on the trampoline in her grandfather's yard when she is shot in the head and killed instantly by a stray bullet.³⁵⁶ The grieving grandfather thinks about the next victim: "We need more police officers. There is no doubt in my mind. I'm praying for all of these families [who had family members killed] but, you know what, I'm praying for the next people too."³⁵⁷

By this time, the need for more police is so obvious that the City Council drops its opposition to hiring. But hiring and even retaining current officers is now difficult. Before the hostilities against police, the city had their pick of seventy applications for every opening. The ability to hire only officers with a suitable background and temperament typically requires just such a large selection pool. Amid the hostile climate, however, one nearby county averages 3.8 applicants per position.³⁵⁸ That lack of choice does not bode well for a future force of suitable officers.

The officer quoted above takes his family and moves to a police force in Iowa: "Down here they appreciate you, you get a lot of support from the community . . ."³⁵⁹ As a former New York City Police Commissioner explains, "Nobody wants to work in a place where they're not wanted . . ."³⁶⁰

2. The Nature and Extent of the Problem

Anti-police rhetoric, attacks, and policies have had a severe impact on the morale of America's police forces. The result is significant staffing shortages across the country as police departments, especially in cities, are hit by a wave of early retirements and difficulty in finding suitable new officers to fill increasingly thankless and criticized jobs.

Police demoralization's most obvious effect is creating staff shortages. The reduction in the number of available officers intensifies the lack of proactive policing, makes it more likely low-level offenses will be ignored, and lengthens police response times even to serious crimes while hampering investigations that take time and personnel resources.

356. Davis, *supra* note 228.

357. *Id.*

358. See Brady Slater, *After George Floyd: Northland Colleges, Police Recruiting Suffer*, DULUTH NEWS TRIB. (Jan. 21, 2022, 12:00 PM), <https://www.duluthnews Tribune.com/news/local/after-george-floyd-northland-colleges-police-recruiting-suffer> [<https://perma.cc/B9C9-NLST>].

359. *Former Minneapolis Police Officer Talks About His Decision to Leave: 'I Did It Out of Principle,' supra* note 340.

360. Elissa Salamy, 'Crime Will Go Up' if Minneapolis Votes to Replace Police Dept, Says Ex-NYC Police Commish, ABC 4 NEWS (Nov. 2, 2021, 8:03 AM), <https://abcnews4.com/news/nation-world/crime-will-go-up-if-minneapolis-votes-to-replace-police-dept-says-ex-nyc-police-commish> [<https://perma.cc/GFS6-CXN8>].

One recent analysis summarized the “spiraling decline” that such short-ages create:

This all has many law-enforcement leaders and academics concerned that the profession could be pushed into a spiraling decline: As more police officers flee their departments and crime increases, the officers who remain face burnout, have less time to engage with the community, and are more prone to making mistakes, leaving department leaders desperate to fill positions. Some may relax hiring standards and bring in more unqualified cops who get into trouble, creating the next viral encounter, ratcheting up the anti-police climate, leading to more laws that make policing harder, prompting more officers to flee the profession, and on and on.³⁶¹

These effects of demoralization occurred most strikingly in the wake of protests against police after George Floyd’s murder in May 2020. Between April 2020 and April 2021, police retirements nationwide increased by 45% and resignations increased by 18% compared to the previous year.³⁶² In New York City, where politicians like councilwoman Kristin Jordan have referred to the police as the “thugs in blue” and a “racist, rogue military force,”³⁶³ police retirements nearly doubled in the first ten months of 2020, compared to the same period in 2019.³⁶⁴ Many police departments have experienced even more dramatic effects. For example, the Portland Police Bureau “lost more officers to retirement in August 2020 alone than in all of 2019” and an Illinois department received the “lowest turnout in [forty-two] years” for police exam applications.³⁶⁵

Meanwhile, “the Asheville, [North Carolina], police have stopped responding to low-level crimes because they have lost about a third of their staff to resignations and retirement.”³⁶⁶ It is often hard to replace these retiring officers. The Nashville Police Department, for example, which received 4,700 applications in 2010, received only 1,900 in

361. Mills, *supra* note 234.

362. Heather Mac Donald, *Biden Wants to Boost Policing — After Spreading Toxic Lies That Tore It Down*, N.Y. POST (July 13, 2021, 6:08 PM), <https://nypost.com/2021/07/13/biden-wants-to-boost-policing-after-spreading-toxic-lies-that-tore-it-down> [<https://perma.cc/56C2-U7RB>].

363. Robert Woodson, *Hold Anti-Police Activists Accountable for the Harm They’ve Done to Black America*, WASH. EXAM’R (Feb. 23, 2022, 10:12 AM), <https://www.washingtonexaminer.com/restoring-america/fairness-justice/hold-anti-police-activists-accountable-for-the-harm-theyve-done-to-black-america> [<https://perma.cc/5Q3R-YEED>].

364. Brianna Lyman, *NYPD Sees Surge in Retirement Amid Rise in Violent Crime, Anti-Police Rhetoric*, DAILY CALLER (Oct. 9, 2020, 9:47 PM), <https://dailycaller.com/2020/10/09/new-york-city-police-department-nypd-retirement-defund-police-anti-police> [<https://perma.cc/R572-ADWG>].

365. Mac Donald, *supra* note 362.

366. *Id.*

2019.³⁶⁷ Similarly, the Seattle Police Department experienced a 40% to 50% decrease in applications, and in other counties, applications have dropped by as much as 70%.³⁶⁸ Eighty-six percent of police chiefs around the country have reported officer shortages, most of which have worsened in recent years.³⁶⁹ Fewer applicants mean fewer choices, which is likely to translate into poorer quality officers.

