

LAW AND DISORDER: WHY POLICE VIOLENCE THRIVES DESPITE PROTESTS

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ABSTRACT

The Ferguson uprising and the 25 million-strong Floyd protests were a watershed, heralding a sustained national scrutiny of the routine violence of policing, or so we thought. A decade after Ferguson and five years after Floyd, police budgets have grown, racialized enforcement continues apace, and reform remains elusive. Despite the public raising their fists and voices to condemn racialized police brutality, so little has changed structurally and culturally. The resilience of policing in the face of grassroots activism, I argue, stems from not just political backlash, protester unpopularity, and fading public attention, but a deeply held cultural conviction that policing is crime fighting. This essay begins with Ferguson as a caution about the limits of protest-based police reform. From there, it traces the historical arc of policing, revealing its origins in the maintenance of racial and social hierarchies. It then turns to the contemporary investment in policing as a source of public order, despite consistent evidence that aggressive street policing fails to reduce crime and often exacerbates harm. Finally, the article critiques the liberal attachment to procedural fixes and individual prosecutions, which serve to preserve the institution's legitimacy rather than challenge its foundations. Until there is a true challenge to the core faith that policing is about reducing harmful crime and preserving public safety, the machinery of violence will continue to thrive in the shadow of critique.

INTRODUCTION

Almost everyone I know was present at, wrote about, or was otherwise involved in the massive racial justice protests of 2020. As an academic and

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a critic of American policing and mass incarceration, I likely surround myself with people with a penchant for protest. Nevertheless, I am certainly not unique in thinking the George Floyd uprising, in which an unprecedented twenty-five million people around the world denounced racism and police violence, was a “watershed.”¹ From that hot and horrible COVID summer emerged something revolutionary. In those heady days, true reform seemed possible. Municipalities could “defund the police” and transition to other forms of service and violence interruption. Broken-windows policing would finally be in the rear window. We could see the end stages of stop-and-frisk, qualified immunity, cash bail, and the militarization of the police. And might we dare to hope for disarming the police and decriminalizing misdemeanors? Today, ten years since Ferguson and five since Floyd, most of these things did not happen. Police continue to be overfunded; stop-and-frisk remains popular and has even made a comeback; qualified immunity and cash bail reforms remain controversial and difficult to achieve; and police killings of civilians continue apace.

The massive public uprising’s failure to foment widespread reform is surely overdetermined. Society’s attention span in a social-media world is shorter than it has ever been. COVID lockdowns made people more attentive to the viral video of George Floyd’s killing and afforded people time to attend protests—a rare social gathering that people could justify because it was outdoors and involved a critical social justice issue. But then lockdown ended, and life resumed. In addition, crime anxiety rose in the aftermath of the pandemic, as it often does in times of crisis. The 2016 Trump presidency, the January 6th insurrection, and COVID were tumultuous events that left Americans feeling insecure and afraid. Add to this a discrete crime spike following the COVID outbreak that the media covered breathlessly, and it is not surprising that sentiment shifted toward prioritizing crime control, spelling doom for nascent progressive reforms.²

In addition to these environmental factors, there is a larger phenomenological reason why more than marginal reform is in a perpetual state of failing to launch. Drawing on my 2021 article, *Policing and*

1. Maneesh Arora, *How the Coronavirus Pandemic Helped the Floyd Protests Become the Biggest in U.S. History*, WASH. POST (Aug. 5, 2020, 11:00 AM), <https://www.washingtonpost.com/politics/2020/08/05/how-coronavirus-pandemic-helped-floyd-protests-become-biggest-us-history/> [https://perma.cc/SRZ9-WAM4].

2. See John Roman, *Why Fear of Crime is Increasing*, SUBSTACK (Aug. 15, 2023), <https://johnkroman.substack.com/p/why-fear-of-crime-is-increasing> [https://perma.cc/TYB6-7FK5].

*“Bluelining,”*³ I will argue that a culturally embedded myth, that policing exists to fight crime, plays a major role in immunizing policing from serious critique and meaningful reform. This myth has been perpetuated by voices on the right, voices on the left, by police unions, and by reformers alike. Among the profound consequences of the myth is people’s sense that the individuals upon whom the police exact their brutality are “criminals.” This image remains in the background even when people’s own eyes observe the militarized police treat nonviolent protesters as enemy combatants. Indeed, in the media coverage of the Gaza protests that were widely organized and populated by young women, the narrative of state-violence recipient as a “thug” even transcended gender stereotypes.⁴ Meaningful reform sparks in people’s minds a de-policed state resembling the criminal anarchy of *The Purge*.

When there is widespread outrage against a particular act of police brutality, as in Floyd’s case, the state does finally act, mostly by sending in *their* cops, from Department of Justice (DOJ) investigators to state prosecutors, to monitor the offending police.⁵ Formal law—the place where radicalism goes to die—becomes the primary and often sole remedial mechanism. Once Derek Chauvin and the other officers involved in George Floyd’s killing were indicted, their convictions became the measure of justice. And, after Minnesota and the federal government used *their* law-enforcement apparati to secure the “bad cops” incarceration, the fiery public fervor for reform reduced to a slow simmer.

In addition to such occasional high-profile prosecutions, policing protests tend to produce, if anything, hundred-page investigative reports and modest procedural reforms—check-the-box training or expensive technology. Meanwhile, the police remain overly funded, armed to the teeth, disproportionately harmful to communities and people of color, and steeped in a pro-arrest, pro-force, masculinist culture that is nearly impossible to

3. See generally Aya Gruber, *Policing and “Bluelining,”* 58 HOUS. L. REV. 867 (2021).

4. See, e.g., David Christopher Kaufman, *Columbia Student Protesters Are Thugs, Not Freedom Fighters*, THE TEL. (Apr. 30, 2024, 5:40 PM), www.telegraph.co.uk/us/comment/2024/04/30/columbia-college-palestine-protest-antisemitism-suspension/ [https://perma.cc/6W5H-CSBY].

5. See generally C.R. DIV., U.S. DEP’T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/K9TF-MG8F].

train away.⁶

I. THE FERGUSON FORECAST

Had my optimistic fellow Floyd protesters taken a beat to think about the predecessor Ferguson uprisings, they would have seen the writing on the wall more clearly. Like Floyd's killing, Officer Darren Wilson's killing of the unarmed teenager Michael Brown was a stark reminder of the reality of brutality that residents of Black city neighborhoods endure daily.⁷ And indeed, the public later saw in real time the police exacting shocking and gratuitous violence on Ferguson protesters. A photo remains lodged in my memory: A solitary figure—braids flowing down to a vibrant turquoise shirt, a bookbag slung over the shoulder, and hands high in the air—faces a small army of police soldiers.⁸ And I mean soldiers. The men, whose bulging forearms were their sole visible feature, looked ready for desert storming, decked out in sand-colored fatigues and boots, helmets, gas masks, and semi-automatic rifles, several of which were pointed directly at that lone civilian.⁹

The Ferguson protests received intense media coverage and it became clear that, for the talking heads and political players, Michael Brown's killing and the subsequent protests were a Rorschach test—they vindicated what the observer already believed. A true testament to confirmation bias: progressive activists and Black community members saw racism and state violence while the pro-policing contingent and conservatives saw crime-ridden urban neighborhoods and anarchic disrespect for law and order. Still, people all over the country could see the palpable anguish in this small St. Louis suburb. Despite the conservative spin on Michael Brown's death—

6. See Grace Manthey et al., *Despite 'Defunding' Claims, Police Funding Has Increased In Many US Cities*, ABC NEWS (Oct. 16, 2022, 7:34 AM), <https://abcnews.go.com/US/defunding-claims-police-funding-increased-us-cities/story?id=91511971> [<https://perma.cc/DL6P-K77U>]. See generally Gruber, *supra* note 3.

7. See Jon Swaine, *Michael Brown Shooting: "They Killed Another Young Black Man In America"*, THE GUARDIAN (Aug. 4, 2014, 4:46 PM), <https://www.theguardian.com/world/2014/aug/12/ferguson-missouri-shooting-michael-brown-civil-rights-police-brutality> [<https://perma.cc/U3HC-KYBJ>].

8. Lauren Williams, *Hands Up, Don't Shoot*, VOX (Aug. 13, 2014, 12:40 PM), <http://www.vox.com/2014/8/13/5998591/hands-up-dont-shoot-photos-ferguson-michael-brown> [<https://perma.cc/E5L7-5RMX>]. The guns were loaded with rubber and wooden bullets.

9. *Id.*

i.e., he was the *real* violent killer—momentum appeared to be on the side of radical reform. But then, like so many important protest issues, Michael Brown’s killing went to the courts and federal investigators where it largely faded away.¹⁰

This is not to say that the protests produced no positive results. They indeed heralded impressive political shifts in Ferguson. They led to greater voter turnout,¹¹ a fairer racial representation among elected officials,¹² and a more progressive local politics.¹³ Still, even these gains remain tenuous. Representative Cori Bush, the Black Lives Matter activist-turned-member of the congressional “Squad,”¹⁴ recently lost to a moderate primary opponent, prosecutor Wesley Bell, whose victory, the press reports, was assisted by funding from pro-Israel groups upset at Bush’s solidarity with Gaza protesters.¹⁵ Similarly, the Floyd protests underwrote many race and Diversity, Equity, and Inclusion (DEI) reforms, ranging from the mere symbolic to the truly meaningful, like curriculum reform.¹⁶ Of course, the

10. See, e.g., Joe Millitzer, *Prosecutor Robert McCulloch Releases Grand Jury Evidence in Michael Brown Case*, FOX2NOW (Nov. 24, 2014, 10:05 PM), <https://fox2now.com/news/prosecutor-robert-mcculloch-releases-grand-jury-evidence-in-michael-brown-case/> [https://perma.cc/4NLE-6KMN] (discussing how a grand jury rejected to indict Darren Wilson for the killing of Michael Brown); *DOJ Clears Darren Wilson in Michael Brown Killing*, CBS NEWS (Mar. 4, 2015, 4:47 PM), <https://www.cbsnews.com/news/darren-wilson-cleared-in-michael-brown-ferguson-killing-by-justice-department/> [https://perma.cc/45JZ-MMWN] (explaining that the DOJ would not prosecute).

11. *Record Turnout for Ferguson Local Elections*, HEADCOUNT, <https://www.headcount.org/politics-and-elections/record-turnout-for-ferguson-local-elections/> [https://perma.cc/6LZM-8LAV].

12. See *id.* (explaining that the historical voting turnout “altered the makeup of the city council to having 3 black and 3 white representatives . . . [and is] a direct result of the breakdown of Ferguson’s community and great loss”).

13. See, e.g., Rebecca Rivas, *The Ferguson Movement is on the Cusp of Revolutionizing Political Power in St. Louis*, MO. INDEP. (May 6, 2021, 8:00 AM), <https://missouriindependent.com/2021/05/06/the-ferguson-movement-is-on-the-cusp-of-revolutionizing-political-power-in-st-louis/> [https://perma.cc/NC2R-FEBC] (discussing some of the movements to build activist political power in Ferguson and St. Louis).

14. See generally Sean Dougherty, *Progressive Dems Known as ‘The Squad,’* USA TODAY (May 22, 2024, 3:50 PM), <https://www.usatoday.com/picture-gallery/news/politics/2024/05/22/progressive-congressional-dems-known-as-the-squad/73793884007/> [https://perma.cc/G4V8-6JS9] (listing members as: Alexandria-Ocasio-Cortez, Ihan Omar, Ayanna Pressley, Rashida Tlaib, Jamaal Bowman, Cori Bush, Greg Casar, Summer Lee, and Delia Ramirez).

15. See Jim Salter, *Wesley Bell, Backed by AIPAC, Defeats ‘Squad’ Member Cori Bush in St. Louis District Primary*, PBS NEWS (Aug. 7, 2024, 9:25 AM), <http://www.pbs.org/newshour/politics/wesley-bell-backed-by-aipac-defeats-squad-member-cori-bush-in-st-louis-district-primary> [https://perma.cc/D48K-EMFQ].

16. Kelly Field, *Colleges Are Changing the Status Quo to Make Curriculum More Inclusive*, HIGHER ED DIVE (Nov. 24, 2020), <https://www.highereddive.com/news/colleges-are-changing-the-status-quo-to-make-curriculum-more-inclusive/589672/> [https://perma.cc/8S4D-JRUN].

meaningful ones spawned an almost immediate conservative backlash, in the form of the “anti-woke” agenda, which has peaked in the weeks after Trump assumed office in 2025.¹⁷ In any case, do not mistake my observations about the protests’ limited effect on policing as an assertion that these extremely important historical moments are not meaningful. What I am saying is that the protests were *so* meaningful that it seems surprising that they did not create more meaningful and lasting police reform. Protesters had hoped this would be their Vietnam—that suffering for the cause would help end the police’s forever war on Ferguson’s residents. But in the end, it was only hope.

To be sure, the grand jury’s failure to indict Wilson did draw condemnation from liberal commentators, who admirably tried to convince lay persons of just how unusual such an outcome is (“A grand jury [would indict a] ham sandwich”).¹⁸ Ferguson’s police department did overhaul its personnel, eventually replacing most of the officers who had been on the force when Wilson killed Brown.¹⁹ And yes, the DOJ, despite finding that Wilson was justified in killing Michael Brown, issued a scathing report on the entrenched racism in Ferguson’s governance structure and ordered sweeping changes.²⁰ But such changes are expensive, leading Ferguson and the feds to wrangle in court for years before reaching a final consent decree, the provisions of which are just now being implemented.²¹ In 2024,

17. Steve Contorno, *Florida Students Return to Schools Reshaped by Gov. DeSantis’ Anti-‘Woke’ Education Agenda*, CNN (Aug. 13, 2022, 9:02 AM), <http://www.cnn.com/2022/08/13/politics/desantis-florida-schools-anti-woke-education-agenda/index.html> [<https://perma.cc/4XJ3-EC32>].

18. Dana Milbank, *Bob McCulloch’s Pathetic Prosecution of Darren Wilson*, WASH. POST (Nov. 25, 2014), www.washingtonpost.com/opinions/dana-milbank-bob-mccullochs-pathetic-prosecution-of-darren-wilson/2014/11/25/a8459e16-74d5-11e4-a755-e32227229e7b_story.html [<https://perma.cc/86ZS-W6C6>]; see also Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?*, 58 HOW. L.J. 825, 828–29 (2015).

19. Chelsea Bailey, *A Decade After Mike Brown’s Death, His Family Still Calls for Justice as Progress Toward Ending Police Killings Remain Slow*, CNN, <https://www.cnn.com/2024/08/09/us/michael-brown-ferguson-10-years/index.html> [<https://perma.cc/44SR-UNK2>] (last updated Aug. 9, 2024, 8:13 AM).

20. See generally C.R. DIV., U.S. DEP’T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015).

21. *Michael Brown’s Death 10 Years Ago Sparked Change in Ferguson*, THE INTELLIGENCER (Aug. 10, 2024), <https://www.theintelligencer.net/news/top-headlines/2024/08/michael-browns-death-10-years-ago-sparked-change-in-ferguson/> [<https://perma.cc/MW65-TN2V>] (“A year later [2016], the city agreed to a federal consent decree requiring sweeping changes [to policing in Ferguson]. The decree is still ongoing.”).

