

Strict Tort Liability for Police Misconduct

ELIAS R. FELDMAN*

The disproportionate rates at which police use wrongful deadly force against racial minorities in the United States is a matter of significant national concern. This Note contributes to the ongoing conversation by proposing a new legal reform, which calls for the state law imposition of strict tort liability on municipal governments for police misconduct. Such a reform could remedy the harms of police misconduct more fully than the existing laws do.

Under the Restatement (Third) of Torts, a person who is found by a court to have carried on an “abnormally dangerous activity” will be subject to strict liability for physical harm resulting from that activity. An abnormally dangerous activity is one which creates a foreseeable and highly significant risk of harm even when reasonable care is exercised in its performance; it is also an activity of “uncommon usage” in the sense that the risk it creates is nonreciprocal. In Part II, this Note explains how the policies and practices of modern policing, in conjunction with human cognitive limitations, cause policing to create a foreseeable and highly significant risk of harm even when performed with reasonable care. Part III then explains how policing’s risk is disproportionately borne by racial minorities, and how this nonreciprocity of risk imposes a dignitary harm on third-party racial minorities distinct from the physical harm suffered by police misconduct’s immediate victims. Part IV, in turn, discusses how policing’s nonreciprocal risk also makes policing “uncommon” in the relevant sense. Having established that policing is the kind of activity to which strict liability can be properly applied as a matter of law, this Note argues in Part V that imposing strict tort liability on municipalities for police misconduct is desirable as a matter of policy because strict liability rules are uniquely effective at correcting the misallocation of social costs and benefits stemming from nonreciprocal risk. Finally, this Note concludes in Part VI by anticipating possible political and legal objections to the proposed reform.

* Executive Managing Editor, Colum. J.L. & Soc. Probs., 2019–2020. J.D. Candidate 2020, Columbia Law School; B.A. in Philosophy-Neuroscience-Psychology, Washington University in St. Louis. The author would like to thank Professor Elizabeth S. Scott for her guidance, the *Columbia Journal of Law and Social Problems* editorial staff for their diligence and care in preparing this Note for publication, and his family for their loving support.

I. INTRODUCTION

Americans are divided over issues of race and policing.¹ While Americans across the social spectrum are aware that racism is a major problem in the United States,² many still disagree about the problem's extent.³ Americans are particularly polarized over high-profile movements protesting police violence toward racial minorities.⁴ Studies have shown that police officers use force against racial minorities at disproportionately high rates, and there is reason to believe much of this force is unjustified.⁵ This unequal distribution of policing's risk causes a dignitary harm to entire communities of racial minorities — one that is independent of the physical and dignitary injuries suffered by individual victims of unjustified force. Injured parties who seek recourse through criminal and civil laws find that both fall short of providing a satisfying remedy for these harms. Accordingly, the failure of America's social institutions to fully address policing's harms is a primary target of today's police reform efforts.⁶

This Note proposes and defends a legal reform that has the potential to go further than existing laws in remedying the harms of police misconduct. Specifically, this reform imposes strict tort liability on municipalities for wrongful police harms upon a find-

1. In June 2017, liberal confidence in police had dropped to its lowest level since 2000 — at thirty-eight percent; while conservative confidence had risen to its highest since that year — at seventy-three percent. See German Lopez, *American Confidence in Police Is Up — Mostly Thanks to Rising Support Among Conservatives*, VOX (July 11, 2017), <https://www.vox.com/identities/2017/7/11/15953184/us-police-trust-polling> [<https://perma.cc/MKL4-HZ3P>].

2. One recent poll found that more than six in ten Americans believe that racism is a major problem in the United States. Eugene Scott, *Most Americans Say Race Relations Are a Major Problem, but Few Discuss It with Friends and Family*, WASH. POST (May 31, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/05/31/most-americans-say-race-relations-are-a-major-problem-but-few-discuss-it-with-friends-and-family/> [<https://perma.cc/TY5C-ZPVX>].

3. Blacks and Democrats are significantly more likely than Whites and Republicans to believe that racism is a substantial concern in American society today. Blacks and Democrats are also disproportionately more likely to believe that race relations have gotten worse over the last fifty years. See Kathy Frankovic, *Americans Are Divided on Race Relations, on and off the Field*, YOUNG (Aug. 16, 2018), <https://today.yougov.com/topics/politics/articles-reports/2018/08/16/americans-are-divided-race-relations-and-field> [<https://perma.cc/3P8H-CXRM>].

4. See *id.* (discussing reactions to National Football League player protests); see also Lopez, *supra* note 1 (observing how “it seems like the backlash to Black Lives Matter has had a bigger impact in the overall [confidence in police] than support for Black Lives Matter has had”).

5. See *infra* Part III.

6. See Dubin, *infra* note 102 and accompanying text.

ing that the resulting injury was wrongful in a criminal proceeding. In essence, the reform proposed in this Note *should* be adopted as a matter of policy and *can* be adopted as a matter of law.

As a matter of principle, a strict liability rule should be adopted as a matter of policy because it promises possible social benefits that outweigh its potential social costs. This Note uses three policy goals as benchmarks by which to measure the social desirability of legal approaches: the law enforcement interest; the justice interest; and the social equality interest.⁷ The more policy interests an approach advances and the further the approach advances them, the more desirable the approach.

With respect to the first policy goal, this Note strives to achieve the socially optimal policing level. “Policing” as used here denotes the common and widespread policies and practices of police officers in the United States today. Policing involves, among other things, the authority to use deadly force when necessary to prevent death or serious bodily injury, the capacity to use deadly weapons toward this end, and the procedures for confronting and apprehending suspected lawbreakers. This Note will refer to this policy goal as the *law enforcement interest*. Notably, a majority of Americans are highly confident in policing as it currently exists,⁸

7. There are other policy interests implicit in this discussion which will become more relevant in this Note’s conclusion. One policy interest is in America’s constitutional values, such as democratic republicanism, popular sovereignty, separation of powers, federalism, Enlightenment philosophy, and the like. This is referred to as the *American ethical interest*. Another interest is in following legal precedent, as codified in the doctrine of *stare decisis*. This allows the law to provide proper notice to people for how to conduct their lives in a lawful way by minimizing unpredictability in legal interpretation. Although there are different reasons why a court might deviate from precedent, courts tend to put more stock into legal principles the longer they have been adhered to. This interest is referred to as the *legal consistency interest*. An additional interest pertains to the time and effort required to pass and implement legislative changes. When considering a legislative proposal, the existence of these factors creates inertia that weighs against the benefits of possible changes. When the proposal’s benefits are equal to its costs, this inertia tilts the decision maker against the policy change. This is referred to as the *transaction cost minimization interest*.

8. Compared to the average institutional confidence of thirty-two percent (of respondents expressing “a great deal” or “quite a lot” of confidence in an institution), fifty-six percent of respondents reported these levels of confidence for police. Jim Norman, *Americans’ Confidence in Institutions Stays Low*, GALLUP (June 13, 2016), <https://news.gallup.com/poll/192581/americans-confidence-institutions-stays-low.aspx> [<https://perma.cc/DT4D-VCYK>]. Confidence in police tends to fall along racial lines: confidence among White Americans has risen in recent years to sixty-one percent, while confidence among racial minorities has dropped, decreasing to forty-five percent among Hispanics and thirty percent among Blacks. See Lopez, *supra* note 1.

and both police officers⁹ and the public¹⁰ generally support the use of aggressive tactics by police under certain circumstances. In light of these trends, a politically viable legal reform must allow for the continued use of modern police practices, including the use of aggressive tactics, where necessary.¹¹

As a second policy goal, this Note favors policies that assign responsibility to actors for harms they commit at exactly the level that best fits their conduct. This requires at least the nominal assignment of responsibility for misconduct to defendants in both criminal and civil proceedings to the extent they are responsible. It also assumes a corresponding policy favoring the provision of remedies to victims of unjust harm that brings the victim as close to a state of wholeness as possible. This Note refers to these policies collectively as the *justice interest*.

Finally, this Note assumes a third policy interest in legal and social equality on the basis of race. This policy interest stands against any social practice that distributes social benefits and costs unequally on the basis of race. This Note refers to this interest as the *social equality interest*.

A strict tort liability rule for police misconduct can feasibly be adopted as a matter of law since it is largely consistent with existing law and, to the extent it is inconsistent, changing the law to accommodate this rule would be jurisprudentially justifiable. More specifically, policing is the kind of activity that can be properly subjected to strict tort liability because it is an “abnormally dangerous activity” as defined in the Restatement (Third)

9. Fifty-six percent of police officers feel that, in some neighborhoods, being aggressive is more effective than being courteous, and forty-four percent agree or strongly agree that hard, physical tactics are necessary to deal with some people. These findings come from a representative sample of 7917 police officers working in fifty-four police and sheriff's departments with more than 100 sworn officers. Rich Morin et al., *Behind the Badge: Amid Protests and Calls for Reform, How Police View Their Jobs, Key Issues and Recent Fatal Encounters Between Blacks and Police*, PEW RESEARCH CTR. (Jan. 11, 2017), <http://www.pewsocialtrends.org/2017/01/11/behind-the-badge/> [<https://perma.cc/7BTW-PG92>].

10. The Cato Institute found in a 2016 survey that most Americans believe police “typically use appropriate force for each situation,” with nearly two-thirds of respondents reporting that the “tactics used by police officers” are “about right.” Emily Ekins, *Policing in America: Understanding Public Attitudes Toward the Police. Results from a National Survey*, CATO INST. (Dec. 7, 2016), <https://www.cato.org/survey-reports/policing-america> [<https://perma.cc/L59F-V9XG>]. At fifty-eight percent, most Americans also believe that police “only use deadly force when it is necessary.” *Id.*

11. See Lopez, *supra* note 1 (“The higher public support for cops will make it more difficult to successfully push for police reform, at least in the short term.”).

of Torts.¹² For states that extend governmental immunity to municipalities for traditionally “governmental” functions like policing, an exception accommodating the proposed strict liability rule would be justifiable.

Because the normativity and feasibility issues are intertwined in ways that make it difficult to justify one independently of the other, this Note is structured to examine the justifications for each in the context of the other. Part II of this Note explains how, given the nature and difficulty of modern policing in conjunction with human cognitive limitations, modern policing imposes a foreseeable and highly significant risk of harm, even when performed with reasonable care. Part III then explains that, although policing’s benefits and burdens should in theory be distributed evenly among citizens, the effects of implicit racial bias cause policing to subject racial minorities to a disproportionate amount of risk. Risk and incidents of police misconduct can together cause three distinct harms: the physical injury to the victim from the realized harm; the dignitary injury to the victim from the realized harm; and the dignitary injury to third-party racial minorities from the disproportionate risk itself.¹³

The failure of existing remedial schemes to remedy these injuries constitutes a failure of our justice and social equality policy interests. In Part IV, this Note briefly examines how this disproportionate imposition of risk also makes modern policing an activity “not of common usage” in the reciprocity-based sense relevant to the Restatement’s definition of an “abnormally dangerous activity.”¹⁴ Having demonstrated that policing fits the Restatement’s strict liability criteria, this Note argues in Part V why a strict liability rule is uniquely capable of remedying modern policing’s harms, going further in satisfying the justice and social equality interests without sacrificing the law enforcement interest. Finally, Part VI responds to anticipated political and legal objections to the proposed strict liability rule. This Note ultimately aims to demonstrate that, in addressing police misconduct, a strict liability rule can more effectively promote the policy interests than existing law.

12. RESTATEMENT (THIRD) OF TORTS § 20(a)–(b) (AM. LAW INST. 2009) [hereinafter Restatement].

13. See *infra* Parts II and III.

14. See Restatement § 20(b).

II. POLICING AS AN UNAVOIDABLY AND FORESEEABLY DANGEROUS ACTIVITY

The proposed strict liability rule is based on the notion that policing is an abnormally dangerous activity of the kind that should be subjected to strict liability. In tort law, a person engaging in an abnormally dangerous activity is strictly liable for physical harm resulting from that activity.¹⁵ The Restatement defines an abnormally dangerous activity as one that, first, is not of common usage and that, second, creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors.¹⁶ In this Part of the Note, it is argued that policing satisfies the Restatement's second requirement because its practices and procedures, which require police officers to make decisions about the reasonable use of deadly force under cognitively demanding conditions, inevitably give rise to "copious occasions for local governments to commit . . . torts that cause direct harm."¹⁷

Police officers "exercise awesome powers, among them surveillance, arrest, incarceration, and the use of force up to and including the authority to kill."¹⁸ The possible harms of police misconduct are substantial: in recent years, police officers have shot and killed nearly 1000 people per year in the United States.¹⁹ Moreover, cases that end in shooting deaths are just the tip of the police-risk iceberg; police officers engage in countless "volatile" encounters with suspects every year that could precipitate deadly force.²⁰ Even when victims of police misconduct are not killed,

15. See *id.* § 20(a).

16. See *id.* § 20(b).

17. Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 419 (2016).

18. CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 33 (2009); see also Nirej Sekhon, *Blue on Black: An Empirical Assessment of Police Shootings*, 54 AM. CRIM. L. REV. 189, 189 (2017) ("Absent a state of emergency, police officers are the only public officials authorized to kill extrajudicially").

19. See John Sullivan et al., *Nationwide, Police Shot and Killed Nearly 1,000 People in 2017*, WASH. POST (Jan. 6, 2018), https://www.washingtonpost.com/investigations/nationwide-police-shot-and-killed-nearly-1000-people-in-2017/2018/01/04/4eed5f34-e4e9-11e7-ab50-621fe0588340_story.html [<https://perma.cc/5YU5-PG48>].

