

# When an Officer Kills: Turning Legal Police Conduct into Illegal Police Misconduct

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## Introduction

Stephon Clark, a twenty-two-year-old Black man, was standing in his grandmother's backyard when he was shot and killed by two Sacramento police officers.<sup>1</sup> Police had been dispatched to investigate a vandalism complaint, and within ten minutes of arriving on the scene, Mr. Clark was dead.<sup>2</sup> The officers had fired their weapons twenty times.<sup>3</sup> Both officers stated that they believed Mr. Clark was pointing a gun at them.<sup>4</sup> All Mr. Clark was holding was a cell phone.<sup>5</sup>

Community members and activists protested Mr. Clark's death, and nearly a year later, they protested again when the Sacramento County district attorney announced her decision not to charge either police officer involved in the killing.<sup>6</sup> The killing of Stephon Clark and the subsequent protests received national coverage, contributing to the national conversation concerning problems with discriminatory policing and excessive force used by police officers.<sup>7</sup>

Former federal prosecutor and current law professor Paul Butler has found that cases like Mr. Clark's have contributed to the "widespread sense that there is a race crisis in American criminal justice."<sup>8</sup> However, Butler has

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1. Jose A. Del Real, *No Charges in Sacramento Police Shooting of Stephon Clark*, N.Y. TIMES (Mar. 2, 2019), <https://www.nytimes.com/2019/03/02/us/stephon-clark-police-shooting-sacramento.html> [<https://perma.cc/D3VK-5DQD>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* See generally Sarah Almkhater et al., *Black Lives Upended by Policing: The Raw Videos Sparking Outrage*, N.Y. TIMES (Apr. 19, 2018), <https://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html> [<https://perma.cc/TFE6-F6R2>] (collecting footage of police violence that has contributed to national conversation on race and policing); P.R. Lockhart, *Ferguson Changed How America Talks About Police Violence. 5 Years Later, Not Much Else Has Changed*, VOX (Aug. 9, 2019), <https://www.vox.com/identities/2019/8/9/20798921/michael-brown-ferguson-uprising-police-violence-reform> [<https://perma.cc/JW6X-4FDD>] (discussing the rise in national awareness of police violence towards communities of color).

8. Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016).

examined the American criminal justice system through the lens of critical race theory<sup>9</sup> to illuminate “a system where racially unjust police conduct is both lawful and how the system is supposed to work.”<sup>10</sup> Butler argues that “many of the problems identified by critics are not actually problems, but are instead integral features of policing and punishment in the United States.”<sup>11</sup> Butler submits that it is “legal police conduct” that perpetuates racial inequality in the criminal justice system—not “illegal police misconduct.”<sup>12</sup>

This Note responds to this argument by imagining what it would look like to explicitly criminalize killings like that of Stephon Clark—to turn legal police conduct into illegal police misconduct. To accomplish this task, Part I will discuss what Butler has termed the “Super Power to Kill,”<sup>13</sup> which describes the way the law authorizes police officers to shoot unarmed and disproportionately minority<sup>14</sup> civilians. I will discuss the Supreme Court’s Fourth Amendment “reasonableness” standard and show how it is reflected in state criminal law concerning police use of force. I will explain how this standard creates difficulty-of-proof issues that prevent the criminal prosecution of police officers for killing civilians. Furthermore, the standard tolerates officer biases and permits juries and judges to use prejudicial considerations in evaluating whether an officer acted reasonably.

Part II will analyze data concerning killings by the police, including who police kill and why police kill. Because on-duty officers are almost always killed by firearms but often kill civilians who are not carrying firearms, I argue that police officers are likely shooting civilians more often than is justifiable. Nevertheless, officers are rarely prosecuted or punished for such killings.

In an attempt to turn legal police conduct into illegal police misconduct, Part III will propose model legislation for a strict-liability misdemeanor that would make it illegal for an on-duty police officer to kill a civilian who is not

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9. *Id.* at 1426. See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995) (compiling seminal essays from the critical-race-theory movement).

10. Butler, *supra* note 8, at 1426.

11. *Id.* at 1425.

12. *Id.*

13. *Id.* at 1452–53.

14. *Id.* In fact, Black men and boys are 2.5 times more likely than white men and boys to die during an encounter with police officers. Amina Khan, *Getting Killed by Police Is a Leading Cause of Death for Young Black Men in America*, L.A. TIMES (Aug. 16, 2019), <https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-for-black-men> [https://perma.cc/8P4Y-87NA]. For Latino men and boys, the risk of dying in an encounter with police officers is 1.4 times higher than it is for white men and boys. *Id.* For Native American men, the risk is 1.2 to 1.7 times higher. *Id.* Additionally, Black women are 1.4 times more likely to be killed by police than white women. *Id.* For Native American women, the risk is 1.1 to 2.1 times higher. *Id.* Although other groups are disproportionately killed by police, this Note tends to focus on Black men in discussing how the law permits police officers to shoot unarmed civilians, as Black men are often seen as “the prototypical criminals in the eyes of the law.” Butler, *supra* note 8, at 1426.

carrying a firearm. I will argue that this crime would be supported by theoretical justifications for other strict-liability crimes. Part IV will then examine the potential consequences of the proposed statute. I will argue that the proposed model legislation would likely lead to increased prosecutions in the short term, reducing the perception of impunity for police officers. This changed perception would then incentivize officers to hold their peers accountable and administrators to experiment with new force policies. In the long term, I argue that these changes could lead to fewer killings by the police and ultimately increase the legitimacy of policing.