Ferguson's new Police Chief Troy Doyle explained, "We're slowly coming into compliance with the consent decree" by offering "implicit bias training, de-escalation training, [and] use-of-force training."²² Still, he had to admit, "There are going to be people who [say], as someone recently said, 'well, you guys made a lot of cosmetic changes, but that doesn't mean that the quality of policing changed.'"²³ Perhaps the commenter said "cosmetic" because Doyle's first order of business had been changing the uniforms.²⁴

The costumes changed, but the script stayed the same. Nationally, police killings of civilians have barely budged.²⁵ In fact, the number of killings has increased every year since 2019.²⁶ Locally, Black people in and around St. Louis continued to experience over-policing and police brutality.²⁷

Years after the DOJ report, racial bias remains a big problem in Ferguson specifically and Missouri generally. On the fifth anniversary of the Ferguson uprising, law professor Justin Hansford explained:

[T]he white-supremacist mentality of being under siege [by Black Lives Matter] has permeated police departments and carried over to public attitudes about the police. By 2016, according to a poll by the Cato Institute, 61 percent of Americans believed there was a war on the police. The Blue Lives Matter Facebook page has over two million likes, while the Black Lives Matter page has under 400,000. The perverse conception of police officers as victims made its way into law when President Barack Obama signed the

22. Michael Martin, *The New Ferguson Police Chief Addresses the Michael Brown Killing a Decade Ago*, NPR (Aug. 7, 2024, 7:23 AM), <http://www.npr.org/2024/08/07/nx-s1-5055888/the-new-ferguson-police-chief-addresses-the-michael-brown-killing-a-decade-ago> [https://perma.cc/UA3T-S5T4].

23. *Id.*

24. See *Michael Brown's Death 10 Years Ago Sparked Change in Ferguson*, *supra* note 21.

25. Matthew Danbury, *Ten Years After Ferguson, Data on Police Killings Shows a Lack of Progress*, NBC NEWS (Aug. 9, 2024, 9:19 AM), <https://www.nbcnews.com/data-graphics/data-police-killings-changed-10-years-ferguson-rcna163847> [https://perma.cc/9U2L-2QKN].

26. *Id. Cf.* Susan Olzak, *Does Protest Against Police Violence Matter? Evidence from U.S. Cities, 1990–2019*, 86 AM. SOCIO. REV. 1066 (2021) (finding a correlation between protests and decreased police violence against Black and Latino men).

27. See Hassan Kanu, *Seven Years After Ferguson Investigation, Missouri Police Still Resist Reforms*, REUTERS (Nov. 10, 2022, 12:47 PM), <http://www.reuters.com/legal/government/seven-years-after-ferguson-investigation-missouri-police-still-resist-reforms-2022-11-10> [https://perma.cc/8P9R-P9NH].

Blue Alert law in 2015. And in spite of the fact that the phrase featured prominently during the Charlottesville neo-Nazi march in the summer of 2017, the House passed the Protect and Serve Act in 2018, another law designed to entrench the Blue Lives Matter narrative in our legal system. No federal legislation was presented to act on any of the recommendations of the president's task force on policing.²⁸

Hansford lays a lot of blame at the feet of the media whose reporting on police killings of civilians “continue[d] to reflect a troubling respectability politics that minimizes the lives lost and overstates the legitimacy of police use of deadly force.”²⁹ If, like me, you have been interested in finding out about the recent 2024 Ferguson protests, you have likely done an internet search that turned up article after article decrying that a protester's attack left an officer “fighting for his life.”³⁰

The ten-year anniversary protest took place outside of the Ferguson police department, which is separated from the street by a metal fence.³¹ Chief Doyle said he allowed the protesters to shake the fence until around midnight when some protesters dismantled a portion of the fence.³² He then sent officers to make arrests for destruction of property.³³ Two officers tried to arrest Elijah Gantt, who fled from them.³⁴ They took chase after Gantt, and while he was running at top speed, a third officer (Travis Brown)

28. Justin Hansford, *5 Years After Ferguson, We're Losing the Fight Against Police Violence*, N.Y. TIMES (Aug. 9, 2019), <http://www.nytimes.com/2019/08/09/opinion/ferguson-anniversary-police-race.html> [https://perma.cc/X38R-J8QS].

29. *Id.* (quoting an unnamed 2016 empirical study measuring the “extent to which the movement changed how officer-involved deaths were reported in local news”).

30. See, e.g., Emma Tucker, *Ferguson Officer 'Fighting for his Life' and Several Arrested After Protests Marking 10 Years Since Michael Brown's Killing*, CNN (Aug. 11, 2024, 10:46 AM), <http://www.cnn.com/2024/08/10/us/michael-brown-protests-ferguson-missouri/index.html> [https://perma.cc/G69N-JNCH]; Michael Loria, *Ferguson Officer 'Fighting for His Life' After Michael Brown Protest, Police Chief Says*, USA TODAY (Aug. 11, 2024, 9:04 PM), <http://www.usatoday.com/story/news/nation/2024/08/11/michael-brown-protest-ferguson-missouri-police-officer-suspects/74761802007> [https://perma.cc/9BPC-XT74].

31. See Tucker, *supra* note 30 (featuring a photo showing metal fence surrounding police department).

32. See *id.*

33. Eric Schmid, *Ferguson Police Release Video of Protester Knocking Over, Injuring Officer*, ST. LOUIS PUB. RADIO (Aug. 13, 2024, 6:03 PM), <http://www.stlpr.org/law-order/2024-08-13/ferguson-police-officer-body-camera-footage-protest> [https://perma.cc/JZK9-CTUA].

34. See Tucker, *supra* note 30.

stepped in Gantt's path with arms akimbo to "catch" him.³⁵ Gantt knocked into Officer Brown, and they both fell to the ground where several other officers jumped on top of them.³⁶ In the end, Officer Brown sustained critical brain injuries, presumably from the fall.³⁷ Officer Brown's condition is horrific and tragic, and Gantt now faces an array of serious felony charges that can land him in prison for life.³⁸

Nevertheless, the media's singular focus on the injured officer has served to further entrench the increasingly popular retrospective that *all* the Ferguson protests, from 2014 to today, symbolize not righteous opposition to racialized police violence, but unjustified and damaging civil disorder perpetrated by "police-hating thugs." The Associated Press article, reporting the charges against Gantt, ends with background on the initial Ferguson uprising: "Three separate investigations found no grounds to prosecute Wilson, who resigned in November 2014. But Michael Brown's death led to months of often violent protests."³⁹

Officer Brown's ordeal, and the ensuing press coverage fully eclipsed any police reform messages of the 2024, and even 2014, protests. Racial justice in Ferguson ultimately became a relative non-issue, not because Ferguson's policing had materially improved, but because the public grew tired of it. With the injury of Officer Brown, Chief Doyle had enough: "This department has become a punching bag for this community, but the officers here now were not even here in 2014," he lamented.⁴⁰ "We've implemented every change the activist community has asked for, from body cameras to bias training, yet we're still facing this violence."⁴¹ To be sure, research confirms that protests are unpopular among the general, non-protesting

35. See Schmid, *supra* note 33; see also Jim Salter, *Ferguson Police Release Body Camera Footage Showing Protester Knocking Officer to Sidewalk*, ASSOCIATED PRESS (Aug. 13, 2024, 7:35 PM), <https://apnews.com/article/ferguson-officer-injured-body-camera-footage-9c6c0011868f1d2a4edb4854800477b4> [<https://perma.cc/ZU7D-JS56>] (updated title Aug. 13, 2024, 7:38 PM).

36. See Schmid, *supra* note 33; see also Salter, *supra* note 35.

37. Jim Salter, *Man Accused in Assault that Critically Wounded Ferguson Officer Now Faces More Charges*, ASSOCIATED PRESS (Sept. 12, 2024, 11:16 AM), <https://apnews.com/article/officer-injured-ferguson-new-charges-31f5fb6885477fc7f0575a2db09a9308> [<https://perma.cc/4366-UV4X>].

38. *Id.*

39. *Id.*

40. Jason Volack, *Ferguson Police Address Violent Clash at Protest on 10th Anniversary of Michael Brown Jr.'s Death*, ABC NEWS (Aug. 10, 2024, 4:33 PM), <https://abcnews.go.com/US/ferguson-police-address-violent-clash-protest-10th-anniversary/story?id=112745830> [<https://perma.cc/W236-UK7K>].

41. *Id.*

public, and it confirms that any violence turns the public decisively against the protesters' cause.⁴² Nevertheless, as Hansford noted, Chief Doyle was far from the first, or only person, to invoke the image of the police as a "punching bag" for the more powerful and dangerous "activist community."⁴³

Mere months after Darren Wilson killed Michael Brown, the media began publicizing a phenomenon called the "Ferguson Effect."⁴⁴ In November 2014, St. Louis's white Police Chief Sam Dotson coined the term to explain the apparently rising violent crime and murder rates in his jurisdiction.⁴⁵ He opined, without supporting evidence, that officers had not been proactive because of fallout from the protests and fear of oversight.⁴⁶ Therefore "the criminal element is feeling empowered."⁴⁷ Despite his best efforts to deflect responsibility for increasing crime onto protesters, Dotson was eventually forced out in 2017 by a new administration—citing his poor performance.⁴⁸ St. Louis Public Radio reported:

The homicide rate also went up during Dotson's tenure. New 21st Ward Alderman John Collins-Muhammad told St. Louis Public Radio that Dotson's retirement is a "step in the right direction." "He's almost like a ghost. The only time you see the chief is when the camera's on. But when something goes wrong in north St. Louis, he's nowhere to be found."⁴⁹

Chief Dotson's self-serving armchair criminology of the Ferguson

42. Brent Simpson et al., *Does Violent Protest Backfire? Testing a Theory of Public Reactions to Activist Violence*, 4 *SOCIUS* 1, 5–10 (2018).

43. Hansford, *supra* note 28.

44. See Dara Lind, *The "Ferguson Effect," a Theory that's Warping the American Crime Debate, Explained*, VOX (May 18, 2016, 8:40 AM), <http://www.vox.com/2016/5/18/11683594/ferguson-effect-crime-police> [<https://perma.cc/3TWR-TJLF>].

45. *Id.*

46. *See id.*

47. *Id.* (quoting Christine Byers, *Crime Up After Ferguson and More Police Needed*, *Top St. Louis Area Chief Say*, ST. LOUIS POST-DISPATCH (Nov. 15, 2024), https://www.stltoday.com/news/local/crime-courts/crime-up-after-ferguson-and-more-police-needed-top-st/article_04d9f99f-9a9a-51be-a231-1707a57b50d6.html [<https://perma.cc/HM5E-W23K>]).

48. Jason Rosenbaum, *St. Louis Police Chief Dotson Out a Day After Krewson Takes Over as Mayor*, ST. LOUIS PUB. RADIO (Apr. 19, 2017, 2:05 PM), www.stlpr.org/government-politics-issues/2017-04-19/st-louis-police-chief-dotson-out-a-day-after-krewson-takes-over-as-mayor [<https://perma.cc/325T-74Q9>].

49. *Id.*

Effect was then spread across the nation by conservative pundit Heather Mac Donald. She bemoaned that “[a]rrests in [B]lack communities are even more fraught than usual, with hostile, jeering crowds pressing in on officers and spreading lies about the encounter.”⁵⁰ The unfortunate result, she opined, is that “Police officers now second-guess themselves about the use of force” and are left to “invent techniques on the spot for taking down resistant suspects that don’t look as bad as the techniques taught in the academy.”⁵¹ Without the police having the unrestrained ability to arrest Black people using any level of force, Mac Donald warned ominously: Black communities would lose the “liberating gains in urban safety over the past 20 years”—gains the police and their white supporters (like her) graciously bestowed on Black people through aggressive street policing.

Despite the Ferguson Effect’s origination in “copaganda,”⁵² and proliferation of the idea as a conservative talking point—social scientists decided it was nevertheless worthy of serious study. They undertook to determine whether certain crimes or murders spike in certain cities or neighborhoods after certain high-profile police killings or protests thereof. Initial studies found no, or modest, connections between certain Ferguson events and various crime rises.⁵³ Yet, a full decade later, researchers are *still* seeking proof of Chief Dotson’s self-interested media quip.⁵⁴

The very fact of all this academic attention serves to put an imprimatur

50. Heather Mac Donald, *The New Nationwide Crime Wave*, *Wallstreet J.* (May 29, 2015, 6:27 PM), <https://www.wsj.com/articles/the-new-nationwide-crime-wave-1432938425> [<https://perma.cc/H5J3-LYZU>].

51. *Id.*

52. Palika Makam, *Copaganda: What It Is and How to Recognize It*, *TEEN VOGUE* (Aug. 5, 2020), <https://www.teenvogue.com/story/what-is-copaganda-explainer> [<https://perma.cc/P92C-96F2>] (“[M]any police departments are [use] these tools [cell phones, storytelling, social media] to depict themselves as kind, heroic, fun-loving community members whose niceness can outweigh the actions of a few ‘bad apples.’ This is called copaganda.”)

53. *See, e.g.*, David C. Pyrooz et al., *Was There a Ferguson Effect on Crime Rates in Large U.S. Cities?*, 46 *J. CRIM. JUST.* 1, 5–7 (2016) (showing no systematic evidence of a Ferguson Effect); Richard Rosenfeld & Joel Wallman, *Did De-Policing Cause the Increase in Homicide Rates?*, 18 *CRIMINOLOGY & PUB. POL’Y* 51, 56 (2019) (finding no correlation between arrest and homicide rates in fifty-three large cities, including during the post-Ferguson “spike” in 2015); *cf.* Joel A. Capellan et al., *Deconstructing the Ferguson Effect: A Multilevel Mediation Analysis of Public Scrutiny, De-Policing, and Crime*, 43 *J. CRIME & JUST.* 125, 134–38 (2020) (finding de-policing did not predict increases in crime but public scrutiny did).

54. *See, e.g.*, Jacob T. Foster et al., *An Empirical Analysis of Depolicing Behavior*, 25 *POLICE PRAC. & RSCH.* 53, 53–70 (2023); Mohammad M. et al., *Why Did US Urban Homicide Spike in 2020? A Cross-sectional Data Analysis for the Largest American Cities*, 44 *RISK ANALYSIS* 1616, 1616–29 (2024) [<https://perma.cc/HC98-XEVM>].

of scientific legitimacy on the conservative talking point that protests are ominous, destructive, and ultimately harm everyone. One need only type “Ferguson Effect” into the academic databases to access a plethora of studies on whether high-profile police violence and/or protests correlate with everything from national short-term murder rates to police morale.⁵⁵

In any case, one does not prove Dotson’s Ferguson Effect simply by correlating the 2014 events with certain crime increases. Dotson and Mac Donald established at the outset that the term “Ferguson Effect” necessarily describes a multi-causal phenomenon: (1) protests affect officers’ decision-making; (2) specifically, they decide to make fewer arrests and use less (or less aggressive) force; (3) this police restraint sends a message to criminals that they won’t be arrested or subjected to aggressive force; (4) criminals hear this message; (5) hearing the message causes them to alter their behavior and commit more crimes than they would have otherwise; (6) crime rates rise. Some studies have found evidence supporting some of the factors, like officers being less proactive after high-profile shootings, but no study proves the theory in its entirety.⁵⁶ Still, there remains a widespread perception that the Ferguson Effect is real and critics should just lay off police. What well-intentioned researchers may have misunderstood is that the Ferguson Effect was never a question to be explored by science: It was always an answer embedded in a deep distrust of Black people, protests, and policing reform, as well as an abiding faith in the crime-fighting, indeed *liberating*, superpowers of police officers imbued with absolute discretion to use violence.

To be sure, all manner of left-radical protest spawns some conservative backlash. The difference between protests against police violence, and how conservatives view the protests, is that they are opposed by not just the

55. Here are a few. See generally Christopher J. Marier & Daniel B. Baker, *Police Use-of-Force Self-Efficacy: An Antidote to the Ferguson Effect?*, 47 J. CRIME & JUST. 309 (2024); Chrystina Y. Hoffman et al., *Beyond the “Ferguson Effect” on Crime: Examining its Influence on Law Enforcement Personnel*, 69 CRIME & DELINQUENCY 2901 (2023); Jane Florence Gauthier & Lisa M. Graziano, *Protecting Against the Ferguson Effect: Do Legitimacy and Pro-Policing News Matter?*, 46 J. CRIME & JUST. 468 (2023); Trisha N. Rhodes & David H. Tyler, *Is it Cool to Be a Cop? Exploring the Differential Impact of Ferguson on Police Applicants*, 15 POLICING 492 (2021).