20. See, e.g., *id.* ("[LAPD] officers are in 1.5 million volatile encounters a year, so shooting someone is an incredibly rare event."). These encounters often pose serious threats to the safety of police officers. More than 40,000 police officers are assaulted by unarmed civilians each year, and about 12,000 police officers are reportedly injured by the assault each year. See Franklin E. Zimring, *The Death of the Unarmed Assailant: On Racial Fears, Ambiguous Movement, and the Vulnerability of Armed Police*, in THE

severe physical injuries can still result and are often accompanied by two distinct dignitary injuries. The first dignitary injury arises from victims going uncompensated for their pain and suffering; the second exists where the physical injury is imposed “by a social order that seems to permit people to conduct themselves in ways that injure others for their own benefit or in promoting their interests.”²¹

Having stipulated that the existing practices by which these dangerous powers are exercised cannot be dispensed with, one can then determine if policing is an unavoidably dangerous activity by asking how great a risk these practices constitute when even performed under a reasonable standard of care. This is different than asking how great a risk law enforcement poses when done at its safest. Indeed, there are many conceivable ways in which police violence could be reduced. One such example is by addressing some of the practices and social factors contributing to police violence: poverty and inequality,²² proactive policing,²³ widespread criminalization,²⁴ insufficient mental health treatment,²⁵ and the widespread potential for criminals to access le-

SYMBOLIC AND MATERIAL CONSTRUCTION OF GUNS (Austin Sarat & Jonathan Obert, eds., forthcoming) (manuscript at 3) (on file with Colum. J.L. & Soc. Probs.).

21. Leslie Bender, *Tort Law's Role as a Tool for Social Justice Struggle*, 37 WASHBURN L.J. 249, 251 (1998) (“Injured people suffer two distinct assaults to their dignity from other-caused physical injuries — the economic and emotional consequences of the physical injury itself, which if uncompensated can encroach upon one’s dignity, and the dignitary injuries imposed by a social order that seems to permit people to conduct themselves in ways that injure others for their own benefit or in promoting their interests.”).

22. The “threat hypothesis” of police violence is the idea that “[i]nequality creates a sense of injustice and anger in which the state’s use of violence is deemed necessary to control a racial and/or economic underclass who are the most seriously affected by economic and social injustices. The economically advantaged fear this underclass and either explicitly, implicitly, or through neglect support a political system whose leaders encourage the use of violence to maintain existing social arrangements.” Brad W. Smith, *Structural and Organizational Predictors of Homicide by Police*, 27 POLICING: INT’L J. POLICE STRAT. & MGMT. 539, 540 (2004).

23. The most common form of proactive policing is “broken windows policing,” which involves police vigorously focusing their attention on low-level crimes and disorder and enforcing even minor infractions. Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L. J. 1480, 1485–86 (2016).

24. See *id.* at 1487–88 (“[M]ass criminalization is the criminalization of relatively non-serious behavior or activities.”). The widely-publicized killing of Eric Garner illustrates how widespread criminalization can lead to violence. There, Garner was arrested for allegedly selling untaxed cigarettes, and died after being placed in a chokehold by an arresting officer. Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [https://perma.cc/MA44-ASYT].

25. In 2015, nearly a quarter of all people killed by police in the U.S. were identified as mentally ill. See Kimberly Kindy, *Fatal Police Shootings in 2015 Approaching 400*

thal weapons.²⁶ Reform in these areas could lead to a reduction in wrongful police harm ex ante. However, in light of the existing political landscape — in particular, the current popular approval of policing — these changes face practical and political obstacles. This Note, therefore, presents a policy reform that is less politically controversial and can advance the policy interests within the constraints of our current political environment.

Given the features listed above, policing in its current form poses a substantial risk of wrongful injury to civilians even when performed with reasonable care. Existing reforms have largely failed to produce institutional change amidst this legal backdrop,²⁷ in part because of the nature of governmental actors,²⁸ and in part because society's law enforcement interest resists changes that would disincentivize policing.²⁹ Even assuming a

Nationwide, WASH. POST (May 30, 2015), https://www.washingtonpost.com/national/fatal-police-shootings-in-2015-approaching-400-nationwide/2015/05/30/d322256a-058e-11e5-a428-c984eb077d4e_story.html [<https://perma.cc/9T33-3323>]. One recent high-profile police shooting of a mentally ill individual was that of Saheel Vassell, who was shot to death in Brooklyn, New York after brandishing a metal pipe in his hand that police officers mistook for a firearm. Vassell had bipolar disorder and had been injured in previous encounters with police. See Benjamin Mueller & Nate Schweber, *Police Fatally Shoot a Brooklyn Man, Saying They Thought He Had a Gun*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/nyregion/police-shooting-brooklyn-crown-heights.html> [<https://perma.cc/9HL5-N93R>].

26. States' efforts to limit gun purchases and keep firearms from falling into the wrong hands are undermined by the free flow of guns across state borders, both legal and illegal. See Christopher Ingraham, *Where Guns Used in Crimes Come From*, WASH. POST (Dec. 29, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/12/29/where-guns-used-in-crimes-come-from> [<https://perma.cc/JFW5-7SA5>].

27. See Lawrence Rosenthal, *Good and Bad Ways to Address Police Violence*, 48 URBAN LAW. 675, 679 (2016) ("A wide variety of reforms have been proposed to address the problem of police violence. Some rely on civil or criminal liability, others on managerial reform. There is, however, reason to doubt their efficacy."). Given the structural protections afforded to defendants in criminal proceedings, criminal law has proven unable to "force fundamental change in how a department is run, supervised, led, and made accountable." Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 638 (2018) (citing Mary M. Cheh, *Are Lawsuits an Answer to Police Brutality?*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 247 (Geller & Toch eds., 1996)). Regarding managerial reform, "most scholars view efforts by police departments to reform from within in order to reduce the rate of unlawful violence as largely ineffective." See Rosenthal, *supra*, at 691; Rachel A. Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 38–39 (2012); Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 853–68 (2016). Opportunities and problems facing civil law reforms are discussed in Parts V and VI, *infra*.

28. See *infra* Part V.

29. This is not to say that there is insufficient will to implement any police reforms, or that no police reforms have proven successful. For example, since the NYPD was ordered to cease its "stop and frisk" practices, the department has implemented "precision

reform could make policing safer without disincentivizing it, there is still reason to doubt how far a reasonable care standard could go in preventing wrongful harms, especially due to the fact that people are highly susceptible to error when making decisions under the types of pressure and time constraints police officers experience in their encounters with criminal suspects.³⁰ Errors become increasingly probable as situations become more cognitively demanding, a phenomenon observable in policing: police officers “must make split second, life or death decisions under conditions of uncertainty,” circumstances that cognitive science has shown to be particularly conducive to human error.³¹

Further complicating police decision-making are the “lengthy, ambiguous police policies” to which officers must conform their conduct.³² The United States Supreme Court recognized these difficulties in *Graham v. Connor*, where it held that “the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving.”³³ To the extent police practices make high-pressure use of force decisions foreseeable, the tremendous cognitive demands of such decision-making render errors in that process just as foreseeable.

The practices of modern policing, in conjunction with our existing socio-political landscape and human cognitive limitations, make modern policing a foreseeably and unavoidably dangerous activity, but this alone does not make it fit for strict liability. Modern policing’s risk may be substantial, foreseeable, and unavoidable, but American society’s resistance to reforms that disin-

policing” — investigations that target the small percentage of offenders who do most of New York’s street crimes — which has reduced random police stops by ninety-eight percent from their peak. This reduction in the amount of police contact is one way that reforms have reduced the risk of harmful errors. See Stephanie Gosk et al., *After Stop and Frisk, the NYPD Reinvents Policing Yet Again*, NBC NEWS (May 13, 2018), <https://www.nbcnews.com/news/crime-courts/after-stop-frisk-nypd-reinvents-policing-yet-again-n873446> [<https://perma.cc/XV8F-CDVD>].

30. As Joanna Schwartz writes, “when tragedies occur, human error almost always plays a role — people misperceive information, process it incorrectly, make careless mistakes. . . . It is impossible to cure limitations of human perception, cognition, and decision-making.” Joanna C. Schwartz, *Systems Failures in Policing*, 51 SUFFOLK U. L. REV. 535, 538 (2018).

31. *Id.* at 545 (“Cognitive psychologists have shown that people are particularly likely to err when making these types of complex, high-speed, high-stress, high-stakes decisions.”).

32. *Id.* at 554.

33. 490 U.S. 386, 396–97 (1989).

centivize policing suggests that it views current levels of policing as socially desirable. The associated risks are, one could say, simply the costs of doing business. As Parts III and IV of this Note explain, these risks are unproblematic as long as they are allocated fairly throughout society. However, a problem emerges when these costs are unfairly allocated. It is this problem that makes modern policing an appropriate subject for strict liability.

III. THE DISPROPORTIONATE ALLOCATION OF POLICING'S RISK

Although civilians generally enjoy the benefits of policing evenly, racial minorities bear a disproportionately high share of policing's costs relative to Whites.³⁴ Given the difficulty of split-second decision making under extreme pressure, police officers are susceptible to subconscious racial biases that may lead them to overestimate the threat posed by suspects of color and cause them to unreasonably resort to deadly force. The resulting harm includes both the physical and dignitary injuries sustained by individual victims and a separate dignitary injury sustained by

34. This Note makes a claim about the allocation of risk toward racial minorities in the United States that are, in fact, subjected to disproportionate risk of wrongful police violence relative to White Americans. It supports its claim by citing to articles and studies drawing conclusions about Black Americans in particular, but uses these findings to make a broader point about all racial minority groups subject to this disproportionate risk. For example, this Note's claim would extend to Hispanic Americans, who may face an even higher risk of being killed during interactions with police than Black men in neighborhoods with high levels of income inequality. See Gerry Everding, *Young Hispanic Men May Face Greatest Risk from Police Shootings, Study Finds*, SOURCE (Mar. 29, 2018), <https://source.wustl.edu/2018/03/young-hispanic-men-may-face-greatest-risk-from-police-shootings-study-finds> [<https://perma.cc/H5ZQ-59AR>]. This Note's claim would also extend to Native Americans, who are also killed by police at disproportionately high rates. See Maggie Koerth-Baker, *Police Violence Against Native Americans Goes Far Beyond Standing Rock*, FIVETHIRTYEIGHT (Dec. 2, 2016), <https://fivethirtyeight.com/features/police-violence-against-native-americans-goes-far-beyond-standing-rock> [<https://perma.cc/CB2L-QEJ3>]. However, this claim would not extend to Asian Americans, who constitute only 1.7% of police killing victims and are thus "killed by police far less often than [one] would expect if killings were randomly distributed throughout the population." Charles E. Menifield et al., *Do White Law Enforcement Officers Target Minority Suspects?*, 79 PUB. ADMIN. REV. 56, 60 (2018). Additionally, although this Note cites to conclusions drawn about men that might not necessarily extend to women, studies suggest that similar disparities exist among American women as well. See, e.g., Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race — Ethnicity, and Sex*, 116 PROC. NATL. ACAD. SCI. U.S.A. 16,793, 16,793 (2019) ("African American men and women, American Indian/Alaska Native men and women, and Latino men face higher lifetime risk of being killed by police than do their white peers."). Thus, this Note uses the phrase "racial minorities" to denote only those individuals who are subject to a disproportionately higher risk of police violence because of their race.

all racial minorities exposed to this heightened risk. This latter dignitary injury stems from the inequity itself.

Many scholars believe that police exercise force against racial minorities — both deadly³⁵ and nondeadly³⁶ — at rates disproportionate to those used against Whites. This disparity, these scholars contend, stems from the policies and practices of law enforcement.³⁷ Others claim that because minority crime offense rates also exceed their representation in society, disparities in encounters with law enforcement are neither disproportionate nor unfair.³⁸ However, findings support the former position over the latter: Blacks, for example, do not commit violent crimes at rates significantly higher than their proportion of the total population,³⁹ yet they are still killed by police at a significantly higher rate than both their proportion of the total population and the rate at which they commit violent crimes.⁴⁰ Blacks are also killed

35. See Rosenthal, *supra* note 27, at 676 (“[M]ounting evidence suggest[s] that those shot or killed by police are disproportionately persons of color.”), and at 676 n.6 (collecting authority).

36. See *id.* at 676 (“The available data suggest a similar racial skew with respect to police use of nondeadly force.”), and at 677 n.7 (collecting authority).

37. See Jacob Bor et al., *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study*, 392 LANCET 302, 302–03 (2018) (“Police violence disproportionately wielded against Black Americans has been linked in part to the ways officers are trained, methods of identifying and engaging suspects, and uneven enforcement and punishment.”).

38. See Cynthia Lee, *Race and Self Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 410 (1996) (“To justify the fear of Blacks as criminals, many people point to statistics which show that Blacks are arrested and convicted of crime far more often than Whites. In 1990, the Sentencing Project published a report . . . [which] found that on any given day in 1989, 23% of Black men between the ages of twenty to twenty-nine were in prison, on probation or parole, or in some way connected with the criminal justice system. Five years later, the Sentencing Project updated its study, reporting that as of 1994, 30.2% of African American males in the age group 20–29 were under criminal justice control — prison, jail, probation, or parole — on any given day.”).

39. *Id.* at 410–11 (“According to the Sentencing Project, ‘The typical African American male in the criminal justice system is *not a violent offender*.’ The large number of African American males connected with the criminal justice system is largely due to the ‘War on Drugs,’ and increased law enforcement of drug crimes . . . contrary to common expectations, ‘the majority of arrestees for violent offenses are white.’ The Federal Bureau of Investigation’s Uniform Crime Reports (UCR) for 1993 confirms this.”).