Even before the increased hiring difficulties of the last few years, a report by the Bureau of Justice Statistics found that the number of police officers nationally was not keeping pace with the growing U.S. population. While the number of sworn officers increased by about 52,000 from 1997 until 2016, the rate of officers per 1,000 citizens decreased by 11%.³⁷⁰ And between 2008 and 2019, per-capita police officer rates have decreased by 8%, and the rates are likely to continue to drop.³⁷¹ Since 2013, the number of sworn police officers around the country has actually *decreased* by about 23,000.³⁷²

The lack of police due to high retirement rates and low application numbers has led to a diminished ability to respond to crime. Studies have consistently shown that having more police officers decreases crime and increases clearance rates.³⁷³ For example, the Niskanen Center conducted a retrospective study of 242 large cities over nearly four decades, finding that for every ten to seventeen officers added to a community,³⁷⁴ one additional homicide and about twenty serious crimes were avoided, and that “the decline in homicide is twice as large for Black victims in per capita terms” than for White victims.³⁷⁵ That means cities with police shortages of more than 100 officers in recent years have each likely suffered at least an additional six to nine homicides each year that would not otherwise have occurred. Across the country, it is likely that hundreds of victims are dying each year as a result of police shortages. And, of course, the staff shortages also impair the ability of police to solve crimes and bring offenders to justice.

367. Lehman, *supra* note 331.

368. *Id.*

369. *Id.*

370. See BUREAU OF JUST. STATS., U.S. DEP’T OF JUST., NCJ 251762, FULL-TIME EMPLOYEES IN LAW ENFORCEMENT AGENCIES, 1997-2016 (Aug. 2018), <https://bjs.ojp.gov/content/pub/pdf/ftelea9716.pdf> [<https://perma.cc/J6BC-EXHG>].

371. See Lehman, *supra* note 331.

372. Martin Kaste & Lori Mack, *America’s Growing Cop Shortage*, NPR (Dec. 12, 2018, 8:33 AM), <https://www.npr.org/2018/12/12/675359781/americas-growing-cop-shortage> [<https://perma.cc/26JB-TA3A>].

373. See Lehman, *supra* note 331; Mourtgos et al., *supra* note 348, at 22.

374. Chalfin et al., *supra* note 305, at 3, 11.

375. *Id.* at 4, 11, 42.

In Baltimore, for example, where the police department now has 500 fewer officers than it did a decade ago, arrests have decreased by 48% over the past five years, suggesting thousands more criminals are escaping justice in the city each year due to police being unable to solve crimes.³⁷⁶ In Las Vegas, police from the Violent Crime Initiative team were diverted from their normal duties in order to patrol anti-police protests in June 2020. Subsequently, officer-initiated activity decreased and murder rates increased.³⁷⁷

While police shortages primarily affect the poorest neighborhoods that experience the most violent crime, the shortages affect all city residents. In Portland, for example, increases in crime have contributed to a 25% to 40% increase in 911 calls compared to the previous year.³⁷⁸ But with more than a dozen 911 dispatch staff authorized positions remaining vacant, the average 911 caller wait-time has significantly increased.³⁷⁹ With police resignations expected to continue in high numbers,³⁸⁰ the effects of police shortages in cities across the country are only likely to worsen.

D. Voluntary Police Non-Intervention: The Ferguson Effect

In the wake of Michael Brown's shooting by a police officer in Ferguson, Missouri in 2014, the term the "Ferguson Effect" was coined.³⁸¹ Over time, the term has been used most notably by researcher Heather Mac Donald,³⁸² and has come to refer to the observation that increased hostility toward and criticism of police officers by the communi-

376. See Sean Kennedy, *'The Wire' Is Finished, but Baltimore Still Bleeds*, WALL ST. J. (Feb. 7, 2020, 6:45 PM), <https://www.wsj.com/articles/the-wire-is-finished-but-baltimore-still-bleeds-11581119104> [<https://perma.cc/3GC6-EY4T>].

377. Paul G. Cassell, *Explaining the Recent Homicide Spikes in U.S. Cities: The "Minneapolis Effect" and the Decline in Proactive Policing*, 33 FED. SENT'G REP. 83, 109 (2020).

378. Shane Dixon Kavanaugh, *How Portland Leaders Fumbled Through a Historic Year of Disorder, Violence and Despair*, OR. LIVE (Feb. 20, 2022, 9:48 AM), <https://www.oregonlive.com/news/2022/01/how-portland-leaders-fumbled-through-an-historic-year-of-disorder-violence-and-despair.html> [<https://perma.cc/JA5H-M7XX>].

379. *Id.*

380. Mourtgos et al., *supra* note 348, at 20.

381. See Dara Lind, *The "Ferguson Effect," a Theory That's Warping the American Crime Debate, Explained*, VOX (May 18, 2016, 9:40 AM), <https://www.vox.com/2016/5/18/11683594/ferguson-effect-crime-police> [<https://perma.cc/GC28-T3VV>].