56. Cheng Cheng & Wei Long, *The Effect of Highly Publicized Police Killings on Policing: Evidence from Large U.S. Cities*, 206 J. PUB. ECON. 1, 13–16 (2022) (finding reduction in self-initiated police activity after high-profile police killing); cf. Matthew Desmond et al., *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOCIO. REV. 857, 858 (2016) (finding that viewing a high-profile killing made people in Milwaukee, especially in Black neighborhoods, reluctant to call the police).

backlash but an *ex ante* set of cultural ideas about policing, its necessity, and the limited possibilities for reform. After the Floyd protests, a truly radical call emerged to “defund” the police—redistribution of city resources from police departments to other public programs that reduce crime. That call required no conservative backlash to fail spectacularly. Few municipalities even reduced their police department budgets, but the slogan became the very exemplar of the folly of radical politics.⁵⁷ Compare this to the once-radical calls to divest from fossil fuels—essentially to “defund” big oil. It required much big oil money and pundit hot air to counter those calls. And the proposals never received the sheer derision directed at defund the police. Those radical calls didn’t fade—they helped shape a new cultural sensibility about climate change.

Not so with Ferguson. After the 2024 protests, Missouri Democrats fully abandoned the police-skeptical and protest-protecting stance that lay at the heart of the initial uprising. Consider the story of Keith Rose, one of the 2024 protesters arrested for destruction of property. Rose, a member of the St. Louis Civilian Oversight Board, was a 2024 Democratic National Convention delegate.⁵⁸ Prosecutor Bell, in his last act before leaving office to campaign for Bush’s congressional seat, charged Rose, along with the other protesters, with *felony* first-degree property damage.⁵⁹ Police had accused Rose of kicking the fence, but his lawyer announced that video and still footage showed Rose merely present at the station when swept up in the arrest dragnet.⁶⁰

Still, the fact that Rose was active in Democratic politics made his arrest newsworthy, and the media reported the story and published his photo alongside pictures of and news about the severely injured Officer Brown.⁶¹

57. Grace Manthey et al., *Despite ‘Defunding’ Claims, Police Funding Has Increased in Many US Cities*, ABC NEWS (2022), <https://abcnews.go.com/US/defunding-claims-police-funding-increased-us-cities/story?id=91511971> [<https://perma.cc/L6GF-6JL2>]. A few jurisdictions experimented with reducing the police budget. See David Cohen, ‘*Defund the Police*’ Is Not the Policy of the Democratic Party, *Pelosi Says*, POLITICO (Feb. 13, 2022, 10:21 AM), <http://www.politico.com/news/2022/02/13/pelosi-defund-police-democrats-00008449> [<https://perma.cc/6BFA-DN4V>].

58. See Sam Clancy & Justina Coronel, *3 St. Louis Aldermen Sign Letter Calling for Civilian Oversight Board Member to Resign After Protest Arrest*, KSDK (Aug. 14, 2024, 10:17 AM) [<https://perma.cc/XR29-WNPA>].

59. See *id.*

60. See *id.*

61. Michael Dorgan, *DNC Delegate Arrested In Protest That Left Cop Critical Faces Calls to Resign From Police Oversight Board*, FOX NEWS (2024), <https://www.foxnews.com/us/dnc-delegate-arrested-protest-left-cop-critical-faces-calls-resign-from-police-oversight-board>

The New York Post editorial board gleefully opined, “Another day, another Democratic apparatchik involved in a violent act of domestic terrorism,” accompanied by a curiously exculpatory photo of Rose calmly standing several feet away, while others shook the fence.⁶² Rose voluntarily withdrew as a convention delegate, but the Missouri Democratic Party still released this non sequitur—perhaps even defamatory statement—about the presumed and likely innocent man:

The Missouri Democratic Party condemns the violence that critically injured Officer Travis Brown and we send our thoughts and well wishes to Officer Brown and his family. While the right to engage in peaceful assembly is fundamental to our democracy, violence is never acceptable. Keith Rose has decided to voluntarily withdraw as an uncommitted alternate delegate to the DNC.⁶³

II. AN OFFICER AND A VICTIM

Why do people so easily see the police as the punching bags of residents of overpoliced and underserved communities or the “activist mob” that speaks for them? The answer could be that outrage at critiques of the police stem from humanistic impulses. After all, the vast majority of officers—even officers who commit brutality on a regular basis—are not bad apples. They are not unreserved racists who seek out law enforcement jobs so they can brutalize and subjugate minorities and the economically marginalized. Rather, cops are mostly just state employees trying to do their job, which is whatever their superiors tell them to do. Consider, for example, the somewhat sympathetic rookie Officers Alexander Kueng and Thomas Lane, who were convicted for their part in Derek Chauvin’s infamous murder.⁶⁴

[<https://perma.cc/YE9Q-9DHT>].

62. Post Editorial Board, *DNC Delegate Thuggery Indicts Democratic Party on Political Violence*, N.Y. POST (Aug. 15, 2024, 1:12 PM), <https://nypost.com/2024/08/15/opinion/dnc-delegate-thuggery-indicts-democratic-party-on-political-violence/> [<https://perma.cc/3UJW-Q43L>] (cleaned up quotation).

63. Clancy & Coronel, *supra* note 58.

64. Press Release, Off. of Pub. Affs., Former Minneapolis Police Officers Tou Thao and J. Alexander Kueng Sentenced to Prison for Depriving George Floyd of His Constitutional Rights (July 27, 2022), <https://www.justice.gov/archives/opa/pr/former-minneapolis-police-officers-tou-thao-and-j-alexander-kueng-sentenced-prison-depriving> [<https://perma.cc/BZ58-PJLD>] (explaining sentences of

The two had just completed their probationary training periods under Chauvin, a decorated nineteen-year veteran training officer.⁶⁵ They were on the job for under a week when they encountered Floyd.⁶⁶ Kueng and Lane hardly fit the mold of a hypermasculine, hyperviolent white supremacist. The New York Times reported about Kueng, who is Black:

He had seen one sibling arrested and treated poorly, in his view, by sheriff's deputies. He had found himself defending his decision to join the police force, saying he thought it was the best way to fix a broken system. He had clashed with friends over whether public demonstrations could actually make things better. "He said, 'Don't you think that that needs to be done from the inside?'" his mother, Joni Kueng, recalled him saying after he watched protesters block a highway years ago. "That's part of the reason why he wanted to become a police officer—and a Black police officer on top of it—is to bridge that gap in the community, change the narrative between the officers and the Black community."⁶⁷

Thomas Lane, who is white, shared such lofty aspirations. Known as a calming presence and someone who would de-escalate situations, he went back to school later in life to become an officer or a teacher. He chose law enforcement but continued to tutor Somali kids and work with at-risk

convicted Officers J. Alexander Kueng, Tou Thao, and Thomas Lane).

65. See Chris Harris, *Who are the Fired Minneapolis Officers Charged After George Floyd's Killing*, PEOPLE (June 4, 2020, 1:56 PM), <https://people.com/crime/who-are-fired-minneapolis-police-officers-charged-after-george-floyd-killing/> [<https://perma.cc/299B-RCBY>] (discussing background of the officers); see also Libor Jany, *Chauvin Trial Again Casts Spotlight on Minneapolis Police Department's Training Program*, FRONTLINE (Apr. 3, 2021), <https://www.pbs.org/wgbh/frontline/article/derek-chauvin-trial-minneapolis-police-department-training-program/> [<https://perma.cc/6FWF-T53Z>] (explaining how recent hires spend "six to seven months riding along with more experienced officers" to learn about "proper use of force" and other police work policies). The six months of training is generally "far less than is required of [] counterparts in other developed countries." *Id.* (quoting COUNCIL ON CRIM. JUST. TASK FORCE ON POLICING, ASSESSING THE EVIDENCE: EVALUATIONS OF PROPOSED POLICING REFORMS (2021), <https://counciloncj.foleon.com/policing/assessing-the-evidence/> [<https://perma.cc/JY3P-5V6D>]).

66. Jany, *supra* note 65.

67. Kim Barker, *The Black Officer Who Detained George Floyd Had Pledged to Fix the Police*, N.Y. TIMES (June 27, 2020), <http://www.nytimes.com/2020/06/27/us/minneapolis-police-officer-kueng.html> [<https://perma.cc/Q7ZU-TFBM>].

youth.⁶⁸

But it was an indulgence of fantasy for Kueng and Lane to believe that they could just waltz into the department and alter existing practices and attitudes. In recent times, policing reformers have invested much misplaced hope on rookie intervention as the key to changing an entrenched culture of violence. Kueng had just completed a probationary period that Chauvin had extended on the ground that the rookie lacked initiative.⁶⁹ Unsurprisingly, Kueng followed Chauvin's lead on restraining Floyd. Lane did try to suggest a less lethal position but was rebuffed by Chauvin.⁷⁰ Reflecting on the imprudence of relying on rookies to check police brutality, Michelle Gross, president of Communities United Against Police Brutality in Minneapolis, queried rhetorically:

How do you as an individual think that you're going to be able to change that system, especially when you're going in at a low level? You're not going to feel OK to say, 'Stop, senior officer.' The culture is such that that kind of intervening would be greatly discouraged.⁷¹

U.S. District Judge Paul Magnuson expressed similar sentiments, blasting Chauvin at his civil rights-violation sentencing hearing: "You absolutely destroyed the lives of three young officers by taking command of the scene."⁷²

68. Rochelle Olson et al., *Descended From Cops, Thomas Lane Saw His Minneapolis Police Career Last 4 Days*, STARTRIBUNE (Aug. 29, 2020, 8:16 PM), <https://www.startribune.com/descended-from-cops-thomas-lane-saw-his-minneapolis-police-career-last-4-days/572263492> [<https://perma.cc/SD9A-GLWV>].

69. See Jon Collins, *Floyd Killing: Ex-Cop Kueng Says He Trusted Chauvin as Senior Officer on Scene*, MPR NEWS (Feb. 16, 2022, 4:00 AM), <http://www.mprnews.org/story/2022/02/16/floyd-killing-excops-testimony-continues-in-federal-trial> [<https://perma.cc/QK9N-SSRQ>].

70. *Id.*

71. See Barker, *supra* note 67 (internal citations omitted) (cleaned up).

72. The Associated Press, *Former Minneapolis Officer Thomas Lane Sentenced to 2 1/2 Years on Federal Charges for His Role in George Floyd's Killing*, NBC NEWS (July 21, 2022, 11:05 AM), <http://www.nbcnews.com/news/us-news/former-minneapolis-officer-thomas-lane-sentenced-2-12-years-federal-ch-rcna39327> [<https://perma.cc/E6L3-CCKN>]. The third officer, Tou Thao, a member of the Hmong community, was many years junior to Chauvin, but not a rookie. See Steve Karnowski, *Ex-Minneapolis Officer Unrepentant as He Gets Nearly 5 Years in George Floyd Killing*, ASSOCIATED PRESS (Aug. 7, 2023, 12:20 PM), <http://www.apnews.com/article/george-floyd-minneapolis-officer-tou-thou-sentencing-586deae4d14807ef3f2bdd0196d0b86> [<https://perma.cc/XUL7-NZLZ>]. He held back the crowd during the incident and received three and a half years for federal civil rights violations and five years for aiding Floyd's murder. *Id.*

If the rookie officers who participated in a killing that outraged the world are somewhat sympathetic, what about the officers who have never used injurious force but whom a sizeable number of young liberals view generically as “pigs” and “thugs with badges?” One might compare such humanistic consideration for the lowly cogs in the policing system to sympathy for the returning Vietnam draftees condemned as “baby killers” by student protesters who had faced college rather than conscription. To be sure, officers, unlike draftees, have a choice of profession, but many choose policing to help people. As good as their motives may be, “helping people” within policing culture rests on a Heather Mac Donald-style premise that state violence, primarily exacted on racially and socioeconomically marginalized people and communities, is the key to safety and even liberation.

Still, one could argue that people sympathize with the individual well-intentioned cops who did little more than abide by training and orders to exercise maximum forcible control, even if those people disagree with such police tactics. And it is these sympathetic sentiments that drive the idea that the police are victims of activists. But I don’t think so. If this were the case, society would largely support protesters’ reform agenda but disagree with their characterization of individual officers as gleeful racists and bad apples. This was much like how many agreed that the Vietnam war needed to end, but strongly opposed protesters’ denigration of individual soldiers. Instead, after the Floyd protests, we saw the opposite sentiment that the individual bad-apple officer, not the system, is *exactly* the problem. This may explain why, at the height of the backlash to “defund” the police in 2021, the number of prosecutions of police officers reached an all-time high—even if a paltry twenty-one cases.⁷³

Prosecutors, the press, and especially the Minneapolis Police Department, maintained that Derek Chauvin was the rottenest apple of them all. Chief Medaria Arradondo was quick to label the killing a murder and testified at Chauvin’s trial that the disgraced officer’s actions were in diametric opposition to department policies and values. He said, “[W]hen we talk about the framework of our sanctity of life and when we talk about our principles and the values we have, [Chauvin’s] action goes contrary to

73. See Jamiles Lartey, *How Policing Has—and Hasn’t—Changed Since George Floyd*, THE MARSHALL PROJECT (Aug. 6, 2022, 12:00 PM), <http://www.themarshallproject.org/2022/08/06/how-policing-has-and-hasn-t-changed-since-george-floyd> [https://perma.cc/M6NS-MEY7].

what we're talking about."⁷⁴ Indeed, in the closing statement, the prosecutor emphasized, "Make no mistake this is not a prosecution of the police, it is a prosecution of the defendant, and there's nothing worse for good police than a bad police who doesn't follow the rules."⁷⁵ He insisted that like the murdered Floyd, the police department was Chauvin's victim. "He betrayed [his] badge," the prosecutor said, concluding, "This is not an anti-police prosecution, it's a pro-police prosecution."⁷⁶

But let us take a closer look at those "sanctity of life"-promoting departmental policies, which according to the chief and prosecution, Chauvin and his accomplices so clearly and brazenly flouted. Minneapolis state law provides that when faced with a fleeing or resisting person who has been "informed . . . that the officer intends to arrest," the officer may use "all necessary" force short of deadly force to effectuate the arrest.⁷⁷ There is no provision that this maximum nondeadly force be reserved for crimes more serious than counterfeit twenties. The point of the statute is not merely to enable the police to incapacitate highly dangerous suspects, but to empower officers to violently compel compliance *whenever* they decide to arrest. The point is control.

At the time of Floyd's death, two kinds of neck restraints were used among the Minneapolis Police Department's "non-deadly force options." Officers were permitted to use a "conscious neck restraint" involving light pressure to the neck to bring an uncooperative person to heel.⁷⁸ Alternatively, for a person who had already resisted police control, officers could employ an "unconscious neck restraint," involving using their "arms or legs to knock out a person by pressing carotid arteries on either side of the neck, blocking blood flow to the brain."⁷⁹ That's right, the Minneapolis department directed its officers to complete arrests, no matter how trivial

74. Ray Sanchez et al., 'The Lessons of This Moment.' *The Testimony by Police Brass at Derek Chauvin's Trial is Unprecedented*, CNN (2021), <http://www.cnn.com/2021/04/10/us/derek-chauvin-george-floyd-trial-testimony/index.html> [<https://perma.cc/2HDH-JRBQ>].

75. *Prosecution Closing Argument Full Transcript: Derek Chauvin Trial for Murder of George Floyd*, REV (2021), <http://www.rev.com/blog/transcripts/prosecution-closing-argument-full-transcript-derek-chauvin-trial-for-murder-of-george-floyd> [<https://perma.cc/AB2G-QQMD>] (hearing on Apr. 19, 2021).

76. *Id.*

77. MINN. STAT. § 629.33 (2024).

78. Michael Tarm, *Explainer: Was Officer's Knee on Floyd's Neck Authorized?*, ASSOCIATED PRESS (Apr. 5, 2021, 5:34 PM), <http://www.apnews.com/article/was-officer-knee-on-george-floyd-neck-authorized-639cab5a670173ea9cc311db4386abf2> [<https://perma.cc/5SRB-DASL>].