40. Studies demonstrate that, from 2012 to 2015, 22.7% of offenders in violent victimizations were Black and 14.4% were Hispanic, compared to 43.8% being White. See Rachel E. Morgan, *Race and Hispanic Origin of Victims and Offenders*, 2012–15, U.S. DEP’T OF JUSTICE, OFFICER OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STAT. 2 (Oct. 2017), <https://www.bjs.gov/content/pub/pdf/rhovo1215.pdf> [<https://perma.cc/Z8Y6-SN5P>]. For reference, Blacks constituted approximately 17.9% of the American population in 2017. See *National African-American History Month: February 2017*, U.S. CENSUS BUREAU (Jan. 10, 2017), <https://www.census.gov/newsroom/facts-for-features/2017/cb17-ff01.html> [<https://perma.cc/62FE-KEJW>]. This shows that, while Blacks do commit violent crimes at

by police officers even more disproportionately among victims who are unarmed,⁴¹ as well as among victims killed during generally innocuous types of police interactions, such as traffic or pedestrian stops.⁴² Together, these findings support the notion that many of the highly publicized fatal encounters between police and Blacks are demonstrative of a broader trend involving wrongful police force against Blacks and other racial minorities rather than merely isolated incidents.⁴³

It is also fair to assume policing's risk of wrongful harm falls disproportionately upon racial minorities given what is known about how unconscious racial biases affect police decision-making.⁴⁴ Much of human thought is subconscious and automatic, following cognitive shortcuts that are generally productive but can nonetheless cause "systematic errors" that lead otherwise well-intentioned people to stereotype certain demographics in unfair and harmful ways.⁴⁵ Most individuals hold implicit racial

slightly higher rates than their percentage of the total population, the fact that Blacks constitute over thirty percent of arrest-related deaths demonstrates that Blacks are killed by police at a rate nearly ten percentage points higher than the rate at which they commit violent crimes. See ANDREA M. BURCH, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, ARREST-RELATED DEATHS, 2003–2009 — STATISTICAL TABLES 2 (Nov. 2011), <https://www.bjs.gov/content/pub/pdf/ard0309st.pdf> [<https://perma.cc/N6HG-KA8AJ>].

41. See Zimring, *supra* note 20, at 5 ("The 40.4% of unarmed civilian deaths is substantially more than three times the percentage of African Americans in the U.S. population. And a statistical analysis of the difference between the 24.5% African American share of deaths when both the officer and civilian are armed and the 40.4% African American share of unarmed victim deaths shows the additional risk to African Americans in the unarmed cases is unlikely to be a random fluctuation from the 24.5% general African American death risk.").

42. See Roland G. Fryer, Jr., *Reconciling Results on Racial Differences in Police Shootings*, 108 AEA PAPERS & PROC. 228, 228 (2018).

43. Two-thirds of police officers say that such encounters are isolated incidents. But fifty-seven percent of Black police officers (including sixty-three percent of Black female officers) believed that they are signs of a broader problem. Morin et al., *supra* note 9.

44. Rosenthal, *supra* note 27, at 677 ("Perhaps the explanation most frequently offered in legal scholarship [for police violence against minorities] is the prevalence of implicit bias, by which stereotypical perceptions of minorities cause officers to perceive them as threatening — a phenomenon well-documented in psychological literature.").

45. See Amos Tversky & Daniel Kahneman, *Judgement Under Uncertainty: Heuristics and Biases*, 185 SCI. 1109, 1130 (1974) ("[P]eople rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations. . . . In general, these heuristics are quite useful, but sometimes they lead to systematic errors."). Tversky & Kahneman's article proved hugely influential in the field of psychology. See Klaus Fiedler & Momme von Sydow, *Heuristics and Biases: Beyond Tversky & Kahneman's (1974) Judgement Under Uncertainty*, in COGNITIVE PSYCHOL.: REVISITING THE CLASSIC STUDIES 146 (Michael W. Eysenck & David Groome eds., 2015) ("It is no exaggeration to say that today's psychology would not be what it is without Daniel Kahneman's and Amos Tversky's seminal work on heuristics and biases. . . ."). Literature on implicit racial bias commonly identifies the phenomenon

biases, regardless of their race⁴⁶ or their conscious attitudes towards racial minorities.⁴⁷ One of the most damaging stereotypes that persists among Americans is the “black-as-criminal” stereotype that causes people to view Black men as more violent and likely to engage in criminal activity.⁴⁸ In one illustrative study, subjects making snap judgments as to whether an object was a gun or a harmless object were more likely to falsely see a gun when primed with a Black face than when primed with a White face.⁴⁹

These biases are so influential that they can cause decision-makers who have the ability to assess reasonableness with sufficient time for careful deliberation to exhibit bias nonetheless. For example, studies have shown that jurors in self-defense cases are inclined to perceive ambiguous actions of minority actors to be more hostile or violent than they actually are.⁵⁰ Even in low-stress circumstances, individuals perceive both ambiguously aggressive⁵¹ and clearly non-aggressive⁵² behavior by Blacks as more threatening than the same behavior exhibited by Whites.

as a manifestation of Tversky and Kahneman’s “heuristics.” See generally, L. Song Richardson & Phillip Atiba Goff, *Self Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293 (2012).

46. Sekhon, *supra* note 18, at 212–13.

47. See Melissa Healy, *How Your Racial Biases Can Change in a Heartbeat*, L.A. TIMES (Jan. 17, 2017), <http://www.latimes.com/science/sciencenow/la-sci-sn-racial-bias-heartbeats-20170117-story.html> [<https://perma.cc/64HL-9G99>] (“Even when people harbor no overt racism, they more often assign stereotyped attributes — most of them negative — to people with African features than they do to white people.”).

48. Lee, *supra* note 38, at 402–03. As previously discussed, this stereotype is not grounded in the actual rates at which Blacks commit violent crimes. See *supra* note 39 and accompanying text.

49. Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1155 n.109 (2012) (citing B. Keith Payne, *Weapon Bias: Split-Second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS IN PSYCHOL. SCI. 287, 287–88 (2006)) (“In the snap-judgment condition, race shaped people’s mistakes. They falsely claimed to see a gun more often when the face was black than when it was white.”). It is worth noting that “a significant majority of [police shootings of minority suspects] were precipitated by involved officers’ [sic] perceiving gun threats.” Sekhon, *supra* note 18, at 191.

50. Lee, *supra* note 38, at 399 (“In self-defense cases, racial stereotypes about either the defendant or the victim can influence the reasonableness determination in different ways. . . . For instance, if the defendant or victim belongs to a racial group whose members are perceived as dangerous or violent criminals, jurors may perceive ambiguous actions of the actor to be more hostile or violent than they actually are.”).

51. Psychologist Birt Duncan found this to be true in an experiment conducted on White undergraduate students from the University of California at Irvine, where subjects observed two people involved in a heated argument resulting in one person shoving the other. Subjects were assigned to four experimental conditions: Black shover/White victim, White shover/Black victim, Black shover/Black victim, and White shover/White victim.

As actors are guided by implicit racial bias even under forgiving circumstances, susceptibility to bias is that much greater for police when making decisions quickly and instinctually under tremendous pressure. Despite their training, police officers do indeed exhibit biased conduct when operating “under the very type of cognitive strain that heightens implicit biases and makes error more likely.”⁵³ Studies have also found that fatigued police officers were not only more likely to associate Blacks with weapons, but also more likely to become involved in use-of-force incidents.⁵⁴ Implicit bias seems to have played a significant role in the 2014 shooting death of Michael Brown, a Black teenager, by a White police officer in Ferguson, Missouri.⁵⁵ The case received national attention when the prosecutor declined to indict Officer Darren Wilson upon finding that:

[T]he officer who fired the shots which killed Michael Brown had a subjective belief that Mr. Brown posed a threat to the officer’s safety that insulated the officer from criminal liability. . . . What made Mr. Brown a threat in Officer Wilson’s mind was the possibility that Michael Brown might seize Officer Wilson’s gun and use it against him. No such intention was threatened verbally — it was the officer’s interpretation of his adversary’s physical movements that generated a fear of death or great bodily harm.⁵⁶

The students were far more likely to infer violence from Black actors than White actors, especially against White victims; seventy-five percent of participants thought the shove constituted “violent” behavior under the first condition, compared to only seventeen percent in the second condition. *Id.* at 405–06.

52. *Id.* at 406 (citing H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children’s Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 592–93 (1980)).

53. Schwartz, *supra* note 30, at 547–48.

54. *Id.* at 550 n.79 (citing Mike Maciag, *The Alarming Consequences of Police Working Overtime*, GOVERNING (Oct. 2017), <https://www.governing.com/topics/public-justice-safety/gov-police-officers-overworked-cops.html> [<https://perma.cc/DE3Z-PQP8>]).

55. See EQUAL JUSTICE INITIATIVE, *Unconscious Racial Bias Gets Increased Attention in Aftermath of Police Shooting of Unarmed Black Teen* (Aug. 28, 2014), <https://eji.org/news/unconscious-racial-bias-after-michael-brown-shooting> [<https://perma.cc/32ND-LHQ5>] (“As state and federal authorities investigate the August 9 shooting of unarmed black teenager Michael Brown by a white police officer in Ferguson, Missouri, the role of unconscious racial bias in police shootings and throughout society has become a focus on national conversation.”).

56. Zimring, *supra* note 20, at 2–3.

This description illustrates how police officers, even when acting in accordance with what they honestly perceive as a reasonable standard of care, might be influenced by their implicit racial biases in a way that leads them to unreasonably use deadly force.⁵⁷

As a legal matter, holding defendants liable for unreasonable actions is challenging when the unreasonableness is caused by implicit bias. Under traditional self-defense doctrine, a non-aggressor is justified in using deadly force if she honestly and reasonably believes it is necessary to prevent imminent bodily harm.⁵⁸ While most jurisdictions follow this rule requiring both honest and reasonable belief, some jurisdictions have historically permitted acquittal on the ground of honest belief alone.⁵⁹

Although it is generally accepted that the “honesty” requirement involves a subjective standard, “there is less agreement on what it means to have a *reasonable* belief.”⁶⁰ Some academics support a subjective standard of reasonableness, yet only a few states have actually adopted one.⁶¹ There are strengths and

57. In Officer Wilson’s testimony about the incident, “he consistently refers to Brown as virtually superhuman. Wilson testified that while he was shooting at Brown, ‘it looked like he was almost bulking up to run through the shots, like it was making him mad that I’m shooting at him.’” Adam Waytz et al., *The Racial Bias Embedded in Darren Wilson’s Testimony*, WASH. POST (Nov. 26, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/11/26/the-racial-bias-embedded-in-darren-wilsons-testimony/> [https://perma.cc/AJL7-4HH5]. Given Wilson’s large physical stature at six-foot-four-inches and 210 pounds, the article’s authors suggest that the officer’s appraisal of Brown as “superhuman” was an unreasonable one influenced by implicit racial bias. They cite to studies they conducted in which participants were significantly faster to associate Black faces with “superhuman” (versus “human”) words and were more likely to consciously attribute superhuman descriptions to Blacks. They conclude, “Wilson seemed to justify his infliction of lethal pain on to Brown because he perceived Brown to be a superhuman threat.” *Id.*

58. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.03[A], at 201 (2d ed. 1995) (“[Deadly force] is justified in using a reasonable amount of force against another person if she honestly and reasonably believes that: (1) she is in imminent or immediate danger of unlawful bodily harm from her adversary, and (2) the use of force is necessary to avoid such danger.”). The Supreme Court has held that police use of deadly force is only justified when necessary to prevent death or serious bodily injury. See *Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (“We conclude that [deadly] force may not be used unless it is necessary to prevent [] escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”). “Deadly force” is typically defined as “force likely to cause death or serious bodily injury.” See Lee, *supra* note 38, at 378 n.24.

59. Lee, *supra* note 38, at 377 n.20.

60. *Id.* at 380.

61. *Id.* at 380 n.31; see, e.g., *State v. Leidholm*, 334 N.W.2d 811, 818 (N.D. 1983) (citation omitted) (stating North Dakota’s standard that “[a] defendant’s conduct is not to be judged by what a reasonably cautious person might or might not do or consider necessary to do under the circumstances, but what he himself in good faith honestly believed and had reasonable ground to believe was necessary for him to do and protect himself from apprehended death or great bodily injury”). Lee notes, however, that calling this standard

weaknesses of both objective and subjective standards and, in practice, most jurisdictions employ hybrid subjective-objective reasonable person standards.⁶² These standards, like the one the New York Court of Appeals applied in *People v. Goetz*,⁶³ allow juries to assess reasonableness based on the particular circumstances or situation of a defendant, including physical characteristics like size or disability.⁶⁴ The criminal law also contains doctrines that recognize diminished culpability when defendants resort to deadly force honestly but unreasonably.⁶⁵

However, one struggles to find satisfying remedies in the criminal law when responses that seem honest and reasonable to the average person are objectively unreasonable and socially undesirable. As Professor Cynthia Lee explains:

An objective standard of reasonableness might also be criticized for focusing too heavily on what the average or ordinary person, rightly or wrongly, would think to do. The ordinary person might act in undesirable ways. She might use deadly force against a Black man to protect herself against an imagined threat even though she would not do so if the ordinary person she was attacking was White. . . . The criminal law might discourage such behavior by clarifying

“subjective” is somewhat of a misnomer because it requires that the defendant honestly believe it was reasonable to act in self-defense. Lee, *supra* note 38, at 383.