#### I. The Super Power to Kill: Why Police Are Not Being Prosecuted

This Part will discuss how the reasonableness standard used by the Supreme Court in analyzing excessive-force claims has been reflected in state criminal codes. I will examine how this standard makes it legal for police officers to shoot unarmed civilians like Stephon Clark. Not only does the reasonableness standard lead to difficulty-of-proof issues in criminal prosecutions for killings by the police, but the standard also permits prejudicial considerations by the officer deciding to shoot and by decision makers in determining if an officer acted reasonably in using deadly force. These considerations discriminate against Black male victims of police shootings in particular.

Three U.S. Supreme Court cases illustrate when police use of force is unconstitutional: *Tennessee v. Garner*,<sup>15</sup> *Graham v. Connor*,<sup>16</sup> and *Scott v. Harris*.<sup>17</sup> In *Garner*, a police officer was dispatched to a house that reportedly had a “prowler” inside.<sup>18</sup> Upon arriving at the scene, a witness informed the police officer that someone was burglarizing the house next door.<sup>19</sup> When the officer went behind the house, he observed someone run across the backyard.<sup>20</sup> The officer called out to the suspect, but when the suspect began to hop over a fence, the officer shot and killed him.<sup>21</sup> The suspect was Edward Garner, an eighth-grade boy, 5' 4" tall and around 100 to 110 pounds.<sup>22</sup> The police officer suspected that Garner was unarmed, but he shot Garner in order to prevent his escape.<sup>23</sup> Ten dollars and a purse were found on Garner's body.<sup>24</sup>

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15. 471 U.S. 1 (1985).

16. 490 U.S. 386 (1989).

17. 550 U.S. 372 (2007).

18. *Garner*, 471 U.S. at 3.

19. *Id.*

20. *Id.*

21. *Id.* at 4.

22. *Id.* at 3, 4 n.2.

23. *Id.* at 3–4.

24. *Id.* at 4.

Garner's father sought damages under 42 U.S.C. § 1983 for violations of Garner's constitutional rights.<sup>25</sup> In order to decide whether Garner's Fourth Amendment rights had been violated, the Court questioned whether the officer's use of force was "reasonable" under the Fourth Amendment.<sup>26</sup> To answer this question, the Court "balance[d] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion,"<sup>27</sup> asking whether "the totality of the circumstances justified a particular sort of search or seizure."<sup>28</sup> Weighing Garner's "unmatched" interest in his own life against the government's interest in enforcing the law, the Court ultimately held that the killing of nonviolent suspects cannot be justified by the government's interests in enforcing the criminal law.<sup>29</sup> In reaching this conclusion, the Court seemed to provide a bright-line rule for interpreting reasonable force against fleeing suspects under the Fourth Amendment.<sup>30</sup> The Court held:

[I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.<sup>31</sup>

Three years after the Court's decision in *Garner*, the Court examined excessive-force claims broadly in *Graham*, determining what constitutional standards govern an excessive-force claim against a law-enforcement officer.<sup>32</sup> In *Graham*, the petitioner, Dethorne Graham, was a diabetic and, feeling the onset of an insulin reaction, asked a friend, William Berry, to drive him to a convenience store to purchase orange juice.<sup>33</sup> Because the store had a long checkout line, Graham quickly exited the store soon after entering and asked Berry to drive him to another friend's house instead.<sup>34</sup> Officer Connor, a city police officer, saw Graham hastily leave the store and became suspicious.<sup>35</sup> Connor followed Berry's car and made an investigative stop

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25. *Id.* at 5.

26. *Id.* at 7.

27. *Id.* at 8 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

28. *Id.* at 8–9.

29. *Id.* at 9–10.

30. See Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U.L. REV. 1119, 1128 (2008) (finding that lower courts took *Garner* to "establish a bright-line rule for the use of force against fleeing suspects").

31. *Garner*, 471 U.S. at 11–12.

32. *Graham v. Connor*, 490 U.S. 386, 388 (1989).

33. *Id.*

34. *Id.* at 388–89.

35. *Id.* at 389.

about a half mile from the store.<sup>36</sup> Though Berry attempted to explain to the officer that Graham was suffering from a “sugar reaction,” the officer ordered Berry and Graham to wait in the car while he figured out if anything happened at the store.<sup>37</sup> When Officer Connor went back to his patrol car to call for backup, Graham got out of the car, ran around it twice, and then sat down on the curb.<sup>38</sup> He then passed out briefly.<sup>39</sup>

Several other police officers arrived at the scene in response to Officer Connor’s request for backup.<sup>40</sup> One officer handcuffed Graham’s hands tightly behind his back, despite Berry’s pleas to give Graham sugar.<sup>41</sup> Several officers lifted Graham while he was unconscious and placed him face down on the hood of Berry’s car.<sup>42</sup> When Graham regained consciousness, he asked the officers to check his wallet for a diabetic decal, but the officers refused.<sup>43</sup> “Four officers grabbed Graham and threw him headfirst into the police car.”<sup>44</sup> When a friend brought Graham orange juice, the officers refused to let him have it.<sup>45</sup> Officer Connor eventually received a report that Graham had done nothing wrong at the convenience store, so the officers drove him home and released him.<sup>46</sup> As a result of his encounter with the police, Graham suffered a broken foot, cuts on the wrist, a bruised forehead, and an injured shoulder.<sup>47</sup> Graham further claimed that he developed a loud ringing in his right ear.<sup>48</sup>

Graham sued the officers involved in the incident under 42 U.S.C. § 1983, alleging that they had used excessive force in violation of his constitutional rights.<sup>49</sup> The Court held that excessive-force claims against law-enforcement officials—deadly or not—should be analyzed under the Fourth Amendment’s “objective reasonableness” standard if the claim arises from an arrest, investigatory stop, or other “seizure” of a free citizen.<sup>50</sup> The reasonableness of the officer’s use of force “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”<sup>51</sup> In particular, the reasonableness calculus “must

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36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 390.