79. *Id.*

the offense, by preventing blood from reaching civilians' brains.

Because Floyd was resistant after having been handcuffed, departmental policy authorized Chauvin to use more than just neck restraint. Departmental policies allowed officers in this situation to use the “maximal restraint technique” involving “hobbles.” The scary-sounding terms describe a pretty traumatic practice. The police use a hobble device to bind the person's legs together and then attach the legs to a device at the person's waist.⁸⁰ The department's training slide on this technique featured a picture of a prone person, held down by several officers, with one officer's knee placed directly on the person's neck.⁸¹ Although Chauvin had initially requested hobbles, he ultimately decided not to use the maximal technique because the neck restraint technique was working.⁸² Ultimately, Chief Arradondo's assessment that Chauvin brazenly flouted departmental standards involved a bit of hair-splitting: The Chief testified that “there is an initial reasonableness in trying to get him under control,” but continued, restraint became “clearly” unreasonable “when Mr. Floyd was no longer responsive and even motionless.”⁸³ The case would have not been so clear had Chauvin discontinued the restraint once he had succeeded in “blocking blood flow to the brain” of George Floyd.

The Minneapolis Police Department has never, and still does not, direct its officers to heed the pleas for mercy or cries of pain of the people they subject to “all necessary” non-deadly force. Subduing and restraining begging and crying people to effectuate arrest *is* the policy, and completed arrests are the goal to be encouraged and celebrated—so long as the pleading person does not die (or does die but not on camera). In fact, police departments, including Minneapolis's, train their officers that begging and pleading people could be in a state of “excited delirium,” which, according

80. Steve Karnowski, *Explainer: Decision on 'Hobble' is at Issue in Chauvin Trial*, ASSOCIATED PRESS (Apr. 6, 2021, 8:25 PM), <http://www.apnews.com/article/trials-minneapolis-death-of-george-floyd-racial-injustice-ce12d0f96e4d5df008d88ad64e809451> [https://perma.cc/X29K-SFDN]; POL'Y & PROC. MANUAL, § 5-300 Use of Force (MINNEAPOLIS POLICE DEP'T 2014) [https://perma.cc/JFZ6-LR7J].

81. See Exhibits, *State of Minnesota v. Chauvin*, 27-CR-20-12951 (July 7, 2020), <https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12951-TKL/Exhibit67807072020.pdf> [https://perma.cc/B3DZ-UM77].

82. Karnowski, *supra* note 80.

83. Jon Collins et al., *Chauvin Trial: Floyd Restraint Violated Cops' Training, Ethics, Chief Says*, MPR NEWS (Apr. 5, 2021, 5:15 AM), <http://www.mprnews.org/story/2021/04/05/chaumin-trial-george-floyd> [https://perma.cc/A6JS-CWDJ].

to the department, is characterized by “delirium, psychomotor agitation, anxiety, hallucinations, speech disturbances, disorientations, [and] violent and bizarre behavior.”⁸⁴

This condition, which is not recognized as a valid medical diagnosis in the world’s leading diagnostic manuals the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders and the World Health Organization’s International Classification of Diseases, consists of a grab-bag of characteristics of noncompliant civilians: people on drugs, with mental health issues, with physical issues, scared out of their minds, or just plain angry. People with excited delirium, Minneapolis officers learn, are “insensitive[] to pain” and exhibit “superhuman strength.” Legal and medical scholar Osagie K. Obasogie responded to racist notions of Black men’s extraordinary strength and Black people’s imperviousness to pain.⁸⁵

In the end, the Minneapolis Police Department counseled its officers to use maximal force precisely on the civilians who respond to arrest with an acute stress reaction—whether due to drugs or other physiological conditions—who may be particularly prone to stress-induced health emergencies like cardiac arrest. And in a sad twist, the fact that police include “sudden death” as an excited delirium characteristic has not made officers more judicious in using force against stressed individuals. Instead, it has provided grounds for police to deny responsibility for arrest-related deaths and blame them on the arrestee’s “independent” condition of excited delirium.⁸⁶

For all the prosecutor’s insistence that Chauvin—not policing policy—was the only problem, the department did ban neck restraints shortly after Floyd’s death, and banned the maximum restraint technique in 2023.⁸⁷ In

84. Exhibits, *State of Minnesota v. Chauvin*, 27-CR-20-12951 (July 7, 2020), <https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12951-TKL/Exhibit67807072020.pdf> [<https://perma.cc/B3DZ-UM77>] (including definition in a slideshow used to train officers; on page 23 of PDF).

85. Osagie K. Obasogie, *Excited Delirium and Police Use of Force*, 107 VA. L. REV. 1545, 1548 (2021).

86. Justin M. Feldman et al., *Mortality Classification for Deaths That Follow the Use of Non-Firearm Force by Police: A National Cross-Sectional Study (United States, 2012–2021)*, MEDRXIV (May 21, 2024), <https://www.medrxiv.org/content/10.1101/2024.05.20.24307634v1.full-text> [perma.cc/5YZP-TAA4].

87. See Steve Karnowski, *Minneapolis Bans Police Chokeholds in Wake of Floyd’s Death*, ASSOCIATED PRESS (June 5, 2020, 7:58 PM), <http://www.apnews.com/article/ce3c4c56b683ae47d26bec1045a35fb7> [<https://perma.cc/SX4M-LDKS>]; Bill Strande & Jennifer Hoff, *Minneapolis*

the wake of the Floyd protests, many departments banned chokeholds, but the payoff in terms of saving lives has likely been moderate, given that deaths during chokeholds are rare occurrences.⁸⁸ But police violence itself, beyond the use of neck restraints, is far from rare. The larger picture is that: Even with departments adopting more strict use-of-force policies, police-induced injury in the United States over the last decade has barely changed. Every year, more than a thousand people die, and tens of thousands suffer serious injuries during arrests.⁸⁹ And, sadly, training and accountability technology like bodycams have barely moved the needle on these overall numbers.⁹⁰ Quite simply: Arrests are high stress, dangerous events, and when the civilian is resistant or armed, even the strictest use-of-force policy may not prevent escalation or ensure safety.⁹¹

Without even counting immediate injuries, the negative psychological and physical health effects of arrests and non-arrest police encounters are significant, correlate with overall morbidity and mortality, and disproportionately affect civilians of color. Research confirms that street policing and pro-arrest programs impose serious social and public health costs. Erin Reinhart explains:

The “war on crime” is the highest-casualty, most expensive, and longest-lasting war in American history.

Police Ban Controversial Restraint Tactics, KARE11 (Apr. 17, 2023, 4:58 PM), <http://www.kare11.com/article/news/local/minneapolis-police-ban-controversial-restraint-tactics/89-5643f3a7-4302-4d7a-afb5-80bbc252fe4a> [<https://perma.cc/GZ8V-4B24>].

88. See Brenden Beck et al., *Neck-Restraint Bans, Law Enforcement Officer Unions, and Police Killings*, 23 CRIMINOLOGY & PUB. POL’Y 663, 665 (2024).

89. E.M.F. Strömmer et al., *Injuries Due to Law Enforcement Use of Force in the United States, 2006–2015: Trends in Severity and by Race*, 11 J. RACIAL & ETHNIC HEALTH DISPARITIES 2699, 2699–2700 (2024). See Ruby F. Quintanilla, *Arrest-Related Deaths in Los Angeles County: Do Use-Of-Force Policies Make a Difference?* (Feb. 2020) (Ph.D. dissertation, University of La Verne) (on file with University of La Verne Library and ProQuest).

90. On bodycams, see generally Hunter M. Boehme & Cory Schnell, *Why Did the Use of Force Go Up? Investigating the Unexpected Impact of a Body-Worn Camera Program on a Use of Force Time Series*, 82 J. CRIM. JUST. 101944 (2022); Barak Ariel et al., *Wearing Body Cameras Increases Assaults Against Officers and Does Not Reduce Police Use of Force: Results from a Global Multi-Site Experiment*, 13 EUR. J. CRIMINOLOGY 744 (2016); Indigo Koslicki et al., *When No One Is Watching: Evaluating the Impact of Body-Worn Cameras on Use of Force Incidents*, 30 POLICING & SOC’Y 569, 566–67 (2020). On bias training, see generally Robert E. Worden et al., *Implicit Bias Training for Police: Evaluating Impacts on Enforcement Disparities*, LAW & HUM. BEHAV. ONLINE, Aug. 2024, <https://pubmed.ncbi.nlm.nih.gov/391333609/> [perma.cc/R6GB-NJ7G].

91. See Ram Sundaresh et al., *Exposure to the US Criminal Legal System and Well-Being: A 2018 Cross-Sectional Study*, 110 AM. J. PUB. HEALTH S116, S116 (2020).

This coordinated assault on the nation's poorest communities has led to tens of millions of individuals locked up in cages with deadly long-term health consequences, at least 31,000 people killed directly by police, and trillions of dollars spent on pointless punishment. For over 50 years, repeated increases to public spending on police and prisons have continually bankrolled this war while failing to ensure safety, leaving the U.S. one of the least safe countries among all wealthy nations.⁹²

But in the public mindset, the good of arrests and aggressive street policing are obvious: crime reduction and prevention of criminal violence. The public largely agrees with state and police departments that arrest *is* the goal to be reached by "all necessary" means.⁹³ There is an ingrained idea that if police make fewer arrests or, God forbid, abandon arrest efforts when a person flees or resists rather than maintaining control at all costs, criminals will be "empowered," and the public will be left to toil in a Batman-less Gotham City. This is why so many liberals rejected the defund the police movement outright, with no effort to ascertain whether reallocating police budgets to other programs would positively or negatively impact crime rates.

III. THE PERPETUAL PUBLIC PREOCCUPATION WITH CRIME

The public sides with the police against protesters who "beat them up." Not despite officers' penchant for violent arrest, but *because* of it. Unlike the anti-protest group who supported Vietnam soldiers but not the war, people oppose policing protests because they believe in the safety promise of America's war on crime. The public is ever nervous that serious reform will deprive cities of the necessary number of police soldiers and deprive police-soldiers of the necessary weapons to successfully prosecute this forever war. While many think of the war on crime mentality as a feature of a bygone era when Democrats and Republicans jockeyed for who could get tougher on "super-predators," the narrative of cities under siege is more

92. Eric Reinhart, *Biden's Plan for More Police Won't Make America Safer*, TIME (Aug. 24, 2022, 7:00 AM), <http://www.time.com/6208047/police-crime-america> [https://perma.cc/3XV8-C2LW].

93. John C. Navarro & Michael A. Hansen, "Please Don't Be Too Nice": *The Role of Political Ideology In the Approval of Police Use of Force*, 46 POLICING: AN INT'L J. 724, 724–38 (2023).

popular than ever. Donald Trump's ultimately successful 2024 election campaign printed and distributed signs that simply read, "Trump Safety | Kamala Crime."⁹⁴ His opponent Kamala Harris also touted her anticrime bona fides, leaning into her record as a tough prosecutor—something she had downplayed just four short years before when she ran for the Democratic presidential nomination amidst surging progressive support for Black Lives Matter.⁹⁵ Nevertheless, Trump was the more natural crime-control candidate, as the election results confirmed.

Whatever lull there may have been in the late 2010s, tough-on-crime rhetoric has roared back. Back when Trump assumed office in 2017, something of a bi-partisan consensus had formed that jail populations were too high and the American law enforcement apparatus had grown too expensive—conservatives worried about economic costs and liberals focused on social and human costs.⁹⁶ Indeed, following the initiative of his son-in-law Jared Kushner, whose father had been incarcerated, Trump successfully championed the First Step Act, the first major incarceration-reduction legislation in congressional history.⁹⁷ With the conservative funders such as the Koch brothers elevating decarceration to a top policy priority, many in the criminal law world were optimistic that reducing law-enforcement's footprint could be a bipartisan issue—and, just maybe, a political winner.⁹⁸ But it was never meant to be.

Historically, respites from anxiety and hatred-producing crime narratives have proven tenuous and short-lived. "Popular punitivism," which describes "the support of the populous for increasingly punitive responses to criminal conduct," has remained resilient across time and

94. Republican Party of Rock County, FACEBOOK (Oct. 5, 2024, 7:16 AM), https://www.facebook.com/story.php?story_fbid=920786360080290&id=100064468040370&_rdr [<https://perma.cc/3LDD-WA36>].

95. See Abdallah Fayyad, *Ruthless "Cop" or "Soft on Crime"? Kamala Harris's Record as Prosecutor, Explained*, VOX (July 31, 2024, 6:00 AM), www.vox.com/today-explained-newsletter/363859/kamala-harris-prosecutor-record-tough-crime [<https://perma.cc/KD68-6JNV>].

96. Dagan Dagan & Steven M. Teles, *Locked In? Conservative Reform and the Future of Mass Incarceration*, 651 AM. ACAD. OF POL. & SOC. SCIENCE 266, 266–76 (2013).

97. See Gabby Orr & Daniel Lippman, *Trump Snubs Jared Kushner's Signature Accomplishment*, POLITICO (Sept. 24, 2019, 5:00 AM), www.politico.com/story/2019/09/24/trump-kushner-criminal-justice-snub-1507285 [<https://perma.cc/633R-UVNL>].

98. Michael Hirsh, *Charles Koch, Liberal Crusader?*, POLITICO MAG., Feb. 5, Mar.–Apr. 2021, www.politico.com/magazine/story/2015/03/charles-koch-overcriminalization-115512 [<https://perma.cc/B5Y2-LTFL>].

major political shifts.⁹⁹ People’s deeply ingrained reactionary response to stories of rising crime, the existence of crime, or even declining crime but rising fear of crime, underlies the perpetual public calls for more policing, prosecution, and incarceration.¹⁰⁰ We have seen time and again that when policing levels are high and a certain crime blips up, the press covers the crime surge (not the policing surge) with alacrity.¹⁰¹ People react not by reasoning that the crime increase proves that our high levels of policing failed but by insisting on more policing to fight the rising tide.¹⁰² When crime declines—something that rarely makes headlines—people ruminate that hyper-policing worked.¹⁰³ Carceral actors and institutions have an uncanny ability to fail up.

Consider, for example, attitudes in New York City. In 1999, Quinnipiac began asking New Yorkers whether crime was a “very serious” problem.¹⁰⁴ Back then, despite higher crime rates and still-popular tough-on-crime policies, just 35 percent of respondents answered the question in the affirmative.¹⁰⁵ Fast forward to February 2022, and more than 70 percent said that New York had a very serious crime problem.¹⁰⁶ Did the city’s millions of residents suddenly become awash in violent crime? No. Homicide rates, the media’s preferred crime indicator, were 50 percent lower than in

99. Wayne Martin, *Popular Punitivism—The Role of the Courts in the Development of Criminal Justice Policies*, 43 AUSTL. & N.Z. J. CRIMINOLOGY 1, 1 (2010).

100. See Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 397–98 (2006); RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 109 (2019).

101. See BARKOW, *supra* note 100.

102. See John Pfaff, *Why Our Fixation on the Murder Rate Is Killing Us*, SLATE (Oct. 8, 2021, 9:00 AM), <https://slate.com/news-and-politics/2021/10/murders-rose-in-2020-dont-give-more-money-to-police.html> [<https://perma.cc/8WNW-3VPZ>].

103. See *id.*; Press Release, The White House, Fact Sheet: President Biden’s Budget Makes Our Communities Safer and Combats Crime (Mar. 9, 2023), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/03/09/fact-sheet-president-bidens-budget-makes-our-communities-safer-and-combats-crime/> [perma.cc/8732-2ULL] [hereinafter Biden Press Release]; *74% of NYC Voters Say Crime is a Serious Problem in the City, an All-Time High*, NBC N.Y. (Feb. 9, 2022, 10:18 PM), <https://www.nbcnewyork.com/news/local/74-of-nyc-voters-say-crime-is-a-serious-problem-in-the-city-an-all-time-high/3544026> [<https://perma.cc/6L9G-UJMR>] [hereinafter 74%].