62. Lee, *supra* note 38, at 380.

63. 68 N.Y.2d 96 (N.Y. 1986). In December 1984, Bernard Goetz shot four young Black men, allegedly in self-defense, on a New York City subway train. See Nadine Klansky, *Bernard Goetz, A Reasonable Man: A Look at New York's Justification Defense* *People v. Goetz*, 53 BROOK. L. REV. 1149, 1149 (1988). Regarding the standard the court would use to determine whether Goetz's use of deadly force was justified, “Judge Wachtler . . . stated that the standard . . . incorporates aspects of both the objective and subjective standards.” *Id.* at 1152 n.13.

64. See Lee, *supra* note 38, at 387.

65. Two different approaches have been taken toward accommodating the law of self-defense in these cases: the Model Penal Code's treatment of self-defense and the imperfect self-defense doctrine. The Model Penal Code mitigates the severity of the offense to the culpability level of the honest mistake, providing that “if a defendant's belief in the need to use self-defense was honest but unreasonable (due to recklessness or negligence), then the defendant would not be guilty of murder, which requires purpose or knowledge, but might be guilty of manslaughter or negligent homicide if recklessness or negligence is sufficient to establish culpability for these lesser offenses.” *Id.* at 392. The imperfect self-defense doctrine reaches the same conclusion in common-law terms: “if the defendant honestly but unreasonably believed in the need to use deadly force . . . the honest but unreasonable belief allows mitigation of the charge from murder to manslaughter ostensibly because the malice aforethought required for murder is absent.” *Id.* at 396. However, neither of these approaches “adequately addresses problems of ambiguity with the reasonableness determination.” *Id.* at 397.

that the reasonable man is neither a racist nor a homophobic person. This, however, does not solve the problem because [people who fear Blacks] might be motivated, not by hatred or bigotry, but by the normal human process of categorization, of which stereotyping is a part.⁶⁶

One observes these difficulties at play in *Goetz*, where the defendant (understood in the most charitable light) believed his victims posed a more serious threat to his safety than they actually did because of his internalization of negative racial stereotypes. The fact that trained officers are susceptible to implicit racial bias suggests that policing's disparate impact may be as much a consequence of the act of policing itself as it is of ill-intentioned officers targeting minority individuals or displaying wanton disregard for their safety. The effects of implicit racial bias on police officers' assessments of the reasonableness of using deadly force explains and further supports the claim that racial minorities are disproportionately subjected to policing's risk of wrongful harm.

Policing's disproportionate risk itself causes an independent dignitary harm to minority populations as a whole. The dignitary injury stems from feeling that one's well-being has been willfully sacrificed by society for its overall benefit and becomes more substantial as the inequity becomes more apparent.⁶⁷ "Racism, like trauma, can be experienced vicariously," and the wrongful police killings of Black Americans "are perceived by many [other Black Americans] as manifestations of structural racism and as implicit signals of the lower value placed on black lives by law enforcement and legal institutions — and by society at large."⁶⁸

For racial minorities, this dignitary harm can have severe and tangible consequences. Studies have found that police killings of unarmed Black Americans worsen the mental health of other Black Americans⁶⁹ by eliciting "heightened perceptions of system-

66. *Id.* at 389–90.

67. The fact that similar effects are not observed after the unarmed killing of Whites suggests that "the meaning ascribed to police killings of unarmed black Americans, in light of the historical and institutional context in which they occur, probably mediates the adverse mental health effects of these events on black Americans." Bor et al., *supra* note 37, at 308.

68. *Id.* at 302, 308.

69. Specifically, the study's estimates imply that police killings of unarmed Black Americans could contribute 1.7 additional poor mental health days per person per year, or 55 million excess poor mental health days per year among Black American adults in the country. To put this in perspective, the population mental health burden from police

ic racism and lack of fairness, loss of social status and self-regard, increased fear of victimization and greater mortality expectations, increased vigilance, diminished trust in social institutions, reactions of anger, activation of prior traumas, and communal bereavement.”⁷⁰ The impact of this inequity is especially damaging for youth, causing “serious institutional, social, and psychological consequences for adolescent boys as they transition into adulthood.”⁷¹ An additional cost of disproportionate policing is the substantial effort minority individuals are forced to undertake in order to minimize contact with law enforcement for their safety and comfort.⁷² This harm is a substantial, foreseeable, and unavoidable consequence of policing’s disproportionate risk suffered by third-party minorities.

These costs illustrate the tension between the law enforcement policy interest and the justice and social equality policy interests. Even if society is better off on the whole for policing as it exists, this fact is of little consolation to those Americans who are unfairly subjected to unjust harm because of their race and for whom policing’s disproportionate risk is a dignitary injury in its own right. A reform must reconcile these policy interests if it is to effectively address policing’s harms.

IV. POLICING AS AN ACTIVITY OF “UNCOMMON USAGE”

Given human cognitive limitations in the kinds of demanding circumstances under which police must make decisions about the reasonableness of using deadly force, policing creates a foreseeable risk of substantial harm even when reasonable care is exer-

killings among Black Americans is nearly as large as the mental health burden associated with diabetes. *Id.* at 307.

70. *Id.* at 302.

71. Nikki Jones, “The Regular Routine”: Proactive Policing and Adolescent Development Among Young, Poor Black Men, 143 *NEW DIRECTIONS FOR CHILD AND ADOLESCENT DEV.* 33, 36 (2014); see also Kathy Sanders-Phillips, *Racial Discrimination: A Continuum of Violence Exposure for Children of Color*, 12 *CLIN. CHILD FAM. PSYCHOL. REV.* 174 (2009) (citing Wong et al., *The Influence of Ethnic Discrimination and Ethnic Identification on African American Adolescents’ School and Socioemotional Adjustment*, 71 *J. PERSONALITY* 1197 (2003); Schulz et al., *Addressing Social Determinants of Health: Community-Based Participatory Approaches to Research and Practice*, 29 *HEALTH EDUC. & BEHAV.*, 287 (2000)) (noting that chronic exposure of youths to racial discrimination poses “significant threats to their future and well being [sic]” and creates higher levels of hopelessness, worthlessness, and anxiety).

72. Jones, *supra* note 71, at 41 (“That these sorts of interactions are unwelcome and potentially injurious is revealed in the effort young men put into *avoiding* them.”).

cised. Further, this risk is also a substantial harm in and of itself because its disproportionality causes a dignitary harm to racial minorities who suffer this unfair risk because of their race. This Part of the Note argues that policing is also not an activity “of common usage,” thereby satisfying the Restatement’s second requirement for finding an abnormally dangerous activity.

An activity is of common usage if it is “engaged in by a large fraction of the community” for which “the risks in question are imposed by the many on each other.”⁷³ In other words, “the absence of strict liability can be explained by principles of reciprocity,” and presumably strict liability’s presence can be explained in this way as well.⁷⁴ As Professor Gregory Keating explains, “the basic idea of the reciprocity-of-risk criterion is that negligence liability fairly apportions the burdens and benefits of risky activities within a community of reasonable risk imposition, whereas strict liability does so when risks are imposed by one community on another.”⁷⁵ A “community of risk” is one whose members impose identical risks on one another, thus being exposed to the same amount of risk that they expose others to.⁷⁶ These reciprocal risks are “reasonable” only when, after having gained equal benefits and suffered equal losses, the members of a community all gain more than they lose overall.⁷⁷ When risks are reasonable but nonreciprocal, the prospective victims of nonreciprocal risk impositions are not fully compensated for bearing these risks by the right to impose equal risks in return. Therefore, the benefits

73. RESTATEMENT (THIRD) OF TORTS § 20 cmt. j (AM. LAW INST. 2009) (“Whenever an activity . . . is engaged in by a large fraction of the community, the absence of strict liability can be explained by principles of reciprocity. Even though various actors may without negligence be creating appreciable risks, the risks in question are imposed by the many on each other.”).

74. *Id.* This reciprocity-based rationale has been developed and endorsed by several prominent legal scholars. For example, Professor George Fletcher developed this rationale in *Fairness and Utility in Tort Theory*, where he argues that “the paradigm of reciprocity accounts for the typical cases of strict liability.” George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 554 (1972). Although Professor Fletcher’s critics contend that “the norm of reciprocity is consistent with either general system, whether negligence or strict liability,” they do not dispute that strict liability can be explained in terms of reciprocity. See Mark Geistfeld, *Tort Law and Criminal Behavior (Guns)*, 43 ARIZ. L. REV. 311, 325 n.54 (2001) (internal quotations omitted) (citing Richard A. Epstein, CASES AND MATERIALS ON TORTS 152 (7th ed. 2000)).

75. Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 SO. CAL. L. REV. 193, 202 (2000).

76. *Id.*

77. *Id.*

of imposing risks do not offset the harm of having to bear exposure to them for these individuals.⁷⁸

Policing imposes non-reciprocal risks, even if it may not initially appear to do so. Although not everyone enforces the law,⁷⁹ it is ultimately the community that is imposing law enforcement on itself through a democratically representative government (if such a government can be assumed). Thus, everyone in a community benefits from law enforcement, just as everyone in a community is exposed to the risks it necessarily imposes upon them; such usage is common.

Yet for individuals who bear the risks of policing at a disproportionately higher rate than other members of society, as racial minorities do in the United States, these individuals are under-compensated for their harms. For this particular subpopulation, policing will occur at a level far higher than what it perceives as optimal. This nonreciprocity, even if reasonable for society as a whole, can be harmful if the misallocation of costs and benefits is not remedied. One such cost is the third-party dignitary harm of “liv[ing] with the knowledge that the community is prepared to appropriate their physical well-being — their lives, limbs, and property — whenever doing so is to the community’s advantage . . . [and] the devaluation of their lives that this implies.”⁸⁰ This harm to third parties, rather than the harm to victims, is what makes policing “uncommon,” and thus an appropriate subject for strict tort liability.

78. *Id.* at 203.

79. Why not also assign responsibility to police officers and hold them liable for damages? After all, given the fact that policing carries these inherent risks, are they not assuming a particular risk of causing wrongful harm by serving as police officers? While this may be true, there are reasons to impose liability only on the municipality. Municipal liability spreads the risk among the community and each taxpayer ends up paying less for each incident than the amount of value they enjoy from being in a policed community. This is not the case with individual police officers, for whom shouldering the liability’s burden would far outweigh the benefit they receive from policing. Whereas liability would not disincentivize policing on the part of the municipality, for reasons elaborated upon later in Part V, those reasons do not hold true for individual officers. As a practical matter, it seems unlikely that most individual police officers could pay the multi-million-dollar settlements that many victims rightfully receive, and therefore such liability would not go far in remedying injuries.

80. Keating, *supra* note 75, at 204–05.

V. THE BENEFITS OF STRICT LIABILITY

Having established that policing is appropriately subjectable to strict tort liability, this Part of the Note proposes that state legislatures can more effectively advance their policy interests by imposing strict tort liability on municipalities for police misconduct.⁸¹ Under this approach, when municipal police officers cause wrongful harm in their official capacities and are convicted in a criminal proceeding at any culpability level, the victim or his estate need only present proof of this conviction to win compensatory damages from the municipality in a subsequent civil action.⁸² By compensating the victim for his physical injuries and providing alternative remedies for the dignitary injuries of both the victim and third-party racial minorities, a strict tort liability rule would more fully remedy policing's harms.

The shortcoming of existing law is that civil suits against municipalities rarely result in the public assignment of responsibility or the creation of public awareness that could potentially remedy the dignitary injuries of both the victim and third parties. Civil litigation in police misconduct cases is preceded by a criminal proceeding, but sometimes even a lengthy criminal proceeding can leave the record incomplete, making a civil proceeding the only means for some plaintiffs to fully tell their stories and seek accountability for their injuries.⁸³ However, plaintiffs nonethe-

81. Why not also under federal law? Both federal and state law offer avenues to sue municipalities in tort for damages, and, in practice, plaintiffs make both state and federal law claims in their complaints. *See, e.g.*, Complaint at 18–27, Humberto Martinez et al. v. City of Pittsburgh et al., No. 4:17-cv-04246 (N.D. Cal. 2017) (asserting both federal civil rights violations and state wrongful death claims). However, because the proposed strict liability rule for police misconduct is inspired by state tort liability rules for inherently risky activities, it makes most sense for this rule to be enacted under state law and justified in those terms.

82. The arguments for this approach presented in this Note are novel, but the approach itself might not be. In a 2007 blog post, David Veksler advocated holding a police agency liable when an officer uses unjustified force and causes wrongful harm. Veksler even briefly suggests that policing could be considered an “inherently dangerous activity[y].” But Veksler defends this rule on the grounds that, first, the increased liability would motivate agencies to “minimize mistakes” and “experiment on the most effective ways to perform their jobs,” and that, second, the rule would discourage the prosecution of victimless crimes. David Veksler, *The One Minute Case For Strict Civil Liability of the Justice System*, ONE MINUTE CASES (Nov. 2, 2007, 4:08 PM), <http://oneminute.rationalmind.net/strict-liability/#comments> [https://perma.cc/6KBB-TJAZ]. This Note relies on neither of those arguments.

83. *See* Alan Feurer, *In Police Misconduct Lawsuits, Potent Incentives Point to a Pay-out*, N.Y. TIMES (Aug. 16, 2016), <https://www.nytimes.com/2016/08/17/nyregion/police-misconduct-lawsuit-settlements.html> [https://perma.cc/F7XR-TB29] (“[The plaintiff] had

less face “powerful incentives” to take a settled payout rather than advance toward judicial resolution,⁸⁴ which means terminating the case without resolution on the merits.