48. *Id.*

49. *Id.*

50. *Id.* at 392, 395.

51. *Id.* at 396–97.

embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”<sup>52</sup>

*Graham* instructs courts to apply the objective reasonableness standard by balancing governmental interests against the individual’s interests.<sup>53</sup> The *Graham* Court instructed lower courts using the balancing test to give careful attention to certain factors, including “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”<sup>54</sup> Instead of balancing individual interests against governmental interests to determine a rule to guide police use of force as the Court did in *Garner*, the Court in *Graham* instructs lower courts to employ the weighing technique alone to evaluate the reasonableness of an officer’s use of force in a given situation.<sup>55</sup> The decision has been criticized for leaving judges and juries largely to their own intuitions in determining whether force is reasonable.<sup>56</sup>

Nearly two decades later, the Court revisited excessive-force claims in *Scott v. Harris*.<sup>57</sup> When a speeding driver, Victor Harris, did not respond to a county deputy’s attempts to pull him over, a high-speed chase ensued.<sup>58</sup> Hearing of the chase through radio communication, a second deputy, Chuck Scott, joined the pursuit of Harris.<sup>59</sup> Six minutes after the chase had begun, Scott attempted to end the chase by employing a technique that would cause Harris’s vehicle to spin to a stop.<sup>60</sup> The maneuver was improperly executed, causing Harris to lose control of his vehicle.<sup>61</sup> The accident rendered Harris a quadriplegic.<sup>62</sup>

Harris filed suit alleging a violation of his Fourth Amendment right against unreasonable seizure.<sup>63</sup> The Court used the Fourth Amendment balancing test to decide if the actions taken by Scott were reasonable.<sup>64</sup> Because the Court found that Harris’s unsafe driving placed innocent people in danger of serious injury, it reasoned that the government’s interest in

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52. *Id.*

53. *Id.* at 392, 396.

54. *Id.* at 396.

55. Harmon, *supra* note 30, at 1129–30.

56. *Id.* at 1130.

57. 550 U.S. 372, 376 (2007).

58. *Id.* at 374–75.

59. *Id.* at 375.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 375–76.

64. *Id.* at 382–83.

protecting innocent bystanders outweighed the risk of injury to Harris.<sup>65</sup> In the ruling, the Court clarified that *Garner* did not provide a bright-line rule, but instead was an application of the Fourth Amendment's reasonableness balancing test.<sup>66</sup> The Court held that there is no "easy-to-apply legal test in the Fourth Amendment context," but instead, "in the end we must still slosh our way through the factbound morass of 'reasonableness.'"<sup>67</sup> In *Scott*, the Court rejected the bright-line rule articulated by *Garner* and dismissed the factors discussed in *Graham*.<sup>68</sup> The Court's ruling has been ridiculed for reducing the regulation of reasonable force to an "ad hoc balancing of state and individual interests unconstrained by any specific criteria."<sup>69</sup>

Other than U.S. Supreme Court case law, the main source of law regulating an officer's use of deadly force is state criminal law. Although the Supreme Court's case law concerning civil liability for violating the Fourth Amendment does not control state criminal law, most states have not exceeded the Fourth Amendment reasonableness standard in criminalizing an officer's deadly force.<sup>70</sup> In every state, it is a crime for a police officer to intentionally use deadly force unless the force is found to be justified or excused.<sup>71</sup> Police officers are able to justify their intentional use of deadly force through a self-defense argument, which all citizens can use as a defense to their intentional use of deadly force.<sup>72</sup> A citizen charged with criminal homicide claiming self-defense usually must show that the use of deadly force arose out of an honest and reasonable belief that he or she was being threatened with deadly force or serious bodily injury and that it was necessary to use deadly force to counter the threat.<sup>73</sup> Police officers in most states are also able to defend their use of force or use of deadly force with separate

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65. *Id.* at 383–84.

66. *Id.* at 382.

67. *Id.* at 383.

68. Harmon, *supra* note 30, at 1135–37.

69. *See id.* at 1136–40 ("After *Scott*, courts must 'slosh' their way through the 'factbound morass' without galoshes or a compass, which is to say, with almost no direction at all about what constitutes reasonable force.").

70. In fact, as of 2015, twelve states fell below this standard by broadly refusing to impose criminal liability on officers who used deadly force to seize a fleeing felon—the practice ruled unconstitutional under the Fourth Amendment in *Graham*. Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After Garner*, 35 ST. LOUIS U. PUB. L. REV. 109, 121–24 (2015). Though some states fall below the constitutional standard, the majority of states have use-of-force statutes that employ a reasonableness standard, often focusing on the reasonableness of the officer's beliefs. 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, 654–55. Focusing on the reasonableness of an officer's beliefs is arguably even more lenient than the reasonableness standard announced in *Graham*, which focuses on the reasonableness of the officer's use of force judged from the perspective of a reasonable officer on the scene.