104. Quinnipiac University, *Despite Crime Approval, Mayor’s Job Rating is Negative, Quinnipiac College Poll Finds; New Yorkers Concerned with Race Relations, Police*, QUINNIPAC UNIV. (Apr. 8, 1999), <https://poll.qu.edu/Poll-Release-Legacy?releaseid=731> [<https://perma.cc/DUG2-V9AV>].

105. See *id.*

106. See 74%, *supra* note 103.

1999.¹⁰⁷ A Bloomberg News article pointed to the answer.¹⁰⁸ Observing that “incidents of violent crime [homicide, larceny, burglary, and assault] remain at historic lows in New York City,” but what actually rose was media coverage of crime.¹⁰⁹ During Mayor Bill de Blasio’s tenure, press coverage of crime in New York averaged about 132 stories per month.¹¹⁰ That number started to increase when the tough-on-crime Mayor Eric Adams announced his candidacy, ballooning to 800 stories per month after his January 1, 2022 inauguration.¹¹¹

To be sure, during and immediately after COVID, certain crimes did trend upward, and an already anxious locked-down public had the time to fixate on the crime rise, just as they had on the Floyd video. Almost as quickly as this crime “surge”—mostly meaning increased gun violence in large cities—began, it ended.¹¹² This is why criminologists warn against making too much of short-term movements in crime rates.¹¹³ But politicians, the police, and the media cannot help themselves. Fear, quite simply, sells.

From my perch in Los Angeles in 2024, I witnessed the unmaking of George Gascón, L.A.’s first progressive prosecutor and one of the most well-known in the nation. Gascón had been elected in that heady post-Floyd era and shortly thereafter survived a recall effort.¹¹⁴ His opponent Nathan Hochman, the failed 2022 Republican candidate for California Attorney General who ran as an independent, promised to restore law and order and specifically to “crack down” on retail theft.¹¹⁵ I saw the public become

107. Fola Akinnibi & Raedah Wahid, *Fear of Rampant Crime is Derailing New York City’s Recovery*, BLOOMBERG (July 29, 2022), <https://www.bloomberg.com/graphics/2022-is-nyc-safe-crime-stat-reality> [https://perma.cc/MA9X-PYEB].

108. *See id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See* Marin Cogan, *Why the US Had a Violent Crime Spike During Covid—and Other Countries Didn’t*, VOX (July 8, 2024, 6:00 AM), <http://www.vox.com/politics/358831/us-violent-crime-murder-pandemic> [https://perma.cc/L9M7-GYJR].

113. Matthew Hutson, *The Trouble with Crime Statistics*, NEW YORKER (Jan. 9, 2020), <https://www.newyorker.com/culture/annals-of-inquiry/the-trouble-with-crime-statistics?utm> [https://perma.cc/A234-VLF7].

114. Sasha Ambramsky, *George Gascón Survives Another Recall*, NATION (Aug. 19, 2022), www.thenation.com/article/society/gascon-recall [https://perma.cc/M84Z-A694].

115. *See* Connor Sheets & James Queally, *How L.A.’s Progressive ‘Godfather’ Wound Up Struggling to Keep His Job as D.A.*, L.A. TIMES (Oct. 24, 2024, 3:00 AM), <http://www.latimes.com/california/story/2024-10-24/george-gascon-los-angeles-district-attorney-race> [https://perma.cc/4CTA-TRR3]; Frank Stoltze, *Police Unions, Real Estate Interests Spend Big to Support Hochman, Oust*

increasingly convinced that Gascón had singlehandedly turned the city into a cesspool of crime. And in the deepest of deep blue districts, Hochman won by a landslide.¹¹⁶ His victory was accompanied by the passage of a package of criminalization measures, one of which was to “get tough” on shoplifters.¹¹⁷

In Los Angeles, even at the height of COVID, homicides and violent crimes were nowhere near the level of the 1990s. And by 2024, violent crime was once again at historic lows.¹¹⁸ In October 2023, the Los Angeles Times ran a headline, *Crime is Down, but Fear is Up: Why Is L.A. Still Perceived as Dangerous?*¹¹⁹ Community organizer Skipp Townsend had an answer: “‘A lot of propaganda’ on his social media feed about how it’s getting worse.” He added, that for decades: “People been doing smash and grabs, there were just no cameras around to capture it.”¹²⁰ The broken windows theory, which was mere conjecture when it became popular in the 1980s, holds that visible signs of disorder and rampant petty offenses create a mass psychology of lawbreaking that causes and increases the commission of serious offenses.¹²¹ While empirical research has shown that broken windows do not create more serious crime,¹²² what may be true is that visible signals of “urban decay” create more and more serious fear of crime.

Gascón in DA Race, LAIST (Oct. 31, 2024, 5:00 AM), laist.com/news/politics/gascon-hochman-campaign-funding [https://perma.cc/6HJS-JGH3].

116. See Koko Nakajima & Phi Do, *California and Los Angeles County are Getting Tougher on Crime. Here are the Maps that Show it*, L.A. TIMES (Dec. 30, 2024, 3:00 AM), www.latimes.com/politics/story/2024-12-30/criminal-justice-prop-36-da-hochman-polling-voting-results-maps [https://perma.cc/G969-QXDA].

117. Proposition 36 (Ca. 2024), lao.ca.gov/BallotAnalysis/Proposition?number=36&year=2024 [https://perma.cc/QLK4-XF67].

118. Libor Jany, *Crime is Down, but Fear is Up: Why is L.A. Still Perceived as Dangerous?*, L.A. TIMES (Oct. 12, 2023, 3:00 AM), http://www.latimes.com/california/story/2023-10-12/violent-crime-is-down-fear-is-up-why-is-la-perceived-as-dangerous [https://perma.cc/746A-BHEE].

119. *Id.*

120. *Id.*

121. George L. Kelling & James Q. Wilson, *Broken Windows*, THE ATLANTIC, Mar. 1982, www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465 [https://perma.cc/E369-MG6B].

122. A number of studies found no correlation between “disorder,” the measurement of which is itself an issue of contention, and more serious crimes; while others suggest that disordered neighborhoods may be fertile grounds for “opportunistic” crimes or that disorder and crime might “cluster” together. See Anthony A. Braga et al., *Disorder Policing to Reduce Crime: An Updated Systematic Review and Meta-Analysis*, 23 CRIMINOLOGY & PUB. POL’Y 745, 748–49 (2024) (citing studies). Importantly, there has been no substantiation of the psychology of lawbreaking thesis that formed the main causal mechanism in broken windows theory. *Id.*

The orderly public develops race- and class-based perceptions of disorder through the images that algorithms push to their social-media feeds, the urban scenes that roll by outside of their car windows, and the people they walk by on the way to their favorite restaurant. This sense that the city's windows are broken in turn fuels a generalized crime fear that underwrites impulsive support for policing policies that exacerbate poverty and homelessness—the very symbols of disorder.¹²³ And the cycle goes around.

Currently, Angelenos' relatively tougher attitudes appear to be based on worries about the retail theft and homelessness publicized breathlessly in traditional and social media. While these are the disorders du jour in Los Angeles, there is nothing new about public receptivity to crime fearmongering. For the last half-century, empirically dubious claims about crime rates and spectacular stories about monsters have reliably driven popular punitivism to the benefit of police departments seeking money, prosecutors seeking ease of conviction, and for-profit prison companies seeking warm bodies. Rachel Barkow opines that “criminal justice policy in the United States is set largely based on emotions and the gut reactions of lay people. We have been doing this for decades, with the public and politicians reacting to stories or panics about crime with ill-informed laws and punitive policies.”¹²⁴ Examining shifting public attitudes from 1960 to 1988, William Mayer suggests a precipitous social shift toward conservative crime-control philosophy:

The conventional wisdom on this issue [crime control versus civil liberties] is that liberals got the worst of this debate, and that public opinion became increasingly outraged by horror stories about brutal criminals set free on legal technicalities or through the ministrations of misguided social workers. And, in this case, the conventional wisdom turns out to be quite accurate. From the mid-1960s to the late 1980s, there is clear, strong evidence that American public opinion became substantially more conservative in its assessment of how to

123. See Jonathan Jackson, *Experience and Expression: Social and Cultural Significance in the Fear of Crime*, 44 BRIT. J. CRIMINOLOGY 946, 948 (2004); Kevin M. Drakulich, *Perceptions of the Local Danger Posed by Crime: Race, Disorder, Informal Control, and the Police*, 42 SOC. SCI. RSCH. 611, 611–13 (2013).

124. BARKOW, *supra* note 100, at 1.

deal with crime.¹²⁵

Mayer notes that increased concerns about crime did not translate into equal support for both liberal and conservative proposals for crime reduction. Public support for stronger policing, longer incapacitation, and the death penalty increased significantly, while support for gun control remained the same and support for rehabilitation decreased substantially.¹²⁶

The 1980s ushered in an era of intense government investment in and expansion of law enforcement, culminating in the infamous 1994 “Clinton Crime Bill,” which insiders refer to as the “Biden Crime Bill” because Biden was its sponsor and fiercest advocate.¹²⁷ By then, tough-on-crime politicking had been popular for decades. Richard Nixon’s 1968 campaign and subsequent term as President centered on crime-control. He employed the so-called “Southern strategy” that publicized sensationalized images of Black criminals and heroic police to court Southern Dixiecrats to the Republican party.¹²⁸ In the 1980s, Reagan condemned “welfare queens” and privileged street criminals—declaring a war on drugs.¹²⁹ Perhaps most clearly demonstrative of the awesome power of pro-carceral politics was George H.W. Bush’s landslide win in 1988, which many attribute to the infamous race-baiting Willie Horton ad. The ad blasted Michael Dukakis for furloughing (temporarily releasing) a convicted felon so that he could attend a funeral.¹³⁰ Horton, who was Black, absconded and went on to rape a white woman.¹³¹ The ad focused on a mugshot of Horton—a “very scary looking, disheveled, wild-eyed Black man,” one expert observed—with the

125. See generally WILLIAM G. MAYER, *THE CHANGING AMERICAN MIND: HOW AND WHY AMERICAN PUBLIC OPINION CHANGED BETWEEN 1960 AND 1988* (1992).

126. See generally *id.*

127. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in multiple parts of U.S.C.); see German Lopez, *The Controversial 1994 Crime Law that Joe Biden Helped Write, Explained*, VOX (Sept. 29, 2020, 9:25 AM), www.vox.com/policy-and-politics/2019/6/20/18677998/joe-biden-1994-crime-bill-law-mass-incarceration [<https://perma.cc/84TU-ZS6W>].

128. See Dylan Tureff, *Securing White Votes by Incarcerating Black Bodies: The Criminalization of Blackness and the Perpetuation of a National Moral Panic in the American Carceral State*, GEO. PUB. POL’Y REV., Spring 2021, <https://www.gpprspringedition.com/2020-spring-edition> [<https://perma.cc/QF67-FUQ8>].

129. *Id.*

130. See T.J. Raphael, *How One Political Ad Held Back a Generation of American Inmates*, THE WORLD (May 18, 2015), <https://www.pri.org/stories/2015-05-18/what-willie-horton-wrought> [<https://perma.cc/GAA4-R9TW>].

131. *Id.*

message: “Weekend prison passes—Dukakis on crime.”¹³²

Bush’s victory stoked fear in the hearts of Democrats that the entire party would be “Hortonized.”¹³³ In response, Senators Chuck Schumer and Joe Biden conceived of a wide-ranging crime bill as part of a strategy to wrest the law enforcement platform from Republicans to prevent them from continuing to “demagogue crime.”¹³⁴ Biden introduced the initial version of the bill in 1991, and by 1992, polls showed Democrats leading Republicans 39 percent to 35 percent on which party was better suited to handle the crime problem.¹³⁵ Championing the final version of the bill, Biden boasted, “The liberal wing of the Democratic Party is now for 60 new death penalties. . . . The liberal wing of the Democratic Party is for 100,000 cops. The liberal wing of the Democratic Party is for 125,000 new State prison cells.”¹³⁶

With Democrats at the helm, the government was able to finally and fully implement the carceral program that had been growing in popularity since the late 1960s. The crime bill, which served as a model for the states, reads like the fever dream of conservative tough-on-crime proponents: it increased policing and sentence length, created three-strikes rules, and eliminated parole.¹³⁷ The bill was strategic politics at its finest, and yet contemporary commentators still describe it as a mere reaction to public anxiety during a massive crime wave.¹³⁸

The 1980s did see some increases in violent crimes associated with the

132. *Id.*

133. See Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 537–38 (1996).

134. See *id.*; see also Guy Gugliotta, *Crime Bill a Hostage of Politics*, WASH. POST (Aug. 5, 1992), https://www.washingtonpost.com/archive/politics/1992/08/05/crime-bill-a-hostage-of-politics/e3ecbbdb-8259-4cc7-a407-deee5038bbd0/?utm_term=.07d2c3d8422d [<https://perma.cc/8UMS-592G>]; Lopez, *supra* note 127.

135. ABC News & Washington Post, *ABC News/Washington Post Poll, January 1992*, ICPSR (Oct. 11, 1993) (available in LEXIS, Market Library, Rpoll File). See also Jill Lawrence, *Both Sides Talking Tough on Crime, Looking for Law-and-Order Votes*, ASSOCIATED PRESS, Oct. 13, 1992, LEXIS; David Peterson, *Differences on Crime Barely Register; Bush, GOP Avoid Pulling a ‘Willie Horton’ on Clinton*, STAR TRIB., Oct. 30, 1992, at 5VS.

136. H.R. 3355, 103d Cong., 140 CONG. REC. 23935 (1994) (enacted) (statement of Sen. Joseph R. Biden).

137. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (quoted in Sarah Lustbader, *Joe Biden’s Role in Mass Incarceration Was No ‘Mistake’: It Was Politics*, THE APPEAL (Apr. 25, 2019), <https://theappeal.org/politicalreport/joe-bidens-role-in-mass-incarceration-was-no-mistake-it-was-politics/> [<https://perma.cc/AG2R-LE2Z>]).

138. See, e.g., Richard Rosenfeld, *The 1994 Crime Bill: Legacy and Lessons—Overview and Reflections*, 32 FED. SENT’G REP. 147, 147–52 (2019).

crack cocaine trade in cities.¹³⁹ And to be sure, the media narrative drew on the tropes of “predatory” and “animalistic” Black criminality embedded in the white American imagination since Jim Crow. Stories of zombie-apocalypse-like crack neighborhoods whipped up fear and loathing in a public that mostly had never been to an affected urban area.¹⁴⁰ But no dramatic crime wave ever occurred. A 1993 study sought to put numbers to the “widely held belief that there was a significant increase in the level of criminal activity during the 1980s,” particularly among “urban minority youth.”¹⁴¹ Examining crime data from 1979 to 1992, the researchers concluded that “statistics do not support the notion that there [was] any overall rise in the level of criminal activity.”¹⁴² Instead, “there was a significant increase in the incarceration rate, primarily attributable to an increased probability of incarceration . . . and a sizable increase in the number of arrests and incarcerations for drug law violations.”¹⁴³ When Clinton signed the Crime Bill in 1994, crime rates were in *decline*.¹⁴⁴

In 2019, Biden’s presidential primary opponents, particularly Kamala Harris and Cory Booker, hammered the former vice-president for championing the crime bill, labeling him the “architect of mass incarceration.”¹⁴⁵ Biden had earlier that year apologized for the 100-1 crack cocaine sentencing disparity he had supported, stating that he regretted listening to “the experts [who told him] that [crack and crack cocaine] were somehow fundamentally different.”¹⁴⁶ Responding to Harris’s and Booker’s criticisms, Biden acknowledged that larger critiques of the bill were

139. Scott Boggess & John Bound, *Did Criminal Activity Increase During the 1980s? Comparisons Across Data Sources*, 78 SOC. SCI. Q. 725, 732, 737 (1997).