Settlements promise substantial awards that are attractive to victims of police violence and their families, many of whom “are people of limited means for whom a six-figure check could be life-changing.”⁸⁵ Plaintiffs face a difficult tradeoff between desperately needing compensation and desiring to expose police misconduct through the legal process.⁸⁶ “It’s a rare victim,” Andrew Stoll, a plaintiffs’ lawyer, stated, “that has the luxury of refusing the money to make a bigger point.”⁸⁷ Plaintiffs’ lawyers often even guide their clients toward settlement: “our primary job is to get our clients . . . a decent recovery. . . . If the recovery is fair, we have an obligation not to go forward just to ‘go forward.’”⁸⁸

Indeed, lawyers concerned about their clients’ recoveries have good reason to advise their clients to settle early: one study found that families received a median award of \$2.2 million when they accepted settlements before criminal charges were resolved versus \$500,000 when they accepted after criminal proceedings ended.⁸⁹ And, because plaintiffs have often suffered trauma as a result of the death or injury of a loved one, plaintiffs who might otherwise want to litigate the case ultimately settle just to avoid having to relive this trauma at trial.⁹⁰ Yet, in foregoing opportunities to litigate the case, plaintiffs lose not only the opportunity to have the facts of their own case aired in a public proceeding, but they also lose an important opportunity “to create a public record and push for structural change” that might contribute to remedying the victim’s dignitary injury.⁹¹ The cost of settling these cases is that municipalities can and do expressly deny any

no choice but to fully litigate the civil case’ because the officers who had killed Mr. Diallo were acquitted and the story of his client’s death was never fully told.”)

84. *Id.*

85. *Id.*

86. Barry Scheck, a lawyer who helped a woman sexually assaulted by a police officer negotiate a \$9 million settlement, said “frequently, plaintiffs in these cases are badly damaged and want or even need compensation. . . . But you have to trade that off sometimes with their aspirations to expose what happened, and to find solutions.” *Id.*

87. *Id.*

88. *Id.*

89. Marc Fisher & Derek Hawkins, *Uneven Justice*, WASH. POST (Nov. 3, 2015), <https://www.washingtonpost.com/sf/investigative/2015/11/03/uneven-justice> [<https://perma.cc/JQA3-ZFYL>].

90. See Feurer, *supra* note 83.

91. *Id.*

responsibility for the plaintiff's harm,⁹² depriving victims of the symbolic assignment of responsibility and public awareness that a final ruling against the municipality would bring.

By nominally assigning responsibility and publicizing the wrongful harm with a favorable decision on the merits, a strict liability rule for municipalities would provide this kind of relief.⁹³ As Professor Keating points out, strict liability rules are advantageous because they ensure that persons injured by nonreciprocal risk impositions are compensated for their injuries to the greatest extent possible by correcting an unfair distribution of costs and benefits.⁹⁴ When police misconduct causes wrongful harm, money damages are often insufficient to remedy resulting dignitary harms.⁹⁵ Rather, the injured party may want “a public judgment of liability,” which can “place responsibility on the offender, moderate any self-blame, recognize and affirm the societal norm that was violated, and communicate to an injured party that he is a respected member of the community.”⁹⁶

The provision of remedies for an individual victim's dignitary injury is well established. For example, tort law already allows for nominal damages to be awarded to plaintiffs that have “symbolic value . . . separate and independent” from the monetary worth of compensatory damages.⁹⁷ Nominal damages enable “litigants to hold ‘an entity responsible for its actions and inactions,’ and to ‘alert the municipality and its citizenry to the issue.’”⁹⁸

92. See Zusha Elinson & Dan Frosch, *Cost of Police-Misconduct Cases Soars in Big U.S. Cities*, WALL ST. J. (July 15, 2015), <https://www.wsj.com/articles/cost-of-police-misconduct-cases-soars-in-big-u-s-cities-1437013834> (“New York City Corporation Counsel Zachary Carter said the settlement ‘should not be construed as an acknowledgement that the convictions of these five plaintiffs were the result of law-enforcement misconduct.’”).

93. To be clear, the constitutional guarantee of equal protection under the law and this Note's stated policy interest in social equality both assure that this strict liability rule would extend to people in a jurisdiction regardless of race. But to the extent there are reasons for applying the strict liability rule to non-minority individuals, the injury of policing's disparate impact is not one of them.

94. Keating, *supra* note 75, at 204–05.

95. See Leslie Bender, *Tort Law's Role as a Tool for Social Justice Struggle*, 37 WASHBURN L.J. 249, 259 (1998) (“While monetary remedies can restore some aspects of the damaged dignity when there are physical injuries, money is a poor substitute for being treated with respect and dignity, particularly in the face of social inequalities.”).

96. Valerie P. Hans, *Dignity Takings, Dignity Restoration: A Tort Law Perspective*, 92 CHI.-KENT L. REV. 715 (2017) (citing JENNIFER ROBBENNOLT & VALERIE P. HANS, *THE PSYCHOLOGY OF TORT LAW* 19 (2016)).

97. Megan E. Cambre, *A Single Symbolic Dollar: How Nominal Damages Can Keep Lawsuits Alive*, 52 GA. L. REV. 993, 950 (2018) (citing *Amato v. City of Saratoga Springs*, 170 F.3d 311, 318 (2d Cir. 1999)).

98. *Id.*

The existence of nominal damages reflects the value of assigning nominal responsibility to a cause of some wrongful dignitary harm that money damages may be insufficient to remedy.

Scholarly literature has also recognized how apologies by the defendant to the plaintiff can have symbolic value similar to that of nominal damages, going beyond compensatory damages to “wipe the moral ledger’ clean and construct an understanding of the injury and the relationship which both parties can accept.”⁹⁹ In apologizing, a defendant denies “the diminishment of the victim, and [the defendant’s] relative elevation, expressed by [the defendant’s] wrongful action.”¹⁰⁰ Professor Jennifer Robbennolt reasons that “if civil decision makers were allowed to compel an apology as part of their verdict, they might choose to do so as a better way by which to restore equity.”¹⁰¹ These discussions of nominal damages and apologies illustrate how there are dignitary harms that accompany physical injuries, the reparation of which may go further toward making the victim whole and creating a more equitable state of affairs.

While it is not clear that the same things victims deem necessary for remedying their dignitary injuries would also remedy the dignitary injuries of third-party minorities, accountability and public awareness might also be important to these third parties given the foci of contemporary social movements.¹⁰² Additionally, a strict liability rule would help remedy the immediate victim’s physical injuries as well. The inability to quickly and easily se-

99. Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1020 (1999).

100. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1698–99 (1992).

101. Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1147 (2002).

102. Colin Kaepernick said that the goal of his kneeling protests is “to bring awareness and make people realize what’s really going on in the country. There are a lot of things that are going on that are unjust, [that] people aren’t being held accountable for.” Jared Dubin, *Colin Kaepernick: I’ll Keep Sitting for Anthem Until Meaningful Change Occurs*, CBS SPORTS (Aug. 28, 2016), <https://www.cbssports.com/nfl/news/colin-kaepernick-ill-keep-sitting-for-anthem-until-meaningful-change-occurs> [<https://perma.cc/B6GP-RWXA>]. Similarly, the Black Lives Matter movement seeks to “broaden international conversation about the impact of state violence on black people and communities.” Dipka Bhambhani, *The Communications Goals and Strategies of Black Lives Matter*, PR WK. (Feb. 10, 2016), <https://www.prweek.com/article/1383011/communications-goals-strategies-black-lives-matter> [<https://perma.cc/NZ5N-9C6V>]. Black Lives Matter has also presented policy goals oriented toward promoting accountability for police misconduct. See *Black Lives Matters Activists Outline Policy Goals*, BBC NEWS (Aug. 21, 2015), <https://www.bbc.com/news/world-us-canada-34023751> [<https://perma.cc/SJE3-ZCHG>].

cure compensation for their injuries is a practical shortcoming of the legal system that a strict liability rule could compensate for by securing a favorable decision without the large legal costs and necessity to relive trauma.¹⁰³ Even if this benefit is not required by reciprocity principles, it would promote the justice interest while also providing social benefits beyond what is currently possible under existing law.

Finally, the strict liability rule would provide these social benefits without compromising the law enforcement interest. Municipalities already pay plaintiffs huge sums in settling police misconduct cases. In fact, the cities with the ten largest police departments paid out \$248.7 million in settlements and court judgments in 2014, capping off a five-year period where these municipalities paid over a billion dollars in such cases.¹⁰⁴ Although taxpayers assume the costs of these payouts, there is no indication that contemporary policing reforms are primarily motivated by taxpayer interest in limiting municipal spending.¹⁰⁵ One explanation for this, as proposed by Professor Daryl J. Levinson, is that governmental entities, including municipalities, do not respond to economic incentives the way private actors do and will not necessarily engage in less policing even if doing so would incur lesser monetary costs.¹⁰⁶ Instead, “government internalizes only *political* incentives,”¹⁰⁷ which are not necessarily oriented

103. These are issues that make it difficult for victims or their families to litigate against the municipality for civil damages under existing law. See Feurer, *supra* note 83, and accompanying text.

104. Elinson & Frosch, *supra* note 92.

105. The economic cost of police misconduct is generally discussed as being of secondary importance to justice and accountability issues. See, e.g., Steven Greenhut, *Police Misconduct Undermines Justice and Costs Taxpayers Plenty*, R STREET (May 30, 2017), <https://www.rstreet.org/2017/05/30/police-misconduct-undermines-justice-and-costs-taxpayers-plenty> [<https://perma.cc/J64N-372R>] (“Police misconduct is not primarily a problem of finances. How does one put a price tag on the harm caused to its victims, or to the way it undermines the integrity of the justice system?”); Brandi Blessett, *The Cost of Police Misconduct*, P.A. TIMES (May 6, 2016), <https://patimes.org/cost-police-misconduct> [<https://perma.cc/ZGT7-TQ6K>] (“[L]ocal governments need to rethink ways to address police misconduct — if for no other reason than to uphold the fiduciary responsibility administrators have to taxpayers. Maybe economic appeals will at least warrant some consideration by government officials because pleas for justice . . . have fallen on deaf ears.”).

106. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 357 (2000) (“[Government] does not behave like a wealth-maximizer, and therefore does not attach any intrinsic disutility to financial outflows.”).

107. *Id.* at 370.

toward the maximization of monetary wealth. As Professor Levinson explains in the context of constitutional torts:

So long as the social benefits of constitutional violations exceed the compensable costs to the victim and are enjoyed by a majority of the population, compensation will never deter a majoritarian government from violating constitutional rights, because a majority of citizens will gain more from the benefits of government activity than they lose from the taxes necessary to finance compensation of victims. . . . Thus, contrary to the assumptions of courts and commentators about the effects of constitutional tort damages, a majority rule model predicts *under-*, not over, deterrence.¹⁰⁸

Thinking of government incentives in this way, it comes as no surprise that municipalities are simply willing to “[accept] rising claims and settlements as the cost of doing business” rather than changing to prevent future suits.¹⁰⁹ To the extent municipalities are majoritarian governments that actually reflect popular social preferences, the continued existence of policing shows that Americans understand policing to create social benefits greater than its social costs.

Although policing’s social costs are disproportionately borne by particular minority groups who might understand the optimal level of the activity to be lower than the majority has made it, the majority’s preference is the political incentive that drives governmental behavior. There is conceivably some level that policing’s costs could reach that might motivate taxpayers to change policing practices or activity levels, but it seems doubtful that municipalities would pay significantly more to victims under a strict liability rule than they do already. Given how municipalities seek a quick settlement to avoid costly litigation, a strict liability rule might result in lower costs to both municipalities and

108. *Id.*

109. Elinson & Frosch, *supra* note 92 (“The trend caught the attention of New York City Comptroller Scott Stringer, who launched a program to track legal claims called ClaimStat. ‘Instead of accepting rising claims and settlements as the cost of doing business,’ Mr. Stringer says, the city can use the data to identify underlying problems and make changes to prevent future suits.”).

plaintiffs by reducing the amount of time and effort that litigating the case would require.¹¹⁰

Much of the impact of damage payments would be absorbed through insurance coverage anyway.¹¹¹ Therefore, there is reason to doubt that the law enforcement policy interest would be any more disserved by the adoption of a strict liability rule than it is by existing laws. By more fully remedying policing's physical and dignitary harms without requiring any change in existing police practices, a strict liability rule could more effectively advance both the justice and social equality interests without compromising the law enforcement interest.

VI. POLITICAL AND LEGAL OBJECTIONS TO THE PROPOSED REFORM

One could raise a number of different objections against the imposition of a strict tort liability rule for police misconduct. This Part of the Note anticipates and responds to two different kinds of objections. First, Part VI.A responds to political objections against exposing municipalities to tort liability. Then Part VI.B responds to the legal objection that a strict liability rule would be precluded in many states by governmental immunity. These objections raise concerns that are valid but ultimately do not outweigh the merits of adopting the proposed reform.

110. *See id.* (“‘They wanted this to go away fast,’ says Sharon Brunner. . . . A spokesman for the county said the quick payout was made to avoid costly litigation.”).

111. John Rappaport, *An Insurance-Based Typology of Police Misconduct* 369-70 (Coase-Sandor Working Paper Series in Law and Economics No. 763, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808106 [<https://perma.cc/Z288-MJSV>] (“Most small and mid-sized municipalities in the United States purchase insurance that covers a range of police misconduct claims, from improper service of process to outright assault and battery, discrimination, and other civil rights violations.”). However, states that otherwise extend immunity to governmental functions will sometimes waive this immunity when the municipal corporation carries liability insurance. *See* G. Robert Oliver, *Municipal Liability in Propriety and Governmental Functions*, 7 J. PUB. L. 503, 506 (1958) (citing Ga. Code Ann. § 56-1014 (1955)) (“Georgia has by statute restricted immunity in that a municipal corporation is said to waive its immunity in cases where it carries liability insurance.”).