71. FRANKLIN E. ZIMRING, *WHEN POLICE KILL* 176 (2017).

72. *Id.*

73. Lee, *supra* note 70, at 656–58.

provisions that specifically govern police behavior.<sup>74</sup> As an illustration of the separate defense of police use of force, Missouri's Criminal Code provides:

3. In effecting an arrest or in preventing an escape from custody, a law enforcement officer is justified in using deadly force only:

(1) When deadly force is authorized under other sections of this chapter;<sup>75</sup> or

(2) When the officer reasonably believes that such use of deadly force is immediately necessary to effect the arrest or prevent an escape from custody and also reasonably believes that the person to be arrested:

(a) Has committed or attempted to commit a felony offense involving the infliction or threatened infliction of serious physical injury; or

(b) Is attempting to escape by use of a deadly weapon or dangerous instrument; or

(c) May otherwise endanger life or inflict serious physical injury to the officer or others unless arrested without delay.<sup>76</sup>

The separate defense of police use of force often differs from the traditional self-defense doctrine because it lacks the proportionality and necessity requirements of self-defense.<sup>77</sup> In most states, if a person is charged with criminal homicide and claims self-defense, then the defendant must show that his or her "use of force was proportional to the force threatened."<sup>78</sup> However, most states do not have this same requirement for officers who use deadly force to effectuate an arrest or prevent the escape of a fleeing felon.<sup>79</sup> Furthermore, in most states, if a person is charged with criminal homicide and claims self-defense, then he or she must show that the deadly force was necessary because a less deadly alternative was unavailable.<sup>80</sup> Most state laws on police use of deadly force are silent on the requirement of necessity, and courts are split on whether the availability of a less deadly alternative is relevant when considering the reasonableness of an officer's use of deadly force.<sup>81</sup> Furthermore, most states require that the initial aggressor in an altercation between two civilians retreat before using deadly force.<sup>82</sup> Most

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74. ZIMRING, *supra* note 71, at 176.

75. This alludes to other justification defenses that are available to civilians. *See* MO. ANN. STAT. § 563 (West 2012 & Supp. 2019) (codifying the defense of justification).

76. MO. ANN. STAT. § 563.046 (West Supp. 2019).

77. Lee, *supra* note 70, at 655–56.

78. *Id.* at 656.

79. *Id.*

80. *Id.* at 658.

81. *Id.* at 658–59.

82. *Id.* at 661. However, the initial aggressor does not need to retreat if he or she has already withdrawn from the altercation and communicated that withdrawal to the other person. *Id.*



statutes on police use of force do not include this initial-aggressor limitation,<sup>83</sup> providing even more lenience for officer aggression in policing.

Without proportionality or necessity requirements, police use-of-force statutes give officers great latitude to be wrong in their assessments of dangerous situations. Self-defense law generally favors false-positive errors over false-negative errors.<sup>84</sup> Based on a calculation that values innocent lives and disapproves of unjustified aggression, the logic behind the self-defense rule finds social benefit in allowing individuals to defend themselves when attacked.<sup>85</sup> Thus, self-defense law finds that it is preferable to erroneously assume that the other person is an imminent danger and to use unnecessary force than to erroneously perceive a lack of imminent danger and fail to use necessary force.<sup>86</sup> Because police use-of-force statutes are often stripped of necessity and proportionality requirements, this logic is taken to its extreme, as the legality of the officer's force hinges on the sole determination of whether or not an officer's beliefs are reasonable under the circumstances. The reasonableness standard alone gives the officer great latitude to be wrong in his or her assessment of the need for force.<sup>87</sup>

Not only are police use-of-force statutes intentionally designed to offer leeway to officers in assessing the need for force, but the reasonableness standard that is typically used in these statutes offers leeway to judges and juries as well. The standard offers juries "little-to-no guidance" in their deliberations concerning the reasonableness of an officer's use of force.<sup>88</sup> Additionally, it is often difficult to prove that an officer's beliefs were unreasonable,<sup>89</sup> particularly when jurors have a tendency to believe officer testimony over civilian testimony.<sup>90</sup> These difficulty-of-proof issues make it challenging to convict an officer for on-duty killings.<sup>91</sup>

Furthermore, the reasonableness standard unfairly offers lenience toward officers who are influenced by negative stereotypes. Legal standards marked by reasonableness appear neutral, but have been criticized for

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83. *Id.*

84. Rebecca J. Kelly, Note, *Defensive Shootings and Error Risk: A Collateral Cost of Changing Gun Laws?*, 26 YALE L. & POL'Y REV. 567, 588 (2008).

85. *Id.*

86. *Id.* at 570 ("Self-defense law privileges the risk that an innocent non-criminal . . . will be erroneously perceived to be an attacker and therefore shot over the risk that criminals . . . will be allowed to commit their crimes uninterrupted.").

87. *See id.* at 586 ("[R]easonableness gives a self-defender latitude to be wrong in his assessment of a situation.").

88. Lee, *supra* note 70, at 654–55.

89. ZIMRING, *supra* note 71, at 181–82.

90. German Lopez, *Cops Are Almost Never Prosecuted and Convicted for Use of Force*, VOX (Nov. 14, 2018, 4:12 PM), <https://www.vox.com/identities/2016/8/13/17938234/police-shootings-killings-prosecutions-court> [<https://perma.cc/J52Z-DN9U>].