140. See Craig Reinerman & Harry G. Levine, *Crack in the Rearview Mirror: Deconstructing Drug War Mythology*, 31 SOC. JUST. 182, 184–88 (2004).

141. Boggess & Bound, *supra* note 139, at 732, 737.

142. *Id.* at 726.

143. *Id.* at 737.

144. See OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUST., WHAT CAUSED THE CRIME DECLINE? 15–16 (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_What_Caused_The_Crime_Decline.pdf [<https://perma.cc/87ZF-KQVQ>] (observing that crime rates peaked in 1991).

145. Matt Viser & Chelsea Janes, *Feuding Among Biden, Booker and Harris is Unpredictable Force in Diversifying Democratic Party*, WASH. POST (July 26, 2019), www.washingtonpost.com/politics/pre-debate-sparring-between-booker-and-biden-camps-spills-into-another-day/2019/07/25/52932134-ae4-11e9-8e77-03b30bc29f64_story.html [<https://perma.cc/J2K7-9JES>].

146. Jonathan Martin & Astead W. Herndon, *Joe Biden Says He ‘Regrets’ Supporting ‘Tough-on-Crime’ Drug Laws in 1990s as He Considers Presidential Bid*, INDEPENDENT (Jan. 22, 2019, 8:28 AM), <https://www.the-independent.com/news/world/americas/joe-biden-drug-policy-cocaine-crack-law-legislation-2020-president-election-bid-a8740271.html> [<https://perma.cc/93TT-86YV>].

“legitimate” and he may not have “always been right.”¹⁴⁷ In 2020, as he campaigned for President in the shadow of the Floyd protests, Biden admitted that the 1994 bill had been “a mistake” and released a criminal justice plan that reversed many of the crime bill’s provisions.¹⁴⁸ When asked in a town hall whether he still believed that “more cops clearly mean less crime,” he answered in the affirmative, but added: “If, in fact, they’re involved in community policing not jump squads.”¹⁴⁹ Biden viewed such good “cops [as] kind of like schoolteachers” who must “know everything from . . . how to handle hunger in a household [to] how to teach you how to read.”¹⁵⁰

Those were his sentiments in the months after Floyd. By 2022, President Biden was firmly situated in the White House, and amid surging fears of COVID-era crime spikes, he reembraced his tough-on-crime impulses. On July 21, 2022, Biden released his “Safer America Plan” that, mirroring his “mistaken” crime bill, called for putting an additional 100,000 police officers on the street at a price tag of \$13 billion.¹⁵¹ Critics were dismayed by the renewed vigor of Biden’s financial and philosophical commitment to policing, packaged within a reform plan supposedly inspired by the Floyd protests. They also shook their heads at the symbolism of recycling the language of the 1994 bill that the public had just recently begun to regard with a jaundiced eye. The American Civil Liberties Union’s Yasmin Cader wrote:

In this moment of fear and concern, the president must not repeat yesterday’s mistakes today. He calls for hiring 100,000 additional state and local police officers—the same increase in officers as the 1994 crime bill. This failed strategy did not make America safer, instead it resulted in massive over-policing and rampant rights violations in our

147. Alexandra Jaffe, *Biden Says Questions About 1994 Crime Bill Are ‘Legitimate,’* ASSOCIATED PRESS (June 10, 2020, 10:14 PM), www.apnews.com/article/ae20ddaea4b51e57b5d7eff0f0c9ffcb [<https://perma.cc/9TRP-ESFN>]; Arlette Saenz, *Biden: ‘I Haven’t Always Been Right’ on Criminal Justice*, CNN, <http://www.cnn.com/2019/01/21/politics/joe-biden-criminal-justice/index.html> [<https://perma.cc/MA4H-R8K4>] (updated Jan. 21, 2019, 2:39 PM).

148. Saenz, *supra* note 147.

149. ABC News, *Read the Full Transcript of Joe Biden’s ABC News Town Hall*, ABC NEWS (Oct. 15, 2020, 9:53 PM), <https://abcnews.go.com/Politics/read-full-transcript-joe-bidens-abc-news-town/story?id=73643517> [<https://perma.cc/JG2Z-HDE5>].

150. *Id.*

151. See Biden Press Release, *supra* note 103.

communities.¹⁵²

Biden also did not learn from the failed war on drugs and the crack disparity debacle. While eliminating the crack disparity, his plan called for higher penalties for fentanyl, the new “you never go back” drug.¹⁵³

Biden’s rightward turn on crime responded to many factors. Trump had repeatedly savaged Biden on the 2020 campaign for being a champion of defunding the police, which (like most things out of Trump’s mouth) was a lie.¹⁵⁴ Then, on January 21, 2021, as the country was still reeling from the January 6th insurrection which injured so many police officers, a group of Republican senators sought to recapture the pro-police platform. They penned an open letter and published a press release entitled, *Senators Condemn Biden Plan to Defund, Deprive Police of Critical Lifesaving Resources by Executive Fiat*.¹⁵⁵ The Senators had gotten wind that the administration was crafting an executive order that, among other things, prohibited the transfer of certain military equipment to police departments, banned chokeholds, and supported use-of-force and de-escalation training.¹⁵⁶ In fact, that order, which Biden signed on the two-year anniversary of Floyd’s death, *funded* the police, created grants for recruiting, granted funds for training additional officers, and initiated policies for retaining existing officers.¹⁵⁷ Still, the Republican senators warned that without police having their free weapons of military warfare, “Violent crime will continue to skyrocket when police officers are unable

152. Press Release, Am. C.L. Union, ACLU Statement on Biden’s “Safer America Plan” (July 21, 2022), <http://www.aclu.org/press-releases/aclu-statement-bidens-safer-america-plan> [<https://perma.cc/85M9-SYEH>].

153. *Id.*

154. See Glenn Kessler, *Trump Ad Falsely Suggests Biden Supports Defunding Police*, WASH. POST (July 14, 2020), www.washingtonpost.com/politics/2020/07/14/trump-ad-falsely-suggests-biden-supports-defunding-police [<https://perma.cc/3PE2-QAXC>].

155. Press Release, Chuck Grassley, *Senators Condemn Biden Plan to Defund, Deprive Police of Critical Lifesaving Resources by Executive Fiat* (Jan. 21, 2022), www.grassley.senate.gov/news/news-releases/senators-condemn-biden-plan-to-defund-deprive-police-of-critical-lifesaving-resources-by-executive-fiat [<https://perma.cc/UZY7-7YBN>] [hereinafter Grassley Press Release].

156. *See id.*

157. Exec. Order No. 14074, 87 Fed. Reg. 32945 (May 25, 2022), <http://www.whitehouse.gov/briefing-room/presidential-actions/2022/05/25/executive-order-on-advancing-effective-accountable-policing-and-criminal-justice-practices-to-enhance-public-trust-and-public-safety> [<https://perma.cc/SB6X-BN5D>] (titled, “Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety,” but now taken off of The White House web-page under the Trump administration).

to stop these crimes and save innocent lives.”¹⁵⁸ They concluded: “We cannot understand why any elected official would want to stop law enforcement from safely doing their jobs other than to be able to tell their base of voters they are defunding the police.”¹⁵⁹

Biden took the bait and thereafter frequently voiced his strong opposition to defunding the police. The Washington Post described how the President incorporated anti-defund messaging into his widely praised March 1, 2022, State of the Union address:

Biden decided to broach the [defund] topic . . . on Tuesday night. The apparent purpose: to try to put an end to it, once and for all. It wound up being perhaps Biden’s biggest bipartisan applause line of the entire night, save for his early comments on Ukraine. “We should all agree the answer is not to defund the police; it’s to fund the police,” Biden said. Receiving an overwhelmingly positive response—including from Republican leaders who stood and applauded—Biden went off his prepared remarks to drive the point home. “Fund them,” he said. “Fund them.”¹⁶⁰

In the Washington Post’s view, “[T]his was more than checking a box. It was leaning hard into a repudiation of an idea that at least *some* members of his party *have* embraced.” Still, “[T]he reaction was largely muted, save for [Representative] Cori Bush,” the former Ferguson activist whom prosecutor Wesley Bell ran out of office in 2024.¹⁶¹

IV. THE MYTH OF POLICING AS CRIME FIGHTING

That popular punitivism is easy to stir up, regardless of crime rates, is only half of the story about why serious reform is so difficult to achieve. The other half is society’s abiding faith that fighting crime is what the police actually do. The American public did not always believe that the purpose of

158. Grassley Press Release, *supra* note 155.

159. *Id.*

160. Aaron Blake, *Biden Tries to Nix ‘Defund the Police,’ Once and for All*, WASH. POST (Mar. 2, 2022), <http://www.washingtonpost.com/politics/2022/03/02/biden-nix-defund-police> [<https://perma.cc/MF8M-REWD>].

161. *Id.*; see Salter, *supra* note 37 (discussing Bell’s victory).

policing was catching individual criminal bad guys. In the early days of organized policing, many civilians regarded the police as corrupt dispensers of violence who acted on behalf of wealthy capitalists and neighborhood bosses to control the masses.¹⁶² It was only in the latter twentieth century, amidst the “police professionalism” movement, fear stemming from racial integration, and crime politicking, that the public began to understand the police function not as controlling the underclass on behalf of the elite but as fighting evil on behalf of ordinary citizens.¹⁶³ The crime-fighting “formulation of the police role,” Ian Loader observes, “is a myth, an emotionally seductive and politically tempting myth, but a myth nonetheless.”¹⁶⁴

The reality is that police forces did not originate to prevent and punish discrete crimes; police forces did not grow in response to crime spikes; officers have never spent the majority of their time catching criminals or investigating crimes; and most surprising, research shows no clear consensus that there is even a *correlation* between policing—as measured by funding levels, officer numbers, arrests, and deployment numbers—and crime reduction. Indeed, there is evidence that aggressive street policing—the law enforcement-looking conduct that the public assumes fights crime—significantly harms marginalized communities, reduces trust in the police, and thus creates the conditions for lawbreaking in the long run.

A. *The Origins and Growth of Organized Police Forces*

Organized police forces began to emerge in the early nineteenth century and became the norm by the Progressive Era.¹⁶⁵ Just as all politics is local,

162. See Malcolm D. Holmes, *Policing in Gilded Age Urban Hubs*, in *THE ROUTLEDGE HISTORY OF POLICE BRUTALITY IN AMERICA* 25, 28–30 (Thomas Aiello ed., 2023).

163. See *id.* According to a 2016 CATO Institute report, survey respondents identified the top three police functions as investigating violent crime (78%); protecting Americans from crime (64%); and investigating property crime (58%). EMILY EKINS, CATO INST., *POLICING IN AMERICA: UNDERSTANDING PUBLIC ATTITUDES TOWARD THE POLICE. RESULTS FROM A NATIONAL SURVEY*. 5 (2016), <https://www.cato.org/sites/cato.org/files/survey-reports/pdf/policing-in-america-august-1-2017.pdf> [<https://perma.cc/UD5X-JR36>].

164. See Ian Loader, *Why Do the Police Matter? Beyond the Myth of Crime-Fighting*, in *THE FUTURE OF POLICING* 40 (Jennifer Brown ed., 2013).

165. See SAMUEL WALKER & CHARLES M. KATZ, *THE POLICE IN AMERICA: AN INTRODUCTION* 29 (8th ed. 2013) (noting that after the creation of the first modern police force in the 1830s, “Americans moved very slowly in creating new police forces”); Gary Potter, *The History of Policing in the United States*, E. KY. U. POLICE STUD. ONLINE, 2013, at 1, <https://www.denvertaskforce.org/wp->

so is the history of state and local police forces, whose development and growth were a function of the social, racial, and political conditions of the particular places and times.¹⁶⁶ Nevertheless, the origin stories have a striking commonality: they have little to do with rising crime rates. For example, in the Reconstruction-era South, organized policing emerged as part of the effort to maintain post-war white social and economic supremacy. “Black Codes,” with their broad definitions of vagrancy, rendered freed people perpetually subject to state detention and forced labor.¹⁶⁷ A column in the 1865 Lynchburg Virginian newspaper explained that these “stringent police regulations” were “necessary to keep [freedmen] from overburdening the towns and depleting the agricultural regions of labor.”¹⁶⁸ Historian William Cohen observed that at harvest time, “police became most active in discovering vagrants,” as evidenced by the Atlanta Constitution’s directive to law enforcement: “Cotton is ripening. See that the ‘vags’ get busy.”¹⁶⁹ The police forces created to enforce vagrancy laws were composed of former slave catchers and patrollers who “kept blacks off city streets, just as patrollers had done in the colonial and antebellum eras,” historian Sally Hadden notes.¹⁷⁰

In the North, wealthy industrialists created and expanded police forces to control factory workers. In Buffalo, industrialization exploded in the late nineteenth century and, along with it, the rapidly growing Polish migrant population.¹⁷¹ The Buffalo police force grew substantially from its inception in 1871 to 1900, but this growth, according to historians, “had no direct relationship to either the growth of the population or to an increase in

content/uploads/2023/02/the_history_of_policing_in_the_united_states.pdf [https://perma.cc/2YQM-9BXG] (tracing the earliest police departments to the 1830s and finding that most major cities had police departments by the 1880s).

166. There are competing historical accounts of what drove the federal government to organize a national police force. Compare JESSICA R. PLILEY, *POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI* 134–35 (2014) (controlling interstate vice) with SARAH A. SEO, *POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM* 40, 44 (2019) (patrolling the interstate).

167. See generally Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 *YALE L.J.* 2249 (1998).

168. Larry H. Spruill, *Slave Patrols, “Packs of Negro Dogs,” and Policing Black Communities*, 53 *PHYLON* 42, 59 (2016) (quoting *The Lynchburg Virginian*).

169. William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 *J. S. HIST.* 31, 50 (1976).

170. SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 219 (2001).

171. Sidney L. Haring & Lorraine M. McMullin, *The Buffalo Police 1872–1900: Labor Unrest, Political Power, and the Creation of the Police Institution*, 4 *CRIME & SOC. JUST* 5 (1975).

crime.”¹⁷² Instead, the police department, whose commissioners were the manufacturing barons themselves, existed and expanded to thwart workers’ demands for decent labor conditions. These police forces also relied on vagrancy and public disorder laws to prevent worker assembly and arrest labor organizers.¹⁷³ From the turn-of-the century through the Progressive era, anti-vice moral reform and social hygiene programs required larger urban police forces. Relying on a broad cluster of “vag lewd” laws (that targeted sexual impropriety, gender nonconformity, and the “immorality” associated with poverty and transient status), the police orchestrated mass arrests of female sex workers, gay men, “idle” people of color, “idle” poor people, and “unruly” teenagers.¹⁷⁴

Police departments thus formed and proliferated for a variety of reasons—including southern white society’s desire for de facto slavery, industrialists’ interest in preventing immigrant laborers from organizing, city managers’ agenda of cleansing urban areas of undesirables, and the federal prerogative to control immigration, alcohol, and interstate prostitution. As diverse as these reasons were, there is a striking absence. There is little evidence that local sheriffs and constables in the late eighteenth and early nineteenth century suddenly needed large and regimented forces to fight discrete spikes in ordinary crimes like thefts, murders, burglaries, and the like.

Departments expanded steadily throughout the twentieth century more because of political and demographic shifts than because of crime spikes in communities, as the story of the 1994 Crime Bill attests.¹⁷⁵ In the late 1960s and 1970s, for example, racial integration was a significant predictor of increases in police-force manpower, firepower, and other expenditures. A 1981 study by Pamela Irving Jackson and Leo Carroll was the first to “test” the theory that policing and carceral control are the very “instruments of power used by established social classes.”¹⁷⁶ The researchers sought to determine whether the increased law enforcement expenditures during Johnson’s war on poverty and Nixon’s war on crime could be explained by

172. *Id.* at 7.