A. POLITICAL OBJECTIONS

This section of the Note addresses possible political objections to the proposed strict liability rule by responding to four policy objections to exposing municipalities to tort liability, which Professor Fleming James, Jr. has responded to independently:

(1) funds devoted to public purposes should not be diverted to compensate for private injuries; (2) “the public service would be hindered, and the public safety endangered, if the superior authority could be subjected to suit at the instance of every citizen, and, consequently, controlled in the use and disposition of the means required for the proper administration of the Government”; (3) that liability would involve the government “in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests”; and (4) that unlike private enterprise, the government derives no profit from its activities.¹¹²

None of these objections are problematic for the strict liability rule.

Objections (1) and (3) are resolved through the same reasoning. The separation of the two suggests that Objection (1)’s assertion is that funds devoted to public purposes should not be diverted for private injuries for reasons independent of the fact that doing so would be subversive of the public interest. To this, Professor James responds: “since the public purposes involve injury-producing activity, the injuries thus caused should be viewed as a part of the activity’s normal costs, and no one suggests that it is a diversion of public funds to pay the costs of public enterprise even if payment is made to private persons.”¹¹³ As Professor James

112. Fleming James, Jr., *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 615 (1955).

113. *Id.* Professor Joanna Schwartz is similarly unsympathetic about the prospect of imposing additional costs on municipalities that would even suffer consequences from increased costs, writing that “[o]f course, local governments are perpetually strapped for cash, and every dollar counts. But . . . the possibility that qualified immunity might shield local governments from some additional liability costs is insufficient reason to preserve the doctrine.” Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1825 (2018).

correctly points out, one is unlikely to find it improper in principle for the government to cover the costs of its activities.

Whether covering these costs is in fact “subversive to the public interest” is the concern of Objection (3). It is conceivable that the welfare created by exposing municipalities to strict liability for police misconduct is outweighed by the harm caused by redirecting resources away from critically important social services. Strict liability would barely have a perceptible impact on the majority of municipalities,¹¹⁴ but there might be smaller and less affluent municipalities for whom any increased tort liability might require unacceptable cuts to important social services or might be beyond their means entirely.¹¹⁵

As previously noted, a strict liability rule might not impose any greater costs than are already being borne (and might even impose fewer). But if the costs of policing did rise to an unsustainable level, and the municipality could not re-allocate any funds without incurring a net loss in social welfare, then the rational response would be to simply reduce the amount of municipal policing. Professor James’ response to Objection (3) suggests just that:

the direct cost of making compensation by the government will not exceed the sum of the losses suffered by the hapless victims of government activity, and that it is better to distribute these losses widely among the beneficiaries of government than to let them rest on the individual victims; and that the embarrassments and expenses incidental to defending accident suits are also part of the just social cost of operations that cause injuries and have never stifled comparable private enterprise.¹¹⁶

114. Schwartz, *supra* note 113, at 1825. Arguing against qualified immunity for municipal police officers, Professor Schwartz writes: “Lawsuit payouts are a miniscule portion of most local government budgets and would remain so even if they increased significantly.” See also Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1124–49 (2016). Among fifty-three of the largest local governments in the country, payments against law enforcement amounted to 0.15% of government budgets. *Id.*

115. After the July 2009 wrongful police shooting of Harold Phillips in Colfax, Louisiana, the Philips family sued the town, which had so little money that the most it could offer for a settlement was a cheap piece of land. The case was eventually dismissed because “the town had no money and the officer had no assets.” See Fisher & Hawkins, *supra* note 89.

116. James, *supra* note 112, at 615.

This alternative would not be contrary to the law enforcement policy interest because it lowers police activity to its proper level with all externalities having been internalized. The town's reluctance to redirect money from other services indicates that the money creates the most social value when spent elsewhere. Objection (3) is thus resolved with the same logic as Objection (1).

Objection (2) seems to posit that individual citizens could improperly restrain the government through lawsuits and impair its functioning. To this, Professor James responds that "while control of a government activity by private tort litigation may be involved where the alleged tort is legislative action or the making of some high-level policy decision, no such thing is involved in ordinary cases."¹¹⁷ One could reasonably understand decisions about policing as high-level policy decisions and could reasonably assume that injured plaintiffs would have greater incentive to bring tort actions against municipal governments if quick success in those actions was guaranteed.

The remaining question, then, is whether a potential increase in lawsuits would be so great as to impair the government's functioning. Such an outcome seems unlikely, given that police officers are rarely charged, indicted, or successfully prosecuted for police shootings.¹¹⁸ As long as this is the case and insofar as the strict liability rule is limited to cases where plaintiffs succeed in criminal proceedings, the potential pool of plaintiffs who stand to benefit from the rule in civil proceedings would be a small one. And, given the evidentiary difficulties endemic in police shooting cases and existing defendant-friendly legal regimes, the number of individuals benefitting from this policy is unlikely to increase in the near future. The situation envisioned by Objection (2) is therefore not a reasonable possibility under existing conditions.¹¹⁹

117. *Id.*

118. See Bor et al., *supra* note 37, at 308.

119. One may reasonably query why this proposed reform is worth discussing at all, given how narrow its effects would be under existing circumstances. This Note addresses this concern in Part VII, *infra*. Nevertheless, supposing for the sake of argument, that some change in circumstances suddenly gave rise to a substantial increase in the number of police convictions, this development would still not provide a decisive reason against adopting a strict liability rule. It is socially undesirable that municipalities face liability for justified uses of police force; this would run afoul of both the law enforcement interest (by reducing police use of deadly force below its optimal activity level) and the justice interest (by punishing the municipality for the justified conduct of its police officers). At the same time, conducting separate factual inquiries every time police officers use force, even when the same factual questions have already been litigated in a separate proceeding, would constitute a wasteful expenditure of adjudicative resources. The criminal pro-

Lastly, Objection (4)'s position that municipalities do not profit from their activities reflects an overly formalistic understanding of "profit" that is untenable. Professor James writes that "though the government as an entity does not profit from its enterprises . . . the taxpaying public does, and it is the taxpaying public which would bear the costs of government tort liability."¹²⁰ One can also understand the municipality as "profiting" from an enterprise even if the enterprise involves a monetary loss. As Professor Levinson explains, governments internalize social benefits created by an activity even if those benefits are not translated into budgetary inflows.¹²¹ Thus, "[f]or the purposes of internalizing benefits . . . government exhibits a more altruistic, public-regarding welfare function, weighing externalized benefits as if they were enjoyed by the government itself."¹²² Indeed, given the fact that every enterprise involves some cost (at least in terms of time and effort expended), to say that municipalities expect no profits from their activities is to deny their economic rationality.

In short, a strict tort liability rule for police misconduct offers significant social benefits without threatening virtually any social costs. This is because the current state of affairs is inefficient due to the fact that it fails to correct for all of policing's harms, and the strict liability rule would correct for that inefficiency. Reductions in police activity are acceptable if they are efficient in this way. If a municipality cannot afford the costs of business, it simply cannot afford to stay in business.

ceeding finding thus serves an evidentiary function: by identifying those cases where misconduct is established beyond a reasonable doubt, criminal proceedings isolate those cases where one knows with the highest legal standard of proof that someone was wrongfully injured by a municipal officer. Given the high degree of factual certainty of injustice in such cases, it might be proper to impose extensive liability on the municipality where circumstances certainly require it, even at the expense of government efficiency. If the municipality is causing such rampant and readily provable injustice that it would be debilitating for the municipality to be held accountable for this injustice, the inefficiency is less harmful than the injustice and remedying the injustice should take priority over preventing the inefficiency.

120. James, *supra* note 112, at 615.

121. Levinson, *supra* note 106, at 350 ("[G]overnment internalizes social costs if, and only if, they are translated into budgetary outflows, but that the same time, government internalizes social benefits even if they are not translated into budgetary inflows.").

122. *Id.*

B. LEGAL OBJECTIONS

Legal concerns pose a far more serious challenge to the proposed strict liability rule. In particular, one may object that imposing strict tort liability on municipalities in states that use the governmental-proprietary distinction to delineate the scope of municipal liability would be impossible because those states extend immunity for policing as a governmental function.¹²³ For these states, this Note demonstrates why changing state laws to accommodate this rule would be neither undesirable nor particularly radical. Therefore, the governmental-proprietary distinction should be abandoned because it is rooted in the disfavored doctrine of sovereign immunity, is unworkable, and reflects a relatively recent departure from a legal tradition that made no such distinction.

Most lawsuits seeking relief for injuries caused by police misconduct are filed against municipal governments.¹²⁴ However, municipalities in many states are protected from suit for negligent harms caused through policing and other governmental functions by the common-law doctrine of governmental immunity. Akin to and rooted in sovereign immunity doctrine, which protects states from suit and liability, governmental immunity pro-

123. Although this Note focuses on the obstacle posed by governmental immunity, this is not the only conceivable legal objection. Another legal objection might involve the possibility that using a jury's finding that one party (a police officer) is guilty of a criminal offense to impose civil liability on a second party (a municipal government) would unfairly prejudice the second party by depriving it of the opportunity to fully litigate the factual question. Although it is unclear whether this is problematic as a matter of law, there are two reasons why extending the primary finding to the secondary action would not subject a municipality to unfair prejudice. First, given the liberty interests at stake in the criminal proceeding, it is unlikely that the factual question of guilt would not be litigated seriously. There is therefore a smaller chance that the municipality would be prejudiced by its inability to litigate that point itself. Second, although the defendants differ in the two proceedings, the factual question of whether the police officer caused wrongful harm is the same. To relitigate a question that was answered beyond a reasonable doubt in a trial where all that was required was answering that question to a preponderance of evidence, the risk of unfair prejudice appears outweighed by the cost of redundant factfinding.

124. This conclusion follows from two separate facts: first, most police officers work for municipal police governments. See Smith, *supra* note 17, at 417 n.43. Second, most plaintiffs seeking civil remedies after being injured by police misconduct sue the municipal government that employs the offending police officer. See Fisher & Hawkins, *supra* note 89 ("Most of the settlements are between families and the officers' employer . . . suits are typically filed against the city or country or state that employed the officer."). If most officers are municipal officers and most suits for officer misconduct are filed against the government employing the officer, it stands to reason that most police misconduct suits are against municipal governments.

fects political subdivisions of the state, like municipalities, by providing them with “an affirmative defense to liability or suit [that] automatically exists as a defense in legal actions where the plaintiff seeks damages, unless immunity is waived.”¹²⁵

In one respect, municipalities are “creations of the State”¹²⁶ — units of government which act as agents of a creating state¹²⁷ and that act under a great deal of control.¹²⁸ In another respect, a municipality is “in its most elemental sense . . . a local public corporation whose main purpose is to govern the affairs of the area under its jurisdiction.”¹²⁹ Municipal corporations — as municipalities are technically known under state common law¹³⁰ — thus act in a “dual capacity,”¹³¹ performing both “governmental” functions and “proprietary” functions.¹³² Governmental functions are “discretionary, political, legislative, or public in nature and performed for the public good on behalf of the State.”¹³³ Proprietary

125. Dawn E. Norman, *The Metes and Bounds of Governmental Immunity and Political Subdivisions: Limiting Tort Liability for Municipal Utility Districts in Texas*, 40 ST. MARY'S L. J. 581, 586 (2008) (citing *Tooke v. City of Mexia*, 197 S.W.3d 325, 331–32 (Tex. 2006)).

126. Michael A. Lawrence, *Do “Creatures of the State” Have Constitutional Rights?: Standing for Municipalities to Assert Procedural Due Process Claims Against the State*, 47 VILL. L. REV. 93, 96 (2002) (“Municipal corporations are creations of the State. These corporations ‘are usually regarded (in legal theory at least) as subordinate departments, auxiliaries, or convenient instrumentalities of the state for the purpose of local or municipal rule.’ The municipal corporation has been variously described by state courts as ‘an arm of the State, a miniature state, an instrumentality of the state, an agency of the state, and the like.’”).

127. BENJAMIN BAKER, *URBAN GOVERNMENT* 38 (D. Van Nostrand, 1957) (“But whether used in either the strict or elastic sense, ‘municipal’ applies to a unit of government which acts as an agent of the state.”).

128. *Id.* at 96 (“It is clear that, as creations of the sovereign, municipal corporations are subject to a great deal of control by their creating states. Indeed, Judge McQuillin posits that ‘[u]nless restricted by the state constitution, the state legislature has plenary power to create, alter, or abolish at pleasure any or all local governmental areas . . . [and] may establish reasonable preconditions to incorporation of local government units.’”).

129. *Id.* at 43. Additionally, like private corporations, municipal corporations “can sue and be sued. As an artificial person, it is endowed in perpetuity with responsibility for administering local affairs.” *Id.*

130. *Id.* (“We tend to forget that the city is much more than this. It is a public corporation. . .”).

131. Oliver, *supra* note 111, at 503 (“From this premise comes the doctrine that a municipal corporation act in a dual capacity.”).

132. Steven L. Leonard, *Municipal Tort Liability: A Legislative Solution Balancing the Needs of Cities and Plaintiffs*, 16 URB. L. ANN. 305, 310 (1979) (“The harshness of the local government immunity doctrine led courts to create numerous exceptions such as the governmental-proprietary distinction. Its genesis began with the recognition of the dual character of municipal powers — sovereign and governmental.”).