91. ZIMRING, *supra* note 71, at 180–82.

embodying white, male, and wealthy perspectives.<sup>92</sup> When determining the reasonableness of an officer's beliefs, the officer's beliefs will be measured against an "average or typical officer," whose perspective incorporates any subconscious racial biases that a typical officer might have.<sup>93</sup> Professors L. Song Richardson and Phillip Goff have introduced the "suspicion heuristic" construct to explain how "perceiving race—even absent racial animus—can influence judgments of criminality beyond conscious awareness."<sup>94</sup> They argue that individuals deciding whether or not to act in self-defense must make quick judgments of criminality, which is the exact type of situation that often triggers the suspicion heuristic.<sup>95</sup> In these self-defense situations, if the person being judged fits a criminal stereotype, the "suspicion heuristic can cause the actor more easily to believe honestly—but mistakenly—that the person poses a threat and that deadly force is necessary."<sup>96</sup> The suspicion heuristic likely plays a role in cases where a police officer kills a Black male, given that one of the most common stereotypes applied to Black males is that "they are more dangerous, more prone to violence, and more likely to be criminals or gang members than other members of society."<sup>97</sup> The "Black-as-Criminal Stereotype"<sup>98</sup> likely influences the officer's belief in the need to shoot, especially given that heuristics are often relied on to "reduce complex decisions to simpler assessments."<sup>99</sup>

Not only does the Black-as-Criminal Stereotype affect the decisions of officers in the moment, but it also likely affects how judges and jurors perceive the facts of a case presented to them. If the victim of a killing by the police belongs to a group that is perceived as aggressive and dangerous, then judges and jurors hearing the case may perceive ambiguous actions of the victim to be more hostile or violent than the action actually is.<sup>100</sup> This may

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92. See, e.g., Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153, 187 (2008) ("[R]easonableness and common sense have always been assigned a race (white), a gender (male), and a class (wealthy).").

93. Lee, *supra* note 70, at 655.

94. L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 307 (2012).

95. *Id.* at 314.

96. *Id.*

97. Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 403 (1996). While the tendency to equate blackness with criminality is mostly applied to Black men, Black women also suffer from a perception that they are criminal or dangerous. *Id.*

98. For a fuller discussion on how the Black-as-Criminal Stereotype is deeply engrained in American culture, see *id.* at 402–23. See also Richardson & Goff, *supra* note 94, at 296–314 (explaining how implicit racial associations influence judgments of criminality).

99. Richardson & Goff, *supra* note 94, at 298.

100. Lee, *supra* note 97, at 399.

encourage decision makers to find that an officer's belief in the need to shoot is reasonable, even if the belief is grounded in stereotypes and biases.<sup>101</sup>

It is worth noting that the reasonableness standard that defines the substantive law associated with killings by police officers is only one of the factors that suppresses prosecutions of police officers. For example, Professor Kate Levine has argued that prosecutions of police officers are rarer than prosecutions for other civilians due to the “seemingly special precharge and preindictment process that police receive.”<sup>102</sup> Levine finds that when police officers are potential defendants, prosecutors tend to employ a thorough investigation before charging officers with a crime.<sup>103</sup> Additionally, prosecutors tend to present a full set of evidence to the grand jury deciding whether or not to indict.<sup>104</sup> However, prosecutors rarely employ these tactics for other non-officer suspects.<sup>105</sup>

Another factor that explains limited prosecutions of police officers is labor contracts. Professor Stephen Rushin has argued that labor contracts negotiated between police unions and the communities they serve have limited the ability to hold police officers accountable.<sup>106</sup> In particular, “police union contracts [often] delay officer interrogations after alleged misconduct and require investigators to provide officers with access to evidence before beginning interrogations.”<sup>107</sup> These barriers make it difficult to prosecute police officers, as officers are able to coordinate their stories in a way that shifts blame away from them.<sup>108</sup>

Though it is important to note that factors beyond the substantive law affect prosecutions of police officers, a full exploration of these ideas and other accounts of limited prosecutions of police officers is outside of the scope of this Note. Instead, this Note argues that the substantive criminal law has devalued the lives of people of color by permitting police officers to kill unarmed civilians—who are disproportionately people of color—with near impunity. These killings must be recognized as serious misconduct and condemned by our criminal law.

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101. Lee, *supra* note 70, at 655.

102. Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 745 (2016).

103. *Id.*

104. *Id.* at 749.

105. *Id.*

106. See Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1198 (2017) (analyzing a data set of 178 collective bargaining agreements that govern 40% of municipal officers in states allowing collective bargaining agreements).

107. *Id.* at 1222.

108. *Id.* at 1228.

## II. Data on Killings by the Police

In Part I, I argued that the reasonableness standard offers lenience to biased decisions by officers on the ground and leaves judges and juries to their intuitions, which are often influenced by racial biases and stereotypes. In this Part, I will argue that data on killings by the police suggest that the lack of guidance on what constitutes reasonable force has allowed police officers to shoot civilians more often than is justifiable, given that police officers often kill civilians who are not carrying firearms—though on-duty police officers are almost exclusively killed by firearms. Despite this discrepancy, officers are rarely prosecuted or punished for such killings.

There is a dearth of reliable data on killings by police officers, but Professor Franklin E. Zimring offers one of the most comprehensive analyses of killings by police in his book, *When Police Kill*.<sup>109</sup> Zimring estimates that over 1,000 civilians are killed by police in the United States each year, with Black Americans being disproportionately killed. The Bureau of Justice Statistics (BJS) commissioned a study by the Research Triangle Institute (RTI) to compare killings by the police that had been reported through two different federal programs.<sup>110</sup> The study compared the data from the two programs for the years 2003–2009 and 2011.<sup>111</sup> The study estimated that over the course of these eight years, killings by the police in the United States were between 7,427 and 9,937 killings, averaging between 929 killings and 1,217 killings annually.<sup>112</sup> In 2015, *The Guardian* reported every killing by a police officer in the United States with internet links to the news coverage.<sup>113</sup> Analyzing this data for the first six months of 2015, Zimring found that 26.1% of civilians killed by police are Black Americans, even though only 12.2% of citizens in the United States are Black Americans.<sup>114</sup>

The number of civilians killed by on-duty officers is far greater than the number of on-duty police intentionally killed by civilians. The Uniform Crime Reporting Office of the FBI collects data from local law-enforcement agencies on police officers who are killed and assaulted while on duty.<sup>115</sup> Data collected from 2008–2013 showed that there were 275 on-duty officers who died due to an intentional attack aimed at injuring or killing the

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109. ZIMRING, *supra* note 71.

110. *Id.* at 36. One of the federal programs compared in the study was the Federal Bureau of Investigation's (FBI) Uniform Crime Reporting Program, which requested that local police departments submit supplemental homicide reports for "justifiable homicides by police." *Id.* at 28–29. The second federal program compared in the study was through the BJS, which began keeping data on arrest-related deaths in 2003, after Congress passed legislation that required them to do so. *Id.* at 29–30.

111. *Id.* at 36.

112. *Id.* at 39.

113. *Id.* at 43.

114. *Id.* at 45.

115. *Id.* at 92.

officer.<sup>116</sup> This averages nearly 46 officers per year who were intentionally killed while on duty. The reporting from local law-enforcement agencies showed that 268 of these deaths, or 97.5% of all killings, were caused by a firearm.<sup>117</sup> There were only seven non-firearm deaths in six years: three deaths due to personal force; two deaths due to knives; and two deaths due to bombs.<sup>118</sup>

Though police officers are most at risk of dying on duty when confronted with a firearm, a substantial amount of killings by the police involve civilians carrying a less lethal weapon or no weapon at all. *The Guardian's* 2015 survey of killings by the police in the United States showed that nearly 56% of civilians killed by police were armed with firearms.<sup>119</sup> In 41% of killings by the police, however, the target of the shooting possessed a less lethal or nonlethal weapon, or no weapon at all.<sup>120</sup> In fact, officers frequently shoot suspects because they inaccurately believe that the suspect is carrying a firearm. In 9% of killings of white civilians by the police, the police killed the civilian because they believed inaccurately that the victim had a gun.<sup>121</sup> Killings of minority victims by the police have twice the “apparent gun” assumption, with 18% of killings of Black civilians by the police caused by the officer inaccurately assuming that the victim had a gun and 19% of killings of Hispanic civilians by the police caused by the officer inaccurately assuming that the victim had a gun.<sup>122</sup>

Though killings by the police are not uncommon events, criminal ramifications for killings by the police are exceedingly rare. Between 2005 and May of 2017, only eighty-two police officers in the United States were charged with murder or manslaughter resulting from an on-duty shooting.<sup>123</sup> Given that about 1,000 times each year an on-duty police officer kills a civilian,<sup>124</sup> there were likely about 12,400 killings by the police in the same amount of time. This suggests that only about 0.66% of on-duty officers who kill a civilian are charged with murder or manslaughter. During this same period of time, only nineteen officers were convicted for on-duty shootings.<sup>125</sup> This suggests only 0.15% of on-duty police officers who kill a

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116. *Id.* at 96.

117. *Id.*

118. *Id.*

119. *Id.* at 57.

120. *Id.* The type of weapon in the remaining 3% of cases was either unknown or disputed. *Id.*

121. *Id.* at 58–59.

122. *Id.*

123. Philip M. Stinson, *Charging a Police Officer in Fatal Shooting Case Is Rare, and a Conviction Is Even Rarer*, N.Y. DAILY NEWS (May 31, 2017, 8:18 AM), <https://www.nydailynews.com/new-york/convicting-fatal-shooting-case-rare-event-article-1.3210936> [<https://perma.cc/XBU7-9HSX>].

124. ZIMRING, *supra* note 71, at 39.

125. Stinson, *supra* note 123.

civilian are convicted for murder or manslaughter—less than two officer convictions for every 1,000 killings.

Nearly half of the time that an officer kills a civilian, the civilian is either unarmed or armed with a weapon that is less lethal than a firearm. These killings appear unjustifiable in light of the fact that nearly all intentional killings of on-duty police officers are caused by firearms. Despite the fact that officers continue to kill a substantial number of civilians who do not pose a lethal threat and these civilians are disproportionately people of color, police officers are very rarely charged or convicted with a crime for these killings.

### III. Stripping Police of the Super Power to Kill

Several scholars have proposed new legislation aimed at providing stricter guidance on when police use of deadly force is justified, but many of these proposals are still injected with some type of reasonableness calculation.<sup>126</sup> It is possible to imagine decision makers—including prosecutors, jurors, and judges—relying on the surviving reasonableness consideration to maintain the status quo of limited prosecutions for killings by the police. In this Part, I propose a strict-liability regime that would prevent this from happening.

This Note recommends the creation of a police-specific, strict-liability misdemeanor that makes it a crime for an on-duty police officer to kill a civilian who does not carry a firearm. I propose that states supplement their current statutes on police use of force with the following model statute:

#### Model Statute on Police Use of Deadly Force

(a) Regardless of whether an on-duty police officer knows if the civilian is or is not carrying a firearm, the officer commits an offense if he intentionally or knowingly uses deadly force that causes the death of a civilian who is not carrying a firearm when the force is used.

(b) Any use-of-force defense is not a defense to prosecution under this section.

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126. See, e.g., ZIMRING, *supra* note 71, at 197–98 (2017) (offering two different types of statutes to reform police use of force, including: (1) changing the sentencing schemes for killings by police, but not changing the underlying formulation, and (2) creating a police-specific “excessive deadly force” crime, where the *actus reus* is that “the officer used deadly force that was clearly not justified”); Lee, *supra* note 70, at 661 (offering model legislation on police use of deadly force that focuses on the reasonableness of the officer’s actions rather than focusing on only the reasonableness of the officer’s beliefs); Toussaint Cummings, Note, *I Thought He Had a Gun: Amending New York’s Justification Statute to Prevent Police Officers from Mistakenly Shooting Unarmed Black Men*, 12 CARDOZO PUB. L. POL’Y & ETHICS J. 781, 825–28 (2014) (proposing that the subjective prong of the New York police-specific justification for deadly force be eliminated, leaving the jury to determine only “if a reasonable person would have believed the officer’s use of force was necessary”).

I will now provide a few clarifications. First, the statute not only criminalizes killings by the police of unarmed civilians, but it also criminalizes killings by the police of civilians armed with a weapon that is less lethal than a firearm. As explained previously, data have shown that intentional killings of on-duty police officers are overwhelmingly caused by firearms.<sup>127</sup> Thus, by only allowing an officer to use deadly force when he or she is threatened by a firearm, the statute creates a bright-line proportionality requirement that is grounded in the reality of what lethal force looks like against on-duty police officers.

Second, the statute is not meant to supplant the current system of felony homicides that is accompanied by police-specific justification defenses; the statute is only meant to create a new police-specific misdemeanor that will be added to the existing scheme for criminalizing killings by the police. By making the crime a serious misdemeanor that is meant to fit into the existing scheme of criminal sanctions for killings by police officers, the statute respects that police officers are sometimes put in dangerous situations and must make difficult decisions quickly. In recognition of the seriousness of a felony conviction and the unique challenges that are faced by police officers, a police officer would continue to be charged with a felony homicide only if his or her belief in the necessity of deadly force was unreasonable. While the statute respects the risks faced by officers on the job, it does not allow these challenges to offer a blanket justification for the killings of innocent civilians—civilians who are disproportionately people of color.<sup>128</sup> The statute prioritizes black and brown lives by criminally sanctioning officers who kill civilians who effectively pose no lethal threat.

Lastly, despite the common requirement of culpability in defining a crime,<sup>129</sup> the model statute lacks a culpable mental state as to whether the civilian is carrying a firearm, and it removes the officer's access to use-of-force defenses. The officer must only have a culpable mental state (knowingly) as to the act of using deadly force that causes the death of a civilian, but there is no culpable mental state as to whether the civilian is carrying a firearm. Thus, the officer's liability is not dependent on proof of any mental attitude with respect to whether or not the civilian is carrying a firearm. Furthermore, the model statute removes access to use-of-force defenses, meaning that officers cannot argue that they had a reasonable belief that force was necessary given the circumstances.

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127. See *supra* text accompanying notes 115–118.

128. ZIMRING, *supra* note 71, at 45.

129. See, e.g., John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1371 (1979) (“The other essential of crime definition is culpability.”).

Criminal liability is often confined to offenses that have some form of “conscious wrongdoing,” with recklessness being the minimum culpability most widely found in the penal law.<sup>130</sup> It has been argued that punishing conduct without reference to the actor’s state of mind is often unproductive because it neither deters other actors from behaving similarly in the future nor does it correctly identify socially dangerous individuals.<sup>131</sup> Punishment without fault has been labeled unjust because it subjects the offender to punishment and the stigma of criminal conviction without any proof that the offender is morally blameworthy.<sup>132</sup>

However, imposing liability without fault is not uncommon in the United States, as many penal statutes exist that punish conduct without requiring a state of mind that indicates blameworthiness.<sup>133</sup> Generally, liability without fault is confined to “regulatory” or “public welfare” offenses.<sup>134</sup> These public welfare offenses are aimed at regulating inherently dangerous activities.<sup>135</sup> It can be argued that encounters between armed police officers and civilians are inherently dangerous in light of the fact that officers kill roughly 1,000 civilians each year.<sup>136</sup>

The typical justifications for using strict liability in public welfare offenses lend support to the use of strict liability in the model statute. One rationale supporting the use of strict liability in public welfare offenses is that juries are often “ill-suited to decide what is reasonable in complex high risk activities.”<sup>137</sup> In these situations, legislators prefer to assess for themselves what type of conduct is unreasonable instead of relying on the competence of jurors, who are often swayed by their own sympathies and prejudices.<sup>138</sup> As discussed in Part I, jurors assessing officer reasonableness might be affected by the Black-as-Criminal-Stereotype<sup>139</sup> or by their personal attitudes toward police officers.<sup>140</sup> In contrast, the model statute provides a bright-line rule that is informed by the realities of policing, including that officers are almost only at risk of death when confronted with a firearm,<sup>141</sup> and that nearly

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130. *Id.* at 1372. Recklessness is defined as a “conscious disregard of a substantial and unjustifiable risk that the actor is doing that which the law forbids.” *Id.*

131. Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109.

132. *Id.*

133. Jeffries & Stephan, *supra* note 129, at 1373.

134. *Id.*

135. See Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 419 (1993) (discussing the genesis of public welfare offenses and giving examples of such offenses).

136. ZIMRING, *supra* note 71, at 39.

137. Levenson, *supra* note 135, at 421.

138. *Id.*

139. See *supra* text accompanying notes 97–101.

140. See *supra* text accompanying notes 88–91.

141. See *supra* text accompanying notes 115–118.



one out of five minority civilians killed by a police officer is killed because the officer assumed the civilian had a gun when the civilian did not.<sup>142</sup> The model statute takes these realities into account in determining that it is unreasonable for a police officer to kill a civilian who is not carrying a firearm.

A second rationale that is commonly used to justify strict liability for public welfare offenses is that it makes prosecution easier where it would be difficult to prove intent.<sup>143</sup> In public welfare offenses, strict liability is based on the belief that if the defendant had taken care to prevent the accident, it would not have happened.<sup>144</sup> A showing of culpability is unnecessary because the mere fact that the prohibited act occurred illustrates the defendant's negligence.<sup>145</sup> Similarly, in a case where a police officer kills a civilian who poses no lethal threat to him, the killing itself likely illustrates the officer's own negligence.

Finally, strict-liability statutes offer a powerful statement by the legislature that certain behavior will not be tolerated.<sup>146</sup> Strict liability is a way for the legislature to attempt to provide the "utmost protection" from certain harms by removing any leniency for offenders.<sup>147</sup> At a time when communities of color continually question whether their lives matter to the state,<sup>148</sup> a strict-liability statute passed explicitly to criminalize killings by the police of unarmed people would act as an affirmative response from the legislature that their lives do matter.

Critics might argue that the crime created by the model statute cannot be justified by rationales supporting public welfare offenses because the crime proscribed is one that is known at common law. The Supreme Court has found that crimes at common law often result in larger penalties than public welfare offenses and that conviction of a common law crime can

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142. See *supra* text accompanying notes 119–122.

143. Levenson, *supra* note 135, at 421. The California Supreme Court has decided on this point, quoting the Ohio Court of Appeals:

There are many acts that are so destructive of the social order, or where the ability of the state to establish the element of criminal intent would be so extremely difficult if not impossible of proof, that in the interest of justice the legislature has provided that the doing of the act constitutes a crime, regardless of knowledge or criminal intent on the part of the defendant. In these cases it is the duty of the defendant to know what the facts are that are involved or result from his acts or conduct.

*Ex parte Marley*, 175 P.2d 832, 835 (Cal. 1946) (en banc) (quoting *State v. Weisberg*, 55 N.E.2d 870, 872 (Ohio Ct. App. 1943)).

144. Levenson, *supra* note 135, at 421.

145. *Id.*

146. *Id.* at 422.

147. *Id.*

148. See, e.g., Angela J. Davis, *Introduction* to *POLICING THE BLACK MAN* xi, xii (Angela J. Davis ed., 2017) ("[T]he lives of black men and boys continue to be devalued and destroyed with impunity at the hands of the state.").

damage an offender's reputation.<sup>149</sup> Based on these findings, the Court has been reluctant to convict offenders of common law crimes without a showing of blameworthiness.<sup>150</sup> Because the model statute proscribes murder, a crime known at common law, critics might argue that the statute will disproportionately penalize and unfairly stigmatize offenders without a proper showing of moral culpability. However, prosecution under the statute is meant to result in a misdemeanor conviction, which is arguably a less severe penalty than other penalties in our criminal justice system. Additionally, while it is true that offenders of the model statute will likely be stigmatized by their conviction, the costs of this stigma are outweighed by the benefits of the model statute,<sup>151</sup> which is aimed at repairing some of the harms that killings by police inflict on communities of color.<sup>152</sup> Furthermore, police officers who kill unarmed civilians often face stigma, even in the absence of a homicide conviction.<sup>153</sup>

But even beyond public welfare offenses, there are several traditional common law crimes where strict liability has been used and defended. These justifications for strict liability also lend support to the model statute. For instance, while the model statute may lack an explicit culpability element, there is substantive fault associated with the crime proscribed. This justification has been historically used to support strict liability in statutory rape cases, where offenders are unable to claim reasonable mistake as to the victim's age as a defense to prosecution.<sup>154</sup> Statutory rape law respects a power imbalance between adult offenders and child victims, as it is partly motivated by a desire to protect innocent young persons who cannot protect

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149. See *Morrisette v. United States*, 342 U.S. 246, 256 (1952) (describing the penalties for public welfare offenses as "relatively small" and stating that conviction "does no grave damage to an offender's reputation").

150. *Id.* at 252 (finding that courts "have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes").

151. See Steven S. Nemerson, Note, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 COLUM. L. REV. 1517