173. *Id.*

174. Aya Gruber, *Sex Exceptionalism in Criminal Law*, 75 STAN. L. REV. 755, 789–90 (2023).

175. *See supra* note 127–137.

176. Pamela Irving Jackson & Leo Carroll, *Race and the War on Crime: The Sociopolitical Determinants of Municipal Police Expenditures in 90 Non-Southern U.S. Cities*, 46 AM. SOCIO. REV. 290, 291 (1981).

integration and “the political mobilization of [B]lacks” rather than increases in crime.¹⁷⁷

Examining demographics and expenditures in ninety non-Southern cities, they found that both “the *relative* size of the [B]lack population” and “the level of [B]lack political mobilization activity” significantly predicted increased municipal expenditures on policing.¹⁷⁸ Fascinatingly, the data revealed “that as [B]lacks become increasingly visible (i.e., as the percent [B]lack increases beyond 10%), their apparent threat encourages greater policing expenditures until [B]lacks constitute a majority of the population, at which point expenditures begin to slack off.”¹⁷⁹ A later study of 1990s police deployment confirmed that “one of the strongest predictors of police strength” is “the percentage of Black population” in an area, finding that an “increase in 1% of Black population is associated with an increase in 5.54 police officers per 100,000 residents.”¹⁸⁰

Jackson and Carroll address the conventional expectation that “other variables within the equation, such as the crime rate, revenues, and population size” would significantly impact police funding. But, as it often turns out, this conventional wisdom was wrong. The data confirmed “the positive significant relationship between expenditures and percent [B]lack, even after we held constant crime, riots, poverty, and other sociopolitical characteristics.” The researchers concluded that the fact these presumed-important variables “are not significant predictors, and . . . percent [B]lack and civil rights mobilization activity are [significant predictors], lends support to the interpretation that capital expenditure outlays were to some extent a response to the perception that [B]lacks were dangerous and should be controlled.”¹⁸¹ Criminologists Hubert Williams and Patrick Murphy opine that segregation has long been at the heart of American policing:

The fact that the legal order not only countenanced but sustained slavery, segregation, and discrimination for most of our Nation’s history—and the fact that the police were bound to uphold that order—set a pattern for police

177. *See id.*

178. *Id.* at 302–03 (emphasis added).

179. *Id.* at 300.

180. William P. McCarty et al., *Determinants of Police Strength in Large U.S. Cities During the 1990s: A Fixed-Effects Panel Analysis*, 58 *CRIME & DELINQ.* 397, 410–12 (2012).

181. *Id.*

behavior and attitudes toward minority communities that has persisted until the present day. That pattern includes the idea that minorities have fewer civil rights, that the task of the police is to keep them under control, and that the police have little responsibility for protecting them from crime within their communities.¹⁸²

Jackson and Carroll entertained an alternative and more benign explanation for why police funding rose with the percentage of Black people in city populations: City leaders understood that Black people are disproportionately victims of crime and they increased police budgets in a well-intentioned effort to protect law-abiding Black citizens from criminals.¹⁸³ Joe Biden nodded to this idea in 2020 when defending his advocacy of the 1994 Crime Bill. Asked by a town hall audience member, “What’s your view on the crime bill that you wrote in 1994 which showed prejudice against minorities?” Biden responded, “Well, first of all, things have changed drastically. That crime bill, when it voted, the Black Caucus voted for it, every Black mayor supported it across the board.”¹⁸⁴

It is true that in the 1980s, many Black politicians and community members supported tough-on-crime policies.¹⁸⁵ However, Jackson and Carroll reject that increased policing was a response to Black communities’ needs and Black leaders’ political power. Quite simply, that thesis could not explain the “curvilinear” nature of funding, that is, the fact that funding began to decrease when Black people became a majority.¹⁸⁶ Inadequate government revenue was also not behind the drop-off, given that “the mean values of per capita property taxes and of per capita revenues were somewhat higher” in Black-majority cities.¹⁸⁷ Even if Black leaders played some role in “locking up their own,” police growth was largely driven by white racial panic.¹⁸⁸

If, as Jackson and Carroll found, expenditures on policing correlate to

182. Hubert Williams & Patrick V. Murphy, *The Evolving Strategy of Police: A Minority View*, 13 PERSPS. ON POLICING 1, 2 (1990).

183. See Jackson & Carroll, *supra* note 176, at 292.

184. ABC News, *supra* note 149.

185. See generally JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017).

186. See Jackson & Carroll, *supra* note 176, at 303.

187. *Id.*

188. FORMAN, JR., *supra* note 185, at 15–17.

white fear of, and opposition to Black population growth, the data attest that this opposition is deep and persistent. Even as crime has precipitously declined over the past several decades, the numbers of officers has risen—as have overall police expenditures, which increased by about 60 percent from 1990 to 2017.¹⁸⁹ By one estimate, the impact of such increases in police spending on taxpayers' wallets has been over \$17 billion per year.¹⁹⁰ Because these resource investments stem from factors like politics and race-based fears rather than careful analyses of how best to reduce crime, it should not be surprising that the research, explored in subsection C below,¹⁹¹ reveals that policing expenditures had weak or no effect on crime rates.

B. Policing vs. Crime Fighting

Given that organized policing did not emerge or grow to fight crime waves, it stands to reason that police must have been doing other things. In a devastating 2021 indictment of the police function, Shima Baradaran Baughman uses the data on police “clearances”—when police “solve” a case and send it to prosecutors—to challenge “the police myth.”¹⁹² That myth, she says, is “a twofold belief” that (1) “policing’s core function involves preventing, investigating, and solving crime” and (2) “crimes are solved by police.” Baughman analyzed police clearance rates from their inception through the present and found that they were consistently low (20–25 percent). Her conclusion does not mince words:

The history of policing is rife with violence, racial inequity, and a persistent inability to solve even a quarter of major crimes. In fact, police suffered from low clearance rates from as far back as clearance rates have been recorded. And it may actually be that police have gotten worse at solving crimes. Given this reality, there is no “reform” or

189. Aya Gruber & Contributed Content, Opinion, *Facts About Defunding Police Departments*, N.Y. DAILY NEWS (June 17, 2020, 3:40 PM), <https://www.nydailynews.com/opinion/ny-oped-facts-about-defunding-police-departments-20200615-fvqkukbngbb2bko3tev5fq52oe-story.html> [<https://perma.cc/9NKB-PKLV>].

190. *Id.*

191. See generally *infra* IV.C.

192. Shima Baradaran Baughman, *Crime and the Mythology of Police*, 99 WASH. U. L. REV. 65, 127 (2021).

“restoration” of police. In fact, America has never had an effective—crime solving—police force. And police have never enjoyed broadscale legitimacy with minorities or disfavored populations throughout their history. To this end, the police myth is more of a myth among advantaged groups who may never have realized that police were not solving serious crimes with regularity.¹⁹³

The constancy of the police’s non-crime-fighting function is remarkable. The last several decades have seen booming growth in police department personnel and funding, massive improvements in crime-detection technology, and an increasingly pervasive surveillance state.¹⁹⁴ But clearance rates have not budged.¹⁹⁵

So, what do officers do all day, and why do we think it is crime interdiction? Police engage in a number of activities which, in addition to paperwork and court appearances, include driving around, walking around, talking to people (mostly unpleasantly), engaging in stops and frisks, and responding to emergency calls.¹⁹⁶ These activities are disproportionately carried out in economically precarious minority neighborhoods, often producing extreme anxiety among residents.¹⁹⁷ Meanwhile, the community’s legitimate interest in the police actually investigating and solving the serious crimes that have occurred goes perpetually under-addressed.

But, to an outsider, it might *look* like all this police-civilian interaction is criminal catching. The police frequently stop and frisk disproportionately young minority men, whom, research confirms, people implicitly associate with criminality.¹⁹⁸ Police treat the men roughly by barking orders and

193. *Id.* at 127 (citations omitted).

194. *See id.* at 65, 92.

195. *Id.* at 110.

196. Indianapolis Police Department Job Description: Patrol Officer (quoted in MARC MILLER ET AL., CRIMINAL PROCEDURES: THE POLICE: CASES, STATUTES, AND EXECUTIVE MATERIALS 4 (7th ed. 2023)); Jeff Asher & Ben Horwitz, *How Do the Police Actually Spend Their Time?*, NEW YORK TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/19/upshot/unrest-police-time-violent-crime.html> [<https://perma.cc/MS5W-U9UG>].

197. *See* Gruber, *supra* note 3, at 891–97.

198. *See* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. OF PERSONALITY AND SOC. PSYCH. 876, 876–93 (2004); Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. OF PERSONALITY & SOC. PSYCH. 292, 292 (2008).

insisting on total control, as one would treat a criminal. Sometimes the men resist, and the police use violent force—which an onlooker might presume is reserved for the most dangerous individuals. And at the end, even if the person was totally innocent at the outset, the police might arrest the person for their obstinance. I distinctly recall from my public defender days that a large percentage of clients charged with resisting arrest or assault on a police were those who had been beaten during a random police stop and whose “assaults” had managed to leave the officers without a scratch. Even if these cases were dismissed later, the arrest was worth it for the police because it made it immeasurably more difficult for the beaten person to sue or file a complaint. In any case, to an onlooker, an arrest can serve as confirmation that the person was a dangerous criminal all along and the police have a sixth sense about whom to target on the street.

Appearances aside, stop-and-frisk is not crime-fighting. Consider, for example, statistics about the New York Police Department’s (NYPD) stop-and-frisk program. In a 2012 civil rights case, *Floyd v. City of New York*, the plaintiffs challenged the constitutionality of the 4.4 million stops and 2.3 million frisks between 2004 and 2012.¹⁹⁹ They presented statistics that, of the millions of people stopped, over 80 percent were Black and Hispanic while 10 percent were white (all were mostly men).²⁰⁰ For reference, New York’s population in 2010 was 52 percent Black and Hispanic and 33 percent white.²⁰¹ In hundreds of stops, police clearly lacked reasonable suspicion that the person had engaged in a crime, and thousands of the stops were based on vague criteria like the person made a “furtive movement” or had a “suspicious bulge.”²⁰² Officers recorded using force in 23 percent of the stops of Black people, 24 percent of Hispanic people, and 17 percent of white people.²⁰³ Long before *Floyd*, Angela Harris observed:

[Policing] follows the vectors of power established in the larger society in which white dominates nonwhite and rich dominates poor. Police often, and not without justification,

199. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557–58 (S.D.N.Y. 2013); *Floyd, et al. v. City of New York, et al.*, CTR. FOR CONST. RTS., <https://ccrjustice.org/home/what-we-do/our-cases/floyd-et-al-v-city-new-york-et-al> [<https://perma.cc/YSU7-XYCE>].

200. *Floyd*, 959 F. Supp. 2d at 559.

201. *Id.*

202. *Id.*

203. *Id.* at 574.

understand their charge as the protection of “nice” neighborhoods and “decent” people against those perceived to be a threat. In practice, this often means that male power and state power converge on the [B]lack and Latino “underclass.”²⁰⁴

The NYPD insisted that these racially biased and dangerous stops and frisks were necessary for crime interdiction. The data told a different story. Police discovered weapons—including lawfully possessed ones—in a mere 1.0 percent and 1.1 percent of the stops of Black and Hispanic people (respectively) and 1.4 percent of the stops of white people.²⁰⁵ The police discovered contraband (mostly personal-use levels of drugs) in 1.8 percent of the stops of Black people, 1.7 percent of the stops of Hispanic people, and 2.3 percent of the stops of white people.²⁰⁶ Police made an arrest in just 6 percent of the stops—overwhelmingly not for serious crimes (like the robberies, carjackings, and murders that animate public fears).²⁰⁷ In the end, the NYPD’s wide dragnet pulled in very few fish, and certainly not the big fish. Indeed, research has shown that the more arrests for petty broken-windows offenses, the *lower* the clearance rate for serious crimes.²⁰⁸ It stands to reason that if officers are spending the majority of their time stopping millions of non-criminals and arresting people for petty offenses, they are not solving major crimes. So what is the purpose of New York’s socially and economically costly stop-and-frisk program? Police Commissioner Raymond Kelly provided the answer: According to a witness, Kelly said that “he focused on young blacks and Hispanics because he wanted to instill fear in them, every time they leave their home, they could be stopped by the police.”²⁰⁹ The answer is control.

As I have previously written, with the demise of *de jure* segregation, one of the primary functions of the police has been “bluelining”: “Police draw blue lines around Black neighborhoods—just as banks drew their red

204. Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 797 (2000). See also Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 149–50, 163–64 (2017).

205. *Floyd*, 959 F. Supp. 2d at 559.

206. *Id.*

207. *Id.* at 558–59.

208. See Hyunseok Jang et al., *Effect of Broken Windows Enforcement on Clearance Rates*, 36 J. CRIM. JUST. 529, 529–38 (2008).

209. *Floyd*, 959 F. Supp. 2d at 606.

lines—designating them as high-risk areas and stigmatizing them as degraded, pathological spaces.”²¹⁰ Police refer to neighborhoods they violently control and cordon off as “high crime areas,”²¹¹ reinforcing the shibboleth that this segregationist activity is crime fighting. Research has shown that “high-crime neighborhood” is merely a proxy for poor-minority neighborhood. A 2019 study by researchers Ben Grunwald and Jeffrey Fagan, the latest in a long line of research, concludes: “[Officers’] assessments of high-crime areas are only weakly correlated with actual crime rates. The suspect’s race predicts whether an officer deems an area high crime.”²¹² Indeed, the outsized presence of militaristic police (i.e. jump-out squads and SWAT) reinforces the larger public’s perception that these neighborhoods are riddled with violence and leaves its members in perpetual fear of shadowy criminals *and* shadowy jump outs.²¹³

The blueline follows individuals out of policed neighborhoods, ensuring that wherever they go and whatever they do, they not cross the color line. In turn, critical geographer Marie-Eve Sylvestre observes, “[P]ublic spaces have been reorganized and reordered in the context of disorder policing so as to create new barriers and signs of exclusion that reduce the range of possible sensations, social practices, and interactions.”²¹⁴ The ultimate result is not that the police nominally enforce criminal law but rather maximally enforce segregationist spatial and racial “order.” Keeanga-Yamahtta Taylor observes, “You cannot truly be free when the police are able to set upon you at will, for no particular reason at all. It is a constant reminder of the space between freedom and ‘unfreedom,’ where the contested citizenship of African Americans is held.”²¹⁵

210. Gruber, *supra* note 3, at 894.

211. *Id.*

212. Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 *Calif. L. Rev.* 345, 396 (2019). Race also predicts whether non-police people see a neighborhood as “high crime.” See also Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 *Am. J. Socio.* 717, 719 (2001).

213. See Joshua C. Hinkle & David L. Weisburd, *The Irony of Broken Windows Policing: A Micro-Place Study of the Relationship Between Disorder, Focused Police Crackdowns, and Fear of Crime*, 36 *J. CRIM. JUST.* 503, 504, 507 (2008). See also Nicole Flatow, *If You Thought Stop-and-Frisk Was Bad, You Should Know About Jump-Outs*, THINK PROGRESS (Dec. 10, 2014, 5:49 PM), <https://archive.thinkprogress.org/if-you-thought-stop-and-frisk-was-bad-you-should-know-about-jump-outs-385b89fc08d3/> [<https://perma.cc/E55J-KS4G>].

214. Marie-Eve Sylvestre, *Disorder and Public Spaces in Montreal: Repression (and Resistance) Through Law, Politics, and Police Discretion*, 31 *URB. GEOGRAPHY* 803, 820 (2010).