133. MATTHIESEN ET AL., *MUNICIPAL/COUNTY/LOCAL GOVERNMENTAL IMMUNITY AND TORT LIABILITY IN ALL 50 STATES* 2 (2017), <https://www.mwl-law.com/wp-content/uploads/>

functions, on the other hand, are commercial or “chiefly for the private advantage of the compact community,” which private entities can perform and which are not uniquely for the benefit of the general public.¹³⁴ In states that recognize this distinction, a municipal corporation is liable for the negligent acts of its agents when acting in a proprietary function, but not when acting in a governmental function.¹³⁵

Sometimes, the governmental-proprietary distinction is not referred to as such. Distinguishing between governmental and proprietary functions proved challenging and ineffective over time, and courts at one point began to distinguish between “discretionary” functions, which “require the employee to look at all the facts and act upon them in some manner of his own choosing,” and “ministerial” functions, which merely “arise where a law or regulation imposes a duty to perform at a designated time and place . . . in which the employee does not use his own judgment.”¹³⁶ Despite its technical reformulation, this new distinction proved in effect to be “little more than the old unsatisfactory governmental-proprietary rationale.”¹³⁷ To the extent these derivative distinctions do align with the governmental-proprietary distinction, any conclusions this Note draws about the governmental-proprietary distinction are intended to apply to the derivative distinctions as well.¹³⁸

State sovereign immunity from suit in a state’s own courts is, and has always been, “a personal privilege [that the state] may

2013/03/MUNICIPAL-COUNTY-LOCAL-GOVERNMENTAL-LIABILITY-CHART-00212510.pdf [https://perma.cc/CW4K-4HVK] (citing *Millar v. Town of Wilson*, 23 S.E.2d 340 (N.C. 1942)).

134. *Id.* at 2.

135. Oliver, *supra* note 111, at 503–04 (“When a municipal corporation acts in its private, corporate, or proprietary function it is liable for the negligent acts of its agents or servants. In the absence of statutes, however, negligence in the performance of its duties is not imputable to a municipal corporation while acting in its governmental capacity, since the municipal corporation while acting in this capacity is an arm or agent of the state which created it.”).

136. Leonard, *supra* note 132, at 314–15.

137. *Id.* at 315–16.

138. This is not a baseless assumption. See Rosenthal, *infra* note 141, where Professor Rosenthal refers to the Washington state statute as preserving governmental immunity for “discretionary functions.” *Id.* at 804 n.27. However, the statute itself establishes that a government is liable for actions performed in either “its governmental or proprietary capacity.” See WASH. REV. CODE § 4.92.090 (2004). At the very least, Professor Rosenthal seems to treat the discretionary function and governmental-proprietary distinctions as interchangeable.

waive at pleasure.”¹³⁹ States can waive immunity either by statute or judicial decision, though most states that have waived municipal immunities in tort have done so judicially.¹⁴⁰ Although only one state has fully waived immunity by statute, every other state has statutorily limited the scope of immunity to some extent.¹⁴¹

There is considerable variety in how states have statutorily limited their scope of immunity. Some states allow municipal liability under the common law or by statute, subject to restrictions of scope.¹⁴² Other states completely prohibit municipal liability by statute, subject to judge-created exceptions that expand liability.¹⁴³ Most states still recognize a “discretionary function exception”¹⁴⁴ to immunize acts involving a “high-level policy decision for which coordinate branches of government are respon-

139. See *Clark v. Barnard*, 108 U.S. 436, 447 (1883).

140. See Leonard, *supra* note 132, at 312.

141. See Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 J. CONST. L. 797, 804 (2007) (“Only one state has enacted legislation providing that governmental defendants are liable in tort on the same terms as private tortfeasors. All other states limit governmental tort liability by statute.”). The single exception is Washington state, which has fully waived its immunity. See WASH. REV. CODE § 4.92.090 (2004) (“The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.”). For further discussion of this statute, see Debra L. Stephens & Bryan P. Harnetiaux, *The Value of Government Tort Liability: Washington State’s Journey from Immunity to Accountability*, 30 SEATTLE U. L. REV. 35, 41 (2006). The Washington Supreme Court has construed this statute to preserve the common-law immunity for discretionary functions. See *McClusky v. Handorff-Sherman*, 882 P.2d 157, 161–63 (Wash. 1994) (en banc). However, a Washington statute that grants public officials immunity for discretionary acts or omissions also provides that their employer remains liable. See Wash. Rev. Code Ann. § 4.24.470 (West 2005).

142. MATTHIESEN ET AL., *supra* note 133, at 8. For example, California Government Code § 815.2 makes a public entity liable “if the act or omission would, apart from this section, have given rise to a cause of action against that employee,” but California Government Code § 818.2 immunizes public entities from liability for injuries “caused by adopting or failing to adopt an enactment.” See CAL. GOV’T CODE §§ 815.2, 818.2 (West 2019).

143. *Id.* at 6. ALASKA STAT. § 09.65.070(a) (2018) provides that “no action can be maintained against a municipality” except by exception, but the Alaska Supreme Court held in *City of Seward v. Afognak Logging* that this section does not shield municipalities from liability “for negligently performing particular operations to implement [a] broad policy decision.” See 31 P.3d 780, 786 (Alaska 2001).

144. MATTHIESEN ET AL., *supra* note 133, at 5; see also Rosenthal, *supra* note 141, at 805 (“[T]hirty-three states recognize the discretionary-function immunity distinction [by statute].”).

sible,” with acts historically understood as “proprietary” or “ministerial” still allowing for municipal liability.¹⁴⁵

The functions of police departments are generally accepted as governmental,¹⁴⁶ and twelve states have statutes that fully immunize municipalities against liability for injuries caused by police activity.¹⁴⁷ This poses a substantial obstacle to implementing a strict tort liability rule for police misconduct in those states. A strict liability rule requires the ability to sue a municipality and hold it liable for common law tort damages. An argument promoting the rule’s enactment must explain why its inclusion would justify the costs of deviating substantially from past practices. This Note proposes that the governmental-proprietary distinction is worthy of abandonment in its own right because municipal immunity for governmental functions is grounded in the disfavored doctrine of sovereign immunity, and because the governmental-proprietary distinction is a relatively recent development in the common law which has proven practically unworkable and conceptually incoherent.

As noted, the governmental immunity of municipalities for governmental functions is rooted in state sovereign immunity.¹⁴⁸ The American adoption of sovereign immunity was more practical than principled: during the debates over the Constitution’s ratification, Anti-Federalists were concerned that Article III’s grant of federal jurisdiction over suits “between a State and Citizens of another State” might prove deeply embarrassing for states that

145. MATTHIESEN ET AL., *supra* note 133, at 5 (“Generally, however, the terms ‘proprietary’, ‘ministerial’ and ‘planning level’ usually go together and describe functions for which government is liable and for which immunity has been waived. The terms ‘governmental’, ‘discretionary’ and ‘operational level’ usually go together and describe functions for which local government is not liable and retains its immunity.”); *see also* Oliver, *supra* note 111, at 506 (“At present only Florida has gone to the extent of rejecting the immunity theory.”).

146. Oliver, *supra* note 111, at 504–05 (“There are some functions performed by a municipal corporation which are generally accepted as governmental, such as . . . police departments. . . .”). *See also* Leonard, *supra* note 132, at 311 (“The courts refused to immunize cities when they functioned in roles similar to profit-making businesses. . . . Activities analogous to if not in *pari materia* with the state’s sovereignty, such as police protection . . . were immune from tort liability.”).

147. Rosenthal, *supra* note 141, at 807 (discussing states that confer immunity on “acts or omissions in the execution or enforcement of the law”), and at 807–08 n.36 (noting the states that confer immunity to police activity by statute are California, Connecticut, Idaho, Illinois, Iowa, Kansas, Kentucky, Mississippi, New Jersey, Oklahoma, South Carolina, and West Virginia).

148. *See* Mary Walters, *Doctrine of Sovereign Immunity - Statute - Municipal Tort Liability*, 2 NAT. RESOURCES J. 170, 171 (1962). This privilege was originally applied only in actions against states but was later extended to cover municipalities. *Id.*

were sued by private out-of-state parties over war debts they could not pay.¹⁴⁹ When such a suit did occur soon after the Constitution's ratification in which the United States Supreme Court upheld a state's liability on review in *Chisholm v. Georgia*, Congress and the states reacted by quickly adopting and ratifying the Eleventh Amendment, which constitutionally barred suits against states from out-of-state citizens.¹⁵⁰ In 1890, the Supreme Court held in *Hans v. Louisiana* that the Eleventh Amendment also bars citizens of a state from filing a private suit against their own state.¹⁵¹ Since then, the Supreme Court's sovereign immunity jurisprudence has trended toward a broad interpretation of the doctrine that persists to this day.¹⁵²

However, numerous states have completely waived sovereign immunity, either by statute or judicial decision. State courts that have rejected the doctrine condemn it as a legal aberration inconsistent with American jurisprudence.¹⁵³ Writing for the Supreme Court of California, Justice Traynor said "the rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia. . . . [T]he doctrine of governmental immunity for torts for which its agents are liable has no place in our law."¹⁵⁴ Many legal scholars have also decried

149. Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L. J. 1167, 1173 (2003) ("The financial condition of many states at the time was such that suits on their debts could have caused them considerable embarrassment.").

150. *Id.*

151. *Id.* at 1177.

152. See Christina Bohannon, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U. L. REV. 273, 281 (2002) ("It is fair to say that the [Roberts] Court views state sovereign immunity as an implicit constitutional principle which applies to suits brought against a state by any private party in any court.").

153. In *Hargrove v. Town of Cocoa Beach*, the Florida Supreme Court "denied the application of the theory to any situation arising in a democratic form of government, and thereby refused to perpetuate what it considered to be an 'anachronistic' doctrine." Walters, *supra* note 148, at 171 n.6 (citing *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957)). In Illinois, the Appellate Court of Illinois concluded that "the rule of school district tort immunity is unjust, unsupported by any valid reason, and has no rightful place in modern day society." *Id.* (citing *Molitor v. Kaneland Cmty. Unit Dist. No. 302*, 163 N.E.2d 89 (Ill. 1959)). And the Supreme Court of New Jersey said, "surely it cannot be urged successfully that an outmoded, inequitable, and artificial curtailment of a general rule of action created by the judicial branch of the government cannot or should not be removed by its creator." *Id.* (citing *McAndrew v. Mularchuk*, 162 A.2d 820, 832 (N.J. 1960)).

154. *Muskopf v. Corning Hospital District*, 359 P.2d 457, 460, 463 (Cal. 1961), superseded by statute as stated in *Quigley v. Garden Valley Fire Protection Dist.*, 444 P.3d 688 (Cal. 2019).

this doctrine as an “unacceptable affront to the venerable maxim that for every violation of a right, there must be a remedy” established by Chief Justice Marshall in *Marbury v. Madison*.¹⁵⁵ Although scholars are not universally critical of sovereign immunity,¹⁵⁶ the dominant academic position is that constitutionalizing state sovereign immunity is a mistake.¹⁵⁷

Apart from its conceptual grounding in sovereign immunity doctrine, the governmental-proprietary distinction is notorious for its inconsistent and unprincipled applicability. Because state legislatures rarely specify which municipal functions are governmental (and thus give rise to immunity akin to that of the state), judicial attempts to distinguish these functions have proven “elusive and unsatisfactory.”¹⁵⁸ One way courts have applied the governmental-proprietary distinction is by considering functions proprietary if their primary purpose is the procurement of a “special corporate benefit or pecuniary profit,” or governmental if their purpose is “for the common good of all.”¹⁵⁹ This test pro-

155. Bohannon, *supra* note 152, at 274. Other notable scholars have echoed this critique. Professor Akhil Reed Amar wrote, “‘sovereignty’ has become an oppressive concept in our courts. A state government that orders or allows its officials to violate citizens’ federal constitutional rights can invoke ‘sovereign’ immunity . . . even if such immunity means that the state’s wrongdoing will go partially or wholly unremedied.” Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1425–26 (1987); *see also* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 48, n.9 (1998) (recognizing Professor Amar’s critical contribution to Eleventh Amendment jurisprudence). Professor Erwin Chemerinsky has similarly argued that sovereign immunity is “inconsistent with a central maxim of American government: no one, not even the government, is above the law. The effect of sovereign immunity is to place the government above the law and to ensure that some individuals who have suffered egregious harms will be unable to receive redress for their injuries. The judicial role of enforcing and upholding the Constitution is rendered illusory when the government has complete immunity to suit.” Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001). Judge William A. Fletcher and professors Martha A. Field, Vicki C. Jackson, and Suzanna Sherry each have also rejected the Supreme Court’s broad accommodation of the sovereign immunity doctrine. *See* Jeffries, *supra*, at 48 n.9.

156. *See, e.g.*, Jeffries, *supra* note 155, at 48 n.9.

157. *Id.* at 48 (“The dominant academic position [is] that in constitutionalizing some form of state sovereign immunity, the Supreme Court has been on the wrong track these past 100 years.”).

158. James, *supra* note 112, at 623–24. Later, Professor James states that it is “little wonder that courts have despaired of finding a rational and consistent key to the [governmental/proprietary] distinction.” *Id.* at 625.