382. See Heather Mac Donald, *The New Nationwide Crime Wave*, WALL ST. J. (May 29, 2015, 6:27 PM), <https://www.wsj.com/articles/the-new-nationwide-crime-wave-1432938425> [<https://perma.cc/W3HF-7Y3T>].

ty tends to lead to reduced engagement by police.³⁸³ In other words, the Ferguson Effect is a natural and predictable result of police demonization and demoralization. Many like Mac Donald have argued that the effect has intensified since George Floyd's killing in May 2020.³⁸⁴

Consistent with the Ferguson Effect, many police officers have significantly reduced the extent of proactive policing as they argue it would “be easier to do nothing” than to risk an incident that would result in public retaliation, personal and professional risks for the officer, and greater support for de-policing policies such as defunding.³⁸⁵ Such voluntary police pullback has a high cost to the community, as studies show less active policing leads to higher crime rates and lower clearance rates—claims borne out by recent statistics showing a massive spike in homicides and fall in clearance rates after the 2020 protests.³⁸⁶

1. Case Example: The Ferguson Effect in Baltimore

In 2010, the new mayor of Baltimore cuts police salaries and increases the amount police must contribute to their pensions.³⁸⁷ In reaction, retirements increase and vacancies go unfilled. The number of uniformed officers drops by 300 and the murder rate increases by 20% by 2013.³⁸⁸ As one insider puts it, “you can only beat down your horses for so long before they give up.”³⁸⁹ Then in 2014 and 2015, Michael Brown is killed in Ferguson, Missouri, and Freddie Gray dies in police custody in Baltimore. Both deaths prompt rioting. The city announces that it will seek criminal charges against the Baltimore officers involved in Gray's death.³⁹⁰ (It is later determined there was no criminal conduct by the officers.)

383. See Ross Deuchar et al., *Despondent Officer Narratives and the 'Post-Ferguson' Effect: Exploring Law Enforcement Perspectives and Strategies in a Southern American State*, 29 POLICING & SOC'Y: INT'L J. RSCH. & POL'Y 1042, 1045 (2019).

384. See Heather Mac Donald, *Breakdown: The Unwinding of Law and Order in Our Cities Has Happened with Stunning Speed*, CITY J. (July 1, 2020), <https://www.city-journal.org/article/breakdown> [<https://perma.cc/WG5T-ZT75>]. See generally Tanaya Devi & Roland G. Fryer Jr., *Policing the Police: The Impact of "Pattern-or-Practice" Investigations on Crime* (Nat'l Bureau of Econ. Rsch., Working Paper 27324, 2020).

385. TCR Staff, *Can Police Cope with the Surge in Violent Crime?*, CRIME REP. (June 23, 2021), <https://web.archive.org/web/20210623114612/https://thecrimereport.org/2021/06/23/can-police-cope-with-the-surge-in-violent-crime> [<https://perma.cc/C8MT-TVGH>].

386. Stephen J. K. Walters, *Anatomy of a Crime Wave*, CITY J. (May 5, 2021), <https://www.city-journal.org/baltimore-failed-de-policing-experiment> [<https://perma.cc/J3EK-FMLR>].

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.*

Police respond by voluntarily pulling back to avoid incidents. Arrests in Baltimore fall by 33%. The average citizen notices that more criminals than ever remain free. As one Baltimore community organizer reports: “We saw a pullback in this community for over a month where it was up to the community to police the community. And quite frankly, we were outgunned”³⁹¹ The voluntary pullback is driven in large part by police demoralization, caused by the anti-police rhetoric and policies. A police officer working during the riots explains,

It’s demoralizing. After 20 years, it’s soul-crushing. I know I do good in the community. That’s what I do, at great sacrifice to my family and my health. The collateral damage of dealing with horrible, depressing stuff day after day, it adds up To have them screaming “All cops are bad; you’re a murderer” is soul-crushing. I know better, but it just is.³⁹²

Carl Stokes, a former Democratic city councilor, put it this way: “The police stopped doing their jobs, and let people fuck up other people”³⁹³ Between 2011, a year after defunding the Baltimore police began, and 2021, nearly 3,000 Baltimore residents (300 a year) are murdered—in a city of 609,000 (i.e., one out of every 2,000 citizens is killed every year over the decade).³⁹⁴ By 2021, things have only gotten worse: a record 726 shootings result in the deaths of 337 citizens.³⁹⁵

2. Case Example: Police Disengagement in Atlanta

On June 12, 2020, Rayshard Brooks, a Black man attempting to flee arrest, is shot and killed outside a Wendy’s by two White police officers in Atlanta.³⁹⁶ (A two-year investigation by a special state prosecutor sub-

391. Alec MacGillis, *What Can Mayors Do When the Police Stop Doing Their Jobs?*, PROPUBLICA (Sept. 3, 2020, 5:00 AM), <https://www.propublica.org/article/what-can-mayors-do-when-the-police-stop-doing-their-jobs> [<https://perma.cc/MNR6-QKHS>].

392. *Id.*

393. *Id.*

394. See Walters, *supra* note 386; Dan Lampariello, *Community Leaders Fear Baltimore’s Population Loss Could Impact Resident’s Voice*, FOX BALT. (Apr. 23, 2021, 5:55 PM), <https://foxbaltimore.com/news/local/community-leaders-fear-baltimores-population-loss-could-impact-residents-voice> [<https://perma.cc/2YZA-YNR6>].

395. Amy Lu, *Residents Call for Action as Baltimore Again Records More Than 300 Homicides*, WBAL TV, <https://www.wbalv.com/article/baltimore-more-than-300-homicides-2021/38647379#> [<https://perma.cc/B47F-JAWR>] (Dec. 31, 2021, 8:14 PM).

396. See Aimee Ortiz, *What to Know About the Death of Rayshard Brooks*, N.Y. TIMES (Nov. 21, 2022), <https://www.nytimes.com/article/rayshard-brooks-what-we-know.html> [<https://perma.cc/KQN3-T9FF>]; Nexstar Media Wire, *Atlanta Officers Stopped Responding to Calls After Fellow Officer Charged with Murder of Rayshard Brooks, Report Says*, WSPA (June 18, 2020, 12:59 PM), <https://www.wspa.com/news/atlanta-officers-stopped-responding-to-calls-after-fellow-officer-charged-with-murder-of-rayshard-brooks-report-says> [<https://perma.cc/A92P->

sequently determined that there was no criminal conduct by the officers.) With protests against police shootings already occurring after the murder of George Floyd, the reaction is swift. Protesters march to the Wendy's and burn it before occupying the site and declaring it a police-free autonomous zone known as the "Rayshard Brooks Peace Center."³⁹⁷ The Peace Center is maintained as a police-free zone by individuals armed with AR-15s and shotguns. The Atlanta Mayor responds by condemning the police, and the county DA criminally charges the two officers before any investigation. Police officers respond by engaging in massive withdrawal and non-intervention, with many officers calling out sick. Arrests fall by 71% and crime surges. The evening of July 4th is a dark day for Atlanta with twenty-eight shootings, including the murder of eight-year-old Secoria Turner, who is shot and killed by four armed militants in the police-free "peace center."³⁹⁸ Three of the killers are never caught. Secoria's family blames the de-policing and non-intervention for her death.

3. The Nature and Extent of the Problem

When police are demonized and demoralized, they pull back from actively trying to catch criminals, and crime flourishes and justice fails. This dynamic, the Ferguson Effect, might be seen as simply common sense: why would officers feeling demonized and attacked risk their reputations and physical and economic safety by actively involving themselves in potentially controversial situations if they could avoid it? But there is also plenty of empirical evidence to document this predictable connection between anti-police protests and rhetoric and the resulting police pullback and increase in crime and justice failures.

While the police non-intervention effect was first noted in Ferguson, it is now recognized as affecting police departments and crime rates in cities of all sizes across the country. Numerous studies and analyses have found that high-profile incidents involving police use of force, especially against Black suspects, have coincided with both decreases in policing activities and increases in homicides. For example, in the wake

M4TZ]; Christian Boone & Joshua Sharpe, *'We Feel Like We've Been Abandoned.'* *Atlanta Suffers a Deadly July 4*, ATLANTA J.-CONST. (July 10, 2020), <https://www.ajc.com/news/crime--law/feel-like-been-abandoned-atlanta-suffers-deadly-july/zVpAhCvJ71PUqDFRuDoJRI> [<https://perma.cc/NK2C-LKMN>]; Joshua Sharpe, *Atlanta Wendy's Protesters Decry Secoria Turner's Killing*, ATLANTA J.-CONST., <https://www.ajc.com/news/local/atlanta-wendy-protesters-decry-secoria-turner-killing/AaVgEWntopglOYH9ptdjMO> [<https://perma.cc/CJ9S-VAR4>] (July 6, 2020).

397. See Boone & Sharpe, *supra* note 396; Sharpe, *supra* note 396.

398. See Boone & Sharpe, *supra* note 396; Sharpe, *supra* note 396.

of Michael Brown's death in 2014, data from most of the country's sixty largest cities showed a decrease in active policing in those cities,³⁹⁹ and an average increase in homicides of 10.9%.⁴⁰⁰ Another study suggests the Ferguson Effect accounts for a more than 16% increase in the homicide rate across fifty-six large cities in 2015.⁴⁰¹ And, as expected, clearance rates fell as crime increased.⁴⁰²

Surveys of police officers from departments of all sizes also confirm the influence of the Ferguson Effect triggered by demoralization, a highly critical environment, and concerns for officer safety. Overall, 86% of police officers reported that high-profile incidents between officers and Blacks have made their jobs harder.⁴⁰³ The results were high even among officers in small departments with fewer than 300 sworn officers (84%) and among Black officers (81%).⁴⁰⁴ Similarly, 93% of officers say colleagues in their departments had become more concerned about their safety, even before the 2016 ambush killing of five Dallas police officers.⁴⁰⁵ As a result, police are choosing to be more cautious in their interventions.

A former NYPD official reported that in 2020, police are "shying from enforcement that could lead to steep consequences for individual officers in an environment often hostile toward the police."⁴⁰⁶ The decrease in proactive policing, decrease in arrests, and increase in serious crimes have coalesced into dismal clearance rates. Typically, the NYPD has a clearance rate of around 33% for shooting crimes, but in the summer of 2020, only 20% of shootings resulted in an arrest and the clearance rate for shootings was as low as 15% in some parts of the city.⁴⁰⁷ From June to December 2020, amidst protests over George Floyd's murder, New York City experienced a 58% increase in homicides and a

399. Cheng Cheng & Wei Long, *The Effect of Highly Publicized Police Killings on Policing: Evidence from Large U.S. Cities*, 206 J. PUB. ECON. 1, 13-14 (2022).

400. *Id.* at 16.

401. Jamiles Lartey et al., 'Ferguson Effect' Is a Plausible Reason for Spike in Violent US Crime, *Study Says*, GUARDIAN (June 15, 2016, 2:13 PM), <https://www.theguardian.com/us-news/2016/jun/15/ferguson-effect-homicide-rates-us-crime-study> [<https://perma.cc/U8EF-N2KB>].

402. See NAT'L INST. OF JUST., U.S. DEP'T OF JUST., NCJ 251067, ASSESSING AND RESPONDING TO THE RECENT HOMICIDE RISE IN THE UNITED STATES 15 (Nov. 2017), <https://www.ojp.gov/pdffiles1/nij/251067.pdf> [<https://perma.cc/PB5F-S9N3>].

403. Rich Morin et al., *Police, Fatal Encounters and Ensuing Protests*, PEW RSCH. CTR. (Jan. 11, 2017), <https://www.pewresearch.org/social-trends/2017/01/11/police-fatal-encounters-and-ensuing-protests> [<https://perma.cc/83HY-GW47>].

404. *Id.*

405. *Id.*

406. Mara Gay, *Why Did the N.Y.P.D. Solve Fewer Crimes Last Year?*, N.Y. TIMES (Jan. 29, 2021), <https://www.nytimes.com/2021/01/29/opinion/nypd-crime-murder.html> [<https://perma.cc/MG8K-79RL>].

407. Cassell, *supra* note 377, at 109.

38% decrease in arrests, as the NYPD logged 45,000 fewer arrests during this period—meaning tens of thousands of crimes went unsolved as a result of decreased policing.⁴⁰⁸ Along with those changes, the NYPD’s homicide clearance rate in 2020 dropped by 24% from the previous year.⁴⁰⁹

A similar situation occurred in Louisville, Kentucky, which experienced an 87% increase in homicides and a 42% decline in arrest rates during the summer of protests compared to the previous year.⁴¹⁰ A similar trend has been seen in Chicago, where homicide clearance rates dropped for the first time after they had been improving since their last sharp decline in 2015. From June 2020 to February 2021, Chicago murders increased by 65% while arrests decreased by 53%.⁴¹¹ Experts have cited poor police-community relations on both ends as a major contributor to these recent disastrous trends.⁴¹² Similar trends have been demonstrated to exist in St. Louis, Los Angeles, Houston, and New Orleans.⁴¹³

The Ferguson Effect as a cause of rising crime and justice failures can be distinguished from the increased crime caused by general chaos accompanying protests. A study by Harvard economists in 2020 examined crime rates before and after a police shooting that led to a “pattern-or-practice” investigation into local police departments by state or federal authorities.⁴¹⁴ Such investigations are designed to determine whether the department has a systematically unlawful pattern or policy regarding use of force. Researchers found that the effect of such an investigation was a reduction in police engagement as police moved to reduce the opportunity for any violent confrontations that the state or federal investigators might disapprove of.⁴¹⁵ The cities experiencing a viral police incident could be distinguished from the cities experiencing such an incident that also had a pattern-or-practice investigation ongoing. The study found that the latter case (the combination of a viral incident of police violence and a pattern-or-practice investigation) occurred in five studied cities—Chicago, Baltimore, Cincinnati, Riverside, and Ferguson—and led to sharp increases in crime in each city even when control-

408. Johnson, *supra* note 299.

409. Gay, *supra* note 406.

410. Johnson, *supra* note 299.

411. *Id.*

412. See Annie Sweeney & Jeremy Goner, *Chicago Police’s Homicide Clearance Rate Dips in 2020 After Improvement in Recent Years*, CHI. TRIB. (Dec. 15, 2020, 7:27 PM), <https://www.chicagotribune.com/news/criminal-justice/ct-chicago-police-2020-clearance-rates-20201215-2evyuaybxcvxex7s4wlvrx62q-story.html> [<https://perma.cc/DYB6-SZZD>].

413. Johnson, *supra* note 299.

414. See generally Devi & Fryer, *supra* note 384.

415. See *id.* at 9.

ling for the expected level of increased violence caused by a viral incident and protests.⁴¹⁶ Thus, the study could show that the Ferguson Effect caused by the pattern-or-practice investigations caused almost 900 excess homicides and 34,000 excess felonies in the five cities over the two years after the viral incidents. And, of course, most of that crime went unsolved. In other words, these failures of justice were apparently caused by voluntary police non-intervention and not simply because of increased rioting.

The public responds with the same concern and anger whether the police pull back due to external factors (such as de-policing policies imposed by local government) or voluntary non-intervention (the Ferguson Effect). Citizens rarely distinguish between the two sources of police non-intervention as they only see the same effects of higher crime and less justice. As noted early in this article, the majority of the public wants more police intervention, not less.

However, some in law enforcement have distinguished the Ferguson Effect from external de-policing policies. De-policing orders can be quickly and easily reversed, as described previously. But a police department feeling demonized and demoralized is not so easy to fix. Then-FBI Director James Comey worried in a 2015 speech that murder was being fueled by police too afraid to do their jobs. “Part of the explanation [for higher violent crime] is a chill wind that has blown through law enforcement over the last year and that wind is surely changing behavior,” Comey said.⁴¹⁷ “In today’s YouTube world, are officers reluctant to get out of their cars and do the work that controls violent crime?”⁴¹⁸ The answer is a clear yes. According to a study from 2016, 72% of police said they were less willing to engage in proactive policing as a result of highly publicized encounters with Black suspects.⁴¹⁹ That percentage has likely only grown after the murder of George Floyd and the resulting increased attacks on police.

E. Reforms to Reduce Police Non-Intervention

Part of the police non-intervention problem can be alleviated by increasing police funding and hiring more officers, which can reduce the

416. *See id.* at 3-4.

417. Fiona Ortiz, ‘Chill Wind’ in Policing Fueling National Murder Spike: FBI Head, REUTERS (Oct. 23, 2015, 6:30 PM), <https://www.reuters.com/article/us-usa-police-idUSKCN0SH2M420151023> [<https://perma.cc/7J3K-SR2Q>].

418. *Id.*

419. Rich Morin et al., *Behind the Badge*, PEW RSCH. CTR. (Jan. 11, 2017), <https://www.pewresearch.org/social-trends/2017/01/11/behind-the-badge> [<https://perma.cc/SU5M-7J8G>].

stress and exhaustion that comes from short-staffed departments. Hiring more police officers is a proven societal investment, as one study put it:

[S]ocial science literature provides overwhelming evidence that bolstering police forces reduces crime. Hiring more police officers allows departments to engage in community policing and proactive policing strategies, such as concentrating more police officers in areas where crime is high—programs that a report from the National Academy of Sciences notes have been shown in high-quality experimental research to reduce crime.⁴²⁰

Thus, more police are a cost-effective investment in the long run. Studies have shown that investing more can save an additional life for a cost of between \$1.3 and \$2.2 million, much less than the typical statistical economic value of a life, which exceeds \$7 million, and this does not consider the additional societal benefits of reduced non-homicide offenses.⁴²¹ It is certainly wise for cities, states, and the federal government to invest in bolstering police forces.

But budget-oriented reforms will not solve the larger long-term problem of poor police-community relations, which encourages and legitimizes police demonization and hatred. Having more money to hire officers will provide limited benefit if the persons who would make the best officers find the job increasingly unattractive because of anti-police hatred. It is difficult to encourage more active policing when officers know they face a hostile community and withering criticism from politicians and the media. The most effective way to increase police engagement is to increase public support and appreciation of police. Our below recommendation therefore focuses on attempting to rebuild the trust between police and community in order to reduce demonization of police and create a climate conducive to officers intervening with maximum impact in the communities they serve.

Of course, many activists who protest loudly against police will argue that only broad societal reforms and dismantling all legacies of racism and inequity will solve the problem. While we acknowledge the need for broader societal reforms, such as ones aimed at reducing the tragic racial disparity in criminal offense and victimization rates, we also maintain the necessity of doing something *now* to reduce, prevent, and bring justice to the hundreds of thousands of serious crimes occurring each year. Yes, our proposed reform will be implemented in an imperfect system, but a reform that even reduces homicides and justice fail-

420. Jonathan Klick & John M. MacDonald, *Hire More Cops*, CITY J. (Aug. 4, 2020), <https://www.city-journal.org/bolstering-police-forces-reduces-crime> [<https://perma.cc/TAD4-P254>].

421. Chalfin et al., *supra* note 305, at 4.

ures back to their pre-2020 levels would be a reform well worth adopting while we eagerly await the perfectly just society activists will presumably one day create.

IV. RECOMMENDATION: CREATE A POLICE-COMMUNITY OVERSIGHT
COMMISSION THAT WILL HELP POLICE EARN CREDIBILITY WITH THE
COMMUNITY AND THAT WILL ITSELF EARN CREDIBILITY WITH THE
POLICE

Our recommendation for how best to resolve many of the problems of citizen non-cooperation (no-snitch codes, legal cynicism, and public concerns relating to police use of force) and the problems of police non-intervention (anti-police rhetoric and attacks, de-policing policies, police demoralization, and the Ferguson Effect) is to create a police-community oversight commission (“PCOC”) with a diverse membership charged with helping the police earn greater credibility with the community and ensuring the commission earns credibility with the police.

A. Improving Police Credibility with the Community

As to their first mission, improving police credibility with the community, their two main objectives should be: first, ensuring that police deal fairly and respectfully in their interactions with citizens and, second, ensuring that police meet their obligation to the community to prevent crime and promote justice.⁴²²

Purely civilian oversight boards exist, but in addition to lacking diversity in membership, the existing boards tend to focus only on the first obligation and ignore the second. But the duty of police to the community includes both, and loss of public support for the police can come from abusive police interactions or from a failure to control crime and to avoid failures of justice. What is needed is a commission that is charged and empowered to monitor, analyze, strategize, and publicly comment on both police interactions with citizens and police performance in reducing crime and promoting justice.

422. Another common police commission form is that of the official police commission, but such commissions are simply a form of group leadership of the police department. Such commissions do not provide civilian oversight at all but rather are simply a part of the official police hierarchy, in some cases acting as a board of directors overseeing the police chief as chief executive. *See, e.g., Police Commission*, L.A. POLICE DEP’T, <https://www.lapdonline.org/police-commission> [<https://perma.cc/8RAX-NHQL>] (last visited Aug. 12, 2023); *Police Commissioners*, ST. LOUIS CNTY. POLICE, <https://stlouiscountypolice.com/who-we-are/board-of-police-commissioners> [<https://perma.cc/T7E3-UP5G>] (last visited Aug. 12, 2023).

One way to promote these two objectives—monitoring both police interaction with citizens and police performance in promoting safety and justice—would be to have a commission made up of persons representing a wide range of perspectives, expertise, and influence within the community. For example, one can imagine a commission with the following or similar diverse makeup:

- **Community Residents**—three citizen members, including one or more resident of a high-crime area. Election by the community would be ideal (so as to make them independent of existing political officials) but perhaps impractical, so an alternative may be to have these members appointed by joint agreement of the mayor and the police chief. The larger goal here is to get members of the community that will be well-respected and are sufficiently articulate and open to effectively engaging with the community about the Commission's work.
- **Community Institutions**—three members drawn from community institutions, such as the head of a victim's organization, a major religious leader in the community (or the head of an organization representing the community's religious groups), the head of the Chamber of Commerce or other such business organization, a representative of (nonreligious) charitable organizations in the community, or the head of a community mental health organization. The larger goal here is to get the most respected and influential members of the community, whatever institutional group they may be leading.
- **Police Leadership**—three members drawn from the police department leadership, such as the chief of police, the head of criminal investigations, and the head of community patrols. Another possibility is the head of the department's internal affairs department. One can also think of advantages and disadvantages of having the head of the local police union on the commission.
- **Government Institutions**—three members drawn from governmental authorities in the jurisdiction, such as the mayor, the head of the city council, and the district attorney.

The Chairperson of the commission should be elected by the full membership from among the six community members.

There is precedent for some diversity in the membership of an oversight group for police and criminal justice matters, but purely civil-

ian boards are more common.⁴²³ This kind of diverse membership is preferable to a purely civilian oversight board because it is more likely to minimize the us-versus-them dynamic of civilian boards, which can be a destructive rather than a constructive force since the relationship between a purely civilian board and the police inevitably has the potential to turn antagonistic. It is natural for police to see a civilian oversight board as a permanently critical master and for a purely civilian board to see the police as a perpetual problem to be fixed. Thus, it is not uncommon for civilians in the oversight business to have negative views of police: “Police, police unions and various interest groups that don’t have an interest in accountability, have successfully blocked any type of real civilian oversight from being enacted in almost every turn, in almost every single one of the 18,000 police jurisdictions in the country.”⁴²⁴ Similarly, it is not uncommon for many police to have negative attitudes about civilian oversight, as with the head of the National Fraternal Order of Police commenting: “It would be akin to putting a plumber in charge of the investigation of airplane crashes It doesn’t matter how good a plumber that he or she is. It gives no level of expertise in terms of evaluating the cause of a plane crash.”⁴²⁵ The PCOC proposed here is one where all the diverse players are colleagues charged with shared goals that they together will be held responsible for meeting.

Another advantage of this kind of diverse membership is that it provides the differing perspectives and expertise that is important in resolving important issues. For example, should the PCOC approve or disapprove a move to reduce the use of “stop, question, and frisk” below its

423. See, e.g., OFF. OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUST., NACOLE CASE STUDS. ON CIVILIAN OVERSIGHT: ATLANTA CITIZEN REV. BD. 6-7 (2021), <https://portal.cops.usdoj.gov/resourcecenter/ric/Publications/cops-w0953-pub.pdf> [<https://perma.cc/4QVR-YYMG>]; OFF. OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUST., NACOLE CASE STUDS. ON CIVILIAN OVERSIGHT: POLICE ADVISORY COMM’N PHILA. PA. 6 (2021), https://d3n8a8pro7vhm.cloudfront.net/nacole/pages/1302/attachments/original/1626179582/e072007956_NACOLE_CaseStudies_08Philadelphia_v9_508.pdf?1626179582 [<https://perma.cc/YK9Z-EXJX>]; *Kentucky Law Enforcement Council*, TEAM KY.: JUST. & PUB. SAFETY CABINET, <https://justice.ky.gov/Boards-Commissions/pages/klec.aspx> [<https://perma.cc/J5C5-V4CB>] (last visited Aug. 12, 2023).

424. Sam Sinyangwe, the creator of Mapping Police Violence and creator of Campaign Zero, a group that “lays out police reform policies to reduce officer violence.” Marlene Lenthag, *Police Oversight Boards Are Proliferating, but Do They Actually Work?*, ABC NEWS (June 4, 2021, 5:00 AM), <https://abcnews.go.com/US/police-oversight-boards-proliferating-work/story?id=77919091> [<https://perma.cc/8GEQ-M2FM>].

425. Jim Pasco, executive director of the National Fraternal Order of Police, on civilian oversight. Nicole Dungca & Jenn Abelson, *When Communities Try to Hold Police Accountable, Law Enforcement Fights Back*, WASH. POST (Apr. 27, 2021), <https://www.washingtonpost.com/investigations/interactive/2021/civilian-oversight-police-accountability> [<https://perma.cc/URN7-FD5J>].

normal constitutional limits? The answer to that should not depend on the number of activists screaming at a civilian oversight board during a public meeting but rather on a series of conversations among the diverse membership of the PCOC, who are likely to consider what trade-offs make sense for the community. Reduced stop-question-and-frisk may reduce police-community daily tensions but may end up increasing gun carrying and ultimately gun violence, violence of a sort that is both difficult to prosecute and extremely destructive to the community's sense of safety. The diverse membership on the PCOC can sort through the trade-offs and give its public recommendation on the subject. The citizen and the police patrol members may have ideas on how to minimize the negative effect of stops, while the district attorney and the police investigation members may have ideas on how to get more successful prosecutions in gun violence cases, which may include getting more community help in ways that the community members might suggest. One can imagine a long list of policing issues that could benefit from discussions among the diverse colleagues on the PCOC.

Of course, the PCOC's duties would include overseeing and criticizing police whenever appropriate. Police cannot earn the respect, and thereby the cooperation, of the community unless the department shows itself devoted to identifying and firing (and not hiring) persons who are unsuitable for effective and respectful police work. The PCOC could help with identifying problems with police conduct and ensuring appropriate resolution of inappropriate use-of-force incidents.

At the same time, the PCOC ought to be similarly devoted to the task of educating the public about what the police do right and, especially importantly, authoritatively correcting mistaken or misguided criticisms of the police. For example, if a PCOC had existed in Ferguson, Missouri, it could have quickly and authoritatively set the record straight on the shooting of Michael Brown. In other words, as noted above, the PCOC's reason for being is both to improve the quality of policing and to take positive steps to make policing improvements known to the public.

Charging the commission with improving police-community relations through minimizing police misconduct and maximizing safety and justice means the PCOC would need to engage in a wide range of activities. For example, it ought to regularly hear from citizens in public meetings about their interactions with police and regularly review the citizen complaints filed against police and the police handling of those complaints. Similarly, the commission ought to regularly review police performance in reducing crime as well as police performance in promoting the successful prosecution of offenders. To this end, the commission

ought to have the power to demand regular reports from police about their performance in the areas in which the commission has an interest. The commission also should regularly report to the public its assessment of police performance in areas that it thinks important, as well as issuing special reports on relevant subjects as needed. These public reports ought to describe the current situation, the efforts that the police have made to improve their performance, and the efforts that the commission itself has made to promote better police performance. Importantly, the commission reports should also critique the conduct of the media, activists, social institutions, and the community generally and the extent to which they have helped or hurt improvements in police performance. Too many citizen-review boards limit their focus to the police when many of the most influential factors in improving police-community relations are a product of non-police actors. Additionally, the commission should publish statistics on police use of force to show how relatively rare serious misconduct incidents are—some states have already passed laws requiring the publication of such statistics in order to make the (small) size of the problem more apparent.⁴²⁶

B. The Commission Must Establish Its Own Credibility with the Police

As to the commission's second mission, it is critical that the commission establish its own credibility with the police so it can reduce the underlying causes of police non-intervention and provide a mechanism for the community and police to come together and strategize on how to most effectively utilize police presence in the community. Police membership on the commission will help with establishing credibility, as will the commission fulfilling its role in speaking out fairly on police-citizen encounters in a way that would give officers the safety of knowing that an out-of-context video of an arrest will not lead to their demonization and dismissal. In turn, if the commission earns credibility with the police, it can help move police to improve their ability to intervene in communities respectfully and effectively.⁴²⁷

426. Anthony Perez, *More Data, Better Policy*, CITY J. (Sept. 19, 2022), <https://www.city-journal.org/police-transparency-bills-produce-better-policy> [<https://perma.cc/427U-X34K>].

427. Police appear to be open to learning even from the many current oversight commissions that typically have no police representation. Seventy-eight percent of oversight agencies reported that police executives listened carefully to the recommendations made by oversight staff. OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., CIVILIAN OVERSIGHT OF LAW ENFORCEMENT: ASSESSING THE EVIDENCE 39 (Sept. 2016), https://d3n8a8pro7vhnmx.cloudfront.net/nacole/pages/161/attachments/original/1481727974/NACOLE_AccessingtheEvidence_Final.pdf [<https://perma.cc/9DGH-M43Q>].

A potential problem to avoid is the practice of allowing a civilian oversight commission to take over police administrative duties, as in imposing discipline on officers. For example, the first attempted civilian oversight commission in Fruita, Colorado, proved a failure as it was initially given too much power to investigate the police and access confidential information.⁴²⁸ Unsurprisingly, this status was seen as unacceptable by the police, who feared the civilian commission, with little or no policing experience, would be simply a prominently hostile HR department. After city charter revisions, the commission was “limited to recommending policies, standards, procedures, and limitations for the police department, upon the direction of city council and receiving public comment on the operations and management of the agency.”⁴²⁹ The new commission has since been instrumental in weighing in on several important decisions for the community and the police.⁴³⁰ Further, by remaining as an oversight commission rather than taking on police leadership responsibilities, our proposed oversight commission leaves the police leadership with full responsibility for the department’s performance, which keeps the commission in a position to independently judge that performance.

V. CONCLUSION

An effective justice system requires action and cooperation on the part of citizens and police. Failures of justice only require citizens to stand back and police to stand down. Citizen and police inaction is not a result of some moral failing, but rather an inevitable consequence of citizens and police facing strong incentives not to act (or at least not act as vigorously) to address serious crime. For ordinary community members, the pressures created by witness intimidation, codes of silence, legal cynicism, and upset over police use of force outweigh the potential individual benefits of assisting investigations. Similarly, police often face an environment characterized by hostility and hatred from the community and political leaders, as well as physical constraints in the form of limited budgets and understaffing. Given these facts, it is only natural that police will engage in less policing—either from the necessity of scarce resources or out of a sense of self-preservation. The result is a vicious cycle of justice failures and worsened police-community relations as cit-

428. John G. Reece & Judy Macy, *Citizen Advisory Boards in Contemporary Practice: A Practical Approach in Policing*, POLICE CHIEF (Oct. 2015), <https://www.policechiefmagazine.org/citizen-advisory-boards-in-contemporary-practice-a-practical-approach-in-policing> [<https://perma.cc/7LYW-9C4A>].

429. *Id.*

430. *Id.*

izens perceive police as ineffective and so increase their cynicism and hostility, with police disengaging from a hostile community in turn. The increased crime bred by this vicious cycle also ensures more violent confrontations between stressed police and offenders, which often leads to the next viral police use of force incident triggering a cascade of anti-police rhetoric, increased community hostility, and more police disengagement.

The only persons who benefit from this vicious cycle are criminals, who escape justice with increasing frequency (and perhaps political opportunists who see community upset as a path to influence). There is no easy way to cut this Gordian knot of poor police-community relations, but what is not needed is more irresponsible criticism of police or thoughtless blaming of communities for their own victimizations. We propose policymakers tackle the problem by creating a police-community oversight commission designed to win credibility with both police and community and tasked with reversing the misperceptions and distrust that plague community-police interactions.