215. KEEANGA-YAMAHTTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION 108

C. Policing and Crime Rates

Despite all this, people widely believe that police exerting violent authority over Black and Brown neighborhoods and people of color wherever they go *is* crime prevention. The public might not be sure of the inchoate mechanism that translates the control of overwhelmingly innocent people into less crime, they just know it happens. But the data suggest that when police succeed in interdicting and solving crimes, it is despite, not because of, its minority-control agenda. Again, police clearance rates are extremely low, and while police sometimes foil crimes in progress, that is due less to random stops than to citizen calls to the police.²¹⁶ Baughman shows that it is mostly *civilians* who solve crimes.²¹⁷ People call the police; people tell the police what happened; people locate suspects; and people are witnesses. Indeed, people are society's prime crime-fighting resource.²¹⁸ A body of research confirms that when the police use force and interact negatively with a people in a community, the community's members stop calling and cooperating.²¹⁹ Control-based police violence enacted randomly and frequently on civilians on the street accordingly impedes efforts to thwart and solve the serious offenses about which the public cares most.

The police and their supporters tout research that finds correlations between increased policing—i.e., higher budgets, personnel, and practices—and lower crime rates; and correlations between reduced policing and higher crime rates. Much of this scholarship comes from economists who endeavor to determine if a “dollar spent on police” prevents a dollar worth of crime in a given time frame. Only some of this research factors in the financial burdens that arrests, police violence, and criminal prosecutions saddle on individuals and communities. However, economic

(2016).

216. Baughman, *supra* note 192, at 101.

217. *Id.*

218. *See id.*

219. *See e.g.*, Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 240–41 (2008); Jeffrey Fagan et al., *Street Stops and Police Legitimacy in New York*, in *COMPARING THE DEMOCRATIC GOVERNANCE OF POLICE INTELLIGENCE: NEW MODELS OF PARTICIPATION AND EXPERTISE IN THE UNITED STATES AND EUROPE* 203, 208 (Thierry Delpeuch & Jacqueline E. Ross eds., 2016); Susan A. Bandes et al., *The Mismeasure of Terry Stops: Assessing the Psychological and Emotional Harms of Stop and Frisk to Individuals and Communities*, 37 BEHAV. SCI. & L. 176, 178, 187 (2019); Desmond et al., *supra* note 56, at 870–73.

analysis rarely accounts for social costs, happiness, and whether their dollars-to-dollars comparisons are apples to oranges, given differences in people's economic status. To be sure, it is no easy task for researchers to identify social costs, much less calculate them. Researcher John J. Donohue III explains, in the context of incarceration, that it is difficult

to monetarily value the reduction in crime that results from increased incarceration. . . . vexing issues exist. For example, what is a social cost that should count in this calculus versus what is a mere transfer that should not count? How does one value intangibles such as pain and fear of crime? Are the social costs of murder profitably estimated by a single per-murder cost or are certain murders (perhaps in battles between criminals) less socially costly?²²⁰

In recent years, health experts have begun to assess the negative health impacts of policing, but larger public health expenditures are rarely put into the economic calculus of policing's utility. As Emily G. Owens notes: "Quantitative social science has only begun to engage with estimating the social costs of policing."²²¹ She adds that economists' focus on correlating policing numbers or tactics to crime rates—mostly within modest periods of time—and inattention to social costs "currently complicates efforts to identify socially optimal policing policies." As a consequence, studies have found policing efficient because it reduces certain crimes in certain areas during certain time periods. But most have ignored the larger, longer-term harms of the systematic state violence and control—imposed disproportionately on Black Americans—that tend to *increase* crime. Research has shown, for example, that racial segregation itself, of which the police serve as primary guardians, correlates with increased homicide rates.

What is this magical mechanism that transforms all the non-crime-

220. John J. Donohue, *Assessing the Relative Benefits of Incarceration: The Overall Change Over the Previous Decades and the Benefits on the Margin*, in *DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM* 20 (Steven Raphael & Michael A. Stoll eds., 2009), http://www.researchgate.net/publication/49249554_Assessing_the_Relative_Benefits_of_Incarceration_The_Overall_Change_Over_the_Previous_Decades_and_the_Benefits_on_the_Margin [<https://perma.cc/R883-XNZP>].

221. Emily Owens, *The Economics of Policing*, in *HANDBOOK OF LABOR, HUMAN RESOURCES, AND POPULATION ECONOMICS* 1–30 (2020).

fighting control of space and groups into reductions of crime rates? Commissioner Kelly nodded to deterrence—expressing that young Black and Hispanic men will be deterred from committing crimes by knowing that they reside in the space of “unfreedom.”²²² Even without mentioning Kelly’s racist and empirically unsound presumptions—that minority status is such a strong predictor of criminal inclination and that all young Black and Hispanic men require especially strong deterrence—his basic assumption that increased policing is deterrent is also not supported by research. A 2014 study by criminologists Gary Kleck & J.C. Barnes was the first to “directly test[] whether police strength levels actually affect prospective offenders’ perceptions of arrest risks.”²²³ The researchers discovered that “police manpower levels have no effect on perceptions of the risk of arrest, and thus do not influence the amount of general deterrent effects on crime.” A 2015 study by the Brennan Center similarly found “no statistically significant effect of increases in the number of police on crime.” Focused strictly on dollars, Kleck and Barnes concluded that “policy makers may want to reconsider whether increases in police manpower bring sufficient crime reduction benefits to justify their costs.” They went on, “In times of fiscal crisis, it is worth considering the possibility that cuts in police strength may be implemented without causing crime increases. Even in times of fiscal plenty, it may be worth thinking about alternative investments that are more likely to reduce crime.”

The evidence on whether stop-and-frisks and other street policing—collectively referred to by some researchers as “proactive policing”—correlate with crime reduction is decidedly mixed, with much research suggesting weak or no impact and some even finding proactive policing to be criminogenic.²²⁴ According to researchers, “there is a substantial lack of evidence in favor of proactive policing having *any* substantial effect on crime.”²²⁵ This is supported anecdotally by the events following Judge Shira

222. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557–606 (S.D.N.Y. 2013).

223. See generally Gary Kleck & J.C. Barnes, *Do More Police Lead to More Crime Deterrence?*, 60 CRIME & DELINQUENCY 716 (2014).

224. See, e.g., Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 285–86 (2006) (citing Robert J. Sampson & Jacqueline Cohen, *Deterrent Effect of the Police on Crime: A Replication and Theoretical Extension*, 22 LAW & SOC’Y REV. 163, 166 (1988)); Richard Rosenfeld et al., *The Impact of Order-Maintenance Policing on New York City Homicide and Robbery Rates: 1988–2001*, 45 CRIMINOLOGY 355, 357–58 (2007).

225. See also David Weisburd, *Does Hot Spots Policing Inevitably Lead to Unfair and Abusive*

Scheidlin's landmark ruling in *Floyd* that the NYPD's stop-and-frisk program violated the Fourth Amendment prohibition of unreasonable search and seizure and the Fourteenth Amendment guarantee of equal protection.²²⁶ Stop-and-frisks went down, and so did crime rates.²²⁷

The highly publicized *Floyd* decision confirmed that, for years, the NYPD had been engaging in ineffective and racially biased detentions that violated New Yorkers' rights and calling it crime fighting.²²⁸ Then-Mayor Michael Bloomberg and the NYPD were furious.²²⁹ Bloomberg had long reveled as having "my own army in the NYPD, which is the seventh biggest army in the world" as he boasted in 2011,²³⁰ Bloomberg and Kelly initiated a relentless public attack campaign on Judge Scheindlin's objectivity and reporters hounded her for a response.²³¹ She finally spoke to the press and explained her approach:

Too many judges, especially because so many of our judges come out of [the U.S. Attorney's Office for the Southern District], become government judges . . . I'm independent. I believe in the Constitution. I believe in the Bill of Rights. These issues come up, and I take them quite seriously. I'm not afraid to rule against the government.²³²

Then, in an unprecedented move, the Second Circuit Court of Appeals,

Police Practices, or Can We Maximize Both Fairness and Effectiveness in the New Proactive Policing?, 2016 U. CHI. LEGAL F. 661, 667 (2016) ("Studies of policing in [the 1980s] provided a very strong narrative regarding the inability of the police to prevent crime.").

226. See *Floyd*, 959 F. Supp. 2d at 553, 667.

227. *Infra* notes 237–238.

228. See Hinkle & Weisburd, *supra* note 213, at 661, 664–67.

229. Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), <https://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html> [<https://perma.cc/J7P5-2N7V>].

230. Hunter Walker, *Mayor Bloomberg: 'I Have My Own Army'*, OBSERVER (Nov. 30, 2011, 10:06 AM), <https://observer.com/2011/11/mayor-bloomberg-i-have-my-own-army-11-30-11> [<https://perma.cc/4YFH-6TPV>]. *But see* Justin McCrary & Deepak Premkumar, *Why We Need Police*, in THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES 78 (Tamara Rice Lave & Eric J. Miller eds., 2019) (finding via meta-study that police number increases correlate with reduction in crime).

231. See Benjamin Weiser, *Departing Judge Offers Blunt Defense of Ruling in Stop-and-Frisk Case*, N.Y. TIMES (May 2, 2016), <https://www.nytimes.com/2016/05/02/nyregion/departing-judge-offers-blunt-defense-of-ruling-that-ended-stop-and-frisk.html> [<https://perma.cc/7VUX-VLDR>].

232. *Ligon v. City of New York*, 736 F.3d 118, 151 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014).

issued a sua sponte order staying the *Floyd* ruling, remanding the case to another court, and disqualifying Scheindlin as judge.²³³ The reason, they said, was that Judge Scheindlin harbored anti-police biases. Their smoking-gun evidence: the judge’s above statement about objectivity.²³⁴

Bloomberg won that battle, but the NYPD ultimately lost the stop-and-frisk war. Bill de Blasio, who replaced Bloomberg as mayor, had campaigned on reforming the police.²³⁵ When he assumed office, he essentially ended stop-and-frisk with the stroke of a pen.²³⁶ Stop-and-frisks went from a high of approximately 686,000 in 2011 down to roughly 11,000 in 2017, a 98-percent decrease.²³⁷ Far from the city lapsing into anarchy, New York’s 2017 crime rate was seventeen percent *lower* than in 2011.²³⁸ By 2020, the crime rate in NYC had reached a “record low.”²³⁹ This should not have come as a surprise, given the existing evidence on the minimal, and perhaps nonexistent, role of order-maintenance policing on crime rates.²⁴⁰ What evidence there is on the efficacy of various street policing programs—even the promising “hot-spot” policing that concentrates resources to areas designated by formulae and algorithms—hardly provides a bullet-proof case for street policing’s crime-fighting prowess.²⁴¹

233. *Ligon*, 736 F.3d at 151.

234. *Ligon*, 736 F.3d at 123, 129.

235. Michelle L. Price, *A Look at de Blasio’s NYC Mayoral Tenure and What’s Next*, AP NEWS (Dec. 29, 2021), <https://apnews.com/article/kathy-hochul-new-york-city-new-york-police-police-reform-acc5debd51fb133910494a5f27e49b> [<https://perma.cc/UTA4-A2MK>].

236. See Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES (Jan. 31, 2014), <https://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html> [<https://perma.cc/WK6Z-8B7C>].

237. *Stop-and-Frisk Data*, N.Y. C.L. UNION (Mar. 14, 2019), <https://www.nyclu.org/en/stop-and-frisk-data> [<https://perma.cc/58HT-ZAFW>].

238. I arrived at this percentage by adding up felonies and misdemeanors in 2011, and those in 2017, and calculating the change. See *Historical New York City Crime Data*, N.Y. POLICE DEP’T, <https://www1.nyc.gov/site/nypd/stats/crime-statistics/historical.page> [<https://perma.cc/R8B5-SAKN>].

239. *Overall Crime in New York City Reaches Record Low in 2020*, N.Y. POLICE DEP’T (Jan. 6, 2021), <https://www.nyc.gov/site/nypd/news/p0106a/overall-crime-new-york-city-reaches-record-low-2020> [<https://perma.cc/7QLN-6J2P>].

240. See Harcourt & Ludwig, *supra* note 224, at 285 n.53 (finding no impact); Rosenfeld et al., *supra* note 224, at 357–58 (finding a moderate, at best, impact); Anthony A. Braga et al., *Can Policing Disorder Reduce Crime? A Systematic Review and Meta-analysis*, 52 J. RSCH. CRIME & DELINQUENCY 567, 581 (“[A meta-study found that] aggressive order maintenance strategies that target individual disorderly behaviors do not generate significant crime reductions. . . . In contrast, community problem-solving approaches that seek to change social and physical disorder conditions at particular places produce significant crime reductions.”).

241. McCrary & Premkumar, *supra* note 230, at 69–71 (positing that hot-spot policing correlates with an immediate reduction in crime rates because of temporary incapacitation or people avoiding the

Surveying the existing evidence on policing methods, researchers Justin McCrary and Deepak Premkumar observe, “There is a consensus that the standard model of policing, which focuses on random preventive patrols and rapid response time, does not significantly reduce crime or even fear of crime.”²⁴²

I recognize that for every study I cite, one can find a study with a different conclusion. Researchers have found statistically significant correlations between policing and crime-rate reductions, in certain contexts. And every day, scientists engage in meta-reviews to determine, from hundreds of papers on the topic, *what is* the relationship between policing and crime. Nevertheless, the salient point is that after 150 years of street policing being a daily fact of American life—or I should say Black American life—we still cannot proclaim with certainty that it has ever *actually fought* crime. And yet year after year, as the public persistently and mostly mistakenly believes crime is rising, they call for more cops. Before we can achieve meaningful reform, Americans—indeed liberals—need to sever their instinctive connection of policing and crime interdiction. If not, every case of horrific brutality will remain ground to call for *more* funding to “improve” policing. Every rarely mentioned decrease in crime will remain ground to proclaim that policing works. And every publicized crime “wave,” whether short-term, localized, or involving specific crimes (e.g., gang-related murders, catalytic converter thefts), will remain ground to exponentially expand police power. And no matter how many millions of people take to the streets, things will remain the same.

CONCLUSION

It is far easier to diagnose a problem than to offer a solution. No doubt, the popular myth of police as crime fighters seems too big to fail. Assuming the myth’s perpetual existence, various scholars have envisioned a less democratic governance structure for policing and criminal law decision-making, where less punitive and more informed “experts” dictate law-enforcement practice. I leave it to others to debate the equities and potential consequences of such an approach.²⁴³ For now, I will maintain a Pollyannish

area altogether).

242. *Id.* at 79.

243. Compare BARKOW, *supra* note 100 (supporting more professional expertise) with Benjamin

belief in the potential of American hearts and minds to change. As a criminal law professor for well over two decades, I have seen a profound shift in student opinion away from an unquestioning faith in policing and the penal system toward skepticism of criminal law authority and a desire to address social problems and harmful individual behavior outside of the pathological American carceral state.

I am a fan of opening up the conversational space for ideas that most consider taboo, counterintuitive, and even dangerous—like the idea that police do not fight crime. We cannot rely on politicians to do it because they are beholden to voter preferences in the status quo. Radical critics of policing often lack the funds and connections to get their voices heard over the din of “copaganda” favored by mainstream media. So, it is up to all of us, as a collective, to spread the word. When you read articles, attend talks, or otherwise consume academic information about police reform, how often do you encounter the argument that police do not fight crime, rather than a discussion of how the police can more humanely fulfill their assumed crime-fighting purposes? When you do encounter extreme skepticism toward policing, is it mostly ad hominem attacks on individual officers without much more, like the performatively radical social-media messages “ACAB” [All Cops Are Bastards] or “F” the police” or calling police “fascists,” “Nazis” and “pigs”? That policing is and has always been more about maintaining hierarchy and state authority than catching “bad hombres” is a sober and studied fact, not a passionate anarchist opinion. We can, without fear, ceremony, or hesitation, simply state this fact and help move common sense from the presumption that policing is necessarily and exclusively crime-fighting to the informed understanding the police are, at their core, the machinery of state coercive power.

Levin, *Criminal Justice Expertise*, 90 *FORDHAM L. REV.* 2777 (2022) (critiquing over-reliance on professional “expertise” versus lay or situated knowledge).