159. Oliver, *supra* note 111, at 504–05 (“The underlying test seems to be whether the act is for the common good of all without a special corporate benefit or pecuniary profit. . . . The fact that profit is derived from the operation has been said to indicate an exercise of a proprietary function. However, when the fact that revenue received by the city from its governmental operation is only incidental to the primary purpose, the governmental nature is not affected.”); *see also* James, *supra* note 112, at 624 (describing the governmental-proprietary distinction as “whether the function is allocated to the municipality

vides little meaningful guidance because governmental functions can earn profits just as proprietary functions can contribute to the common good. As Professor James argues, “all the functions of a municipality are — or should be — for the public benefit. They are none so less because they serve directly and primarily only a limited segment of the public rather than all the people of the state.”¹⁶⁰ This lack of clarity leaves functions that are not obviously governmental or obviously proprietary in a “twilight zone”¹⁶¹ where line-drawing leads to inconsistency among and within jurisdictions.¹⁶² There seems to be little theoretical coherence to this principle, and state courts have at times exhibited some awareness about the motivated nature of this assessment.¹⁶³

Courts have also sought to distinguish governmental from proprietary functions simply by determining whether the function is one historically performed by the government.¹⁶⁴ But precedent proved “a suggestive guide though [ultimately] a faltering one” because “many of the functions now generally considered

for its profit or special advantage or whether for the purpose of carrying out the public functions of the state without special advantage to the city.”)

160. See James, *supra* note 112, at 624. Professor James also writes “functions have been held governmental in spite of charge, and functions have been held proprietary where there is neither charge nor profit.” *Id.*

161. Baker, *supra* note 127, at 47–48 (“There is no definite answer [for marginal activities] except to say that there is an uncertainty which must be resolved by what the Supreme Court, in a different connection, has called the process of judicial inclusion and exclusion.”). As the Supreme Court observed in *Green v. Frazier*, “Courts, as a rule, have attempted no judicial definition of a ‘public’ as distinguished from a ‘private’ purpose, but have left each case to be decided by its own peculiar circumstances.” *Id.* at 48 (citing *Green v. Frazier*, 253 U.S. 233, 240 (1920)).

162. Oliver, *supra* note 111, at 507 (“Jurisdictions will not always classify swimming pools in the same way. For instance, in Georgia, the municipal corporation may be granted tort immunity even though it derives a profit from the operation of a swimming pool. However, at least one Georgia case indicates that when a city maintains a park or swimming pool primarily for profit, then the operation becomes a ministerial function, and liability attaches.”); see also Stephens & Harnetiaux, *supra* note 141, at 39 (“As in other jurisdictions, Washington’s early case law revealed inconsistencies in the application of the governmental-proprietary dichotomy.”).

163. Oliver, *supra* note 111, at 507. In *V.T.C. Lines v. City of Harlan*, where the Kentucky Court of Appeals found that operating a municipal swimming pool was a governmental function, the court “hinted that the majority of its members might not have wanted to hold the municipality immune from liability but felt it had to do so because the ‘immunity rule (although never clearly defined) has become so imbedded [sic] in the common law of this state over the years that it has become a definite part of our mores.’” 313 S.W. 2d 573, 578 (K.Y. 1958). The facts did not show whether or not the swimming pool was primarily operated for profit and the court merely assumed its primary purpose. *Id.* at 579.

164. James, *supra* note 112, at 624–25.

governmental were privately performed in the not very distant past.”¹⁶⁵ It was on account of these serious shortcomings that the Supreme Court declined to recognize the governmental-proprietary distinction in *Indian Towing Co. v. U.S.*, calling it a “quagmire that has long plagued the law of municipal corporations. . . . [T]he decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound.”¹⁶⁶ The evident consensus of both scholars and courts is that the governmental-proprietary distinction is without merit both in principle and application.

Departing from this distinction would not even be particularly radical because the distinction is itself a relatively recent departure from an older tradition that recognized no distinctions among municipal functions. Under English common law there was no distinction between “private” and “public” corporations,¹⁶⁷ a feature that originally carried over into the American common law: “The common understanding in the 1790s was that the sovereign immunity of the states was not shared by their subdivisions. . . . For purposes of legal category and consequence in 1793, a municipal corporation was seen as more closely analogous to a private corporation than to a state.”¹⁶⁸ Early American cases im-

165. *Id.*; see also Murray Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910, 914–15 (1936) (“There was a time when sewage facilities were furnished by private companies, as was garbage and rubbish collection. Yet the planning of sewers (. . . as opposed to the operation and upkeep of sewers) and the collection and disposal of garbage and ashes are all but universally regarded as governmental. The London police force was not established until 1829. It is not a hundred years since fire companies were generally private and voluntary.”).

166. 350 U.S. 61, 65 (1955). Justice Frankfurter, writing for the Court, also observed that “the fact of the matter is that the theory whereby municipalities are made amenable to liability is an endeavor, however awkward and contradictory, to escape from the basic historical doctrine of sovereign immunity.” *Id.*

167. James D. Barnett, *The Foundations of the Distinction between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations*, 16 OR. L. REV. 250, 252 (1937).

168. William A. Fletcher, *Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, A, 35 STAN. L. REV. 1033, 1100 (1982). This characterization is supported by the statements of writers of the period. In 1793, Steward Kyd published a corporations treatise in which he “treated public and private corporations as merely two branches of the same subject, referring to ‘civil corporations [that] are established for the purpose of local government,’ and other corporations established ‘for the maintenance and regulation of some particular object of public policy.’” *Id.* at 1101 n.263 (citing STEWART KYD, TREATISE ON THE LAW OF CORPORATIONS 28 (1793)). Similarly, James Kent, “writing in 1827, also saw public corporations as merely a subdivision of civil corporations.” *Id.* (citing JAMES KENT, COMMENTARIES ON AMERICAN LAW 277 (1826)). Kent also wrote, “Civil corporations are established for a variety of purposes, and they are either public or

posed liability on cities without any mention of the governmental-proprietary distinction, and it was not until the mid-19th century that this doctrine came into prominence.¹⁶⁹ In 1842, the Supreme Court of New York's decision in *Bailey v. City of New York*¹⁷⁰ was the first to hold a municipal corporation liable for its "private" functions but not its "public" functions.¹⁷¹

This distinction, Professor James D. Barnett writes, "was absolutely reactionary and extremely unfortunate in that it limited the liability of municipal corporations to *one class of functions* in contradiction to the *prevailing* view . . . that, logically and justly, applied the general principle of tort liability to all corporations alike, *without distinction of functions*."¹⁷² Even then, it was not until 1890 that a distinction between a public municipal corporation and a private business corporation — "the American doctrine"¹⁷³ — had been clearly established in the United States.¹⁷⁴

However, the doctrine's popularity began to erode less than a century later, when state jurists who had grown increasingly

private. Public corporations are such as exist for public political purposes only, such as counties, cities, towns, and villages." *Id.* Finally, see James, *supra* note 112, at 622–23 ("The dominant governmental-proprietary distinction did not appear in most of the earlier American cases. . . . The earlier cases seem to have imposed — rather than withheld — liability without regard to the [governmental-proprietary] distinction.").

169. The earliest reported case that recognized the tort liability of a municipal corporation was *Hooe & Harrison v. Corp. of Alexandria* in 1802, in which a city was held liable as "a corporation" without any distinction made between "private" and "public" corporations. See Barnett, *supra* note 167, at 259 (citing *Hooe & Harrison v. Corp. of Alexandria*, 1 Cranch C.C. 90, 90 (DC Cir. 1802)). When the Supreme Court in its 1819 decision in *Trustees of Dartmouth College v. Woodward* (also known as the *Dartmouth College Case*), denied that charters of public corporations are contracts, it upheld the Supreme Court of New Hampshire's distinction between "'private corporations . . . which are created for the immediate benefit and advantage of individuals,' and 'public corporations . . . which are created for public purposes.'" *Id.* at 262 (citing *Trustees of Dartmouth College v. Woodward*, 1 N.H. 111, 115–17 (1817); *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 668–69 (1819)). In the 1830 case of *Fowle v. Council of Alexandria*, the Supreme Court distinguished between "'moneyed corporations, or those carrying on business for themselves' — liable for torts — and 'municipal corporations,' 'established for the general purposes of government' — not so liable." *Id.* at 260 (citing *Fowle v. Council of Alexandria*, 28 U.S. 398, 399 (1830)). However, the contrary doctrine was generally maintained, with state courts refusing to recognize such a distinction in subsequent decades. In a separate line of cases, courts did distinguish between private and public corporations with respect to subjection to legislative control. In 1815, the Supreme Court recognized a distinction between "private corporations" and "public corporations which exist only for public purposes, such as counties, towns, cities, etc." *Id.* at 262 (citing *Terrett v. Taylor*, 9 Cranch 43, 52 (U.S. 1815)).

170. 3 Hill 531 (N.Y. 1842).

171. Barnett, *supra* note 167, at 268.

172. *Id.*

173. *Id.* at 269.

174. Fletcher, *supra* note 168, at 1101.

skeptical of sovereign immunity began linking the questions of municipal immunity and sovereign immunity more generally, and in turn began rejecting municipal immunity for common law torts.¹⁷⁵ The Florida Supreme Court was one of the first to ignore the distinction between governmental and proprietary functions when it extended municipal liability to torts committed by police officers in *Hargrove v. Town of Cocoa Beach*, observing that the governmental-proprietary distinction had resulted in “numerous strange and incongruous results.”¹⁷⁶

The *Hargrove* decision induced “a minor avalanche of decisions repudiating municipal immunity” in state courts across the country, and by the early 1980s a majority of jurisdictions had significantly curtailed municipal immunity.¹⁷⁷ Thus, the governmental-proprietary distinction was widely accepted for only a century. Although that is not an insignificant amount of time, it certainly would not qualify this distinction as a fundamental legal principle. Overall, the cost of legal change seems relatively modest compared to the distinction’s profound practical and theoretical weaknesses.

VII. CONCLUSION

A social reform should be adopted if and only if its social benefits outweigh its social costs, providing a net benefit to society. The benefits of imposing a strict liability rule help remedy the three discrete injuries that stem from modern policing and satisfy the justice and social equality policy interests without reducing policing activity below its socially optimal level. Yet, the cost-benefit analysis of this proposed reform must also involve the costs and benefits of the changes that the reform would require.

175. Smith, *supra* note 17, at 428.

176. J. Bart Budetti & Gerald L. Knight, *The Latest Event in the Confused History of Municipal Tort Liability*, 6 FLA. ST. U. L. REV. 927, 930 (1978) (citing *Hargrove v. Cocoa Beach*, 96 So. 2d 130, 132 (Fla. 1957)). Soon after, the Florida Supreme Court similarly cited “the primary concern in *Hargrove* . . . to eliminate the ‘nebulous’ distinctions between governmental and proprietary functions and determine liability through the respondeat superior doctrine” when the court extended the *Hargrove* rule to intentional torts committed by municipal policemen in *City of Miami v. Simpson*. *Id.* (citing *Miami v. Simpson*, 172 So. 2d 435, 436–37 (Fla. 1965)). However, Florida has since seen a “partial resurrection of the governmental-proprietary distinction,” both in judicial decisions and through the passing of a statute limiting the scope of municipal tort liability, leaving the law of municipal liability in a confused state. *Id.* at 931.

177. Smith, *supra* note 17, at 429 (citations omitted).

There is simply no way of squaring a rule that conceptually treats policing like a commercial activity with existing state law distinctions between governmental and proprietary functions that elevate governmental functions and insulate them from common law tort liability. For states that observe this distinction, one must therefore consider the costs and benefits of not only waiving governmental immunity for municipalities, but also imposing a strict liability rule. Waiving state sovereign immunity would otherwise run afoul of the interests in legal consistency and transaction cost minimization.¹⁷⁸

However, the transaction costs of legislative or judicial reform would not extend beyond drafting and passing legislation given how little practical reliance there is on sovereign immunity at the municipal level. Moreover, the doctrine of state sovereign immunity has become increasingly viewed with skepticism and disfavor by both states and scholars, and the doctrine as applied to municipal corporations is without the kind of historical grounding that has traditionally been used to justify the immunity of sovereign states themselves. Weighing against these interests is the American ethical interest in popular sovereignty, the justice interest, and the social equality interest. These interests are advanced by the waiving of sovereign immunity and the imposition of liability on municipal governments, and the social benefits that would come through their advancement far outweigh the costs of eschewing the countervailing interests. Finally, there are no political concerns that prove fatal to imposing tort liability on municipalities for police activity. To the extent these evaluations are accurate, they counsel in favor of adopting this Note's proposed reform.

Issues of race and policing are a flashpoint in the political culture wars that have gripped our deeply divided nation in recent years. Much of the most controversial aspects of this issue surround the assignment of guilt in criminal proceedings, which this Note has neither examined nor offered a solution for.¹⁷⁹ It may be admitted, then, that this Note does not present a solution to the problem Americans are most concerned about. However, this Note *does* present a viable solution to a secondary concern, which asks, in those situations where an officer has already been con-

178. See *supra* note 7.

179. As mentioned in Part VI, *supra*, police officers are rarely charged, indicted, or successfully prosecuted for police shootings. See Bor et al., *supra* note 37, at 308.

victed for misconduct in a criminal proceeding, whether there is a possible legal tool for remedying the inequitable harms of police misconduct — a tool that can find support from all Americans commonly committed to this Note's assumed policy interests.

What this Note offers of significance is therefore a legal solution that can provide some greater degree of compensation, even if marginal at most, *despite* the intractable political differences Americans have over race and policing. Far more ambitious are the reform's conceptual underpinnings, which constitute a new legal framework for understanding policing in contemporary America. Although this Note addresses only how viewing policing through this novel framework can provide social benefits in the narrow class of circumstances described above, it might potentially facilitate future insights into how policy-makers might address policing's most pressing and confounding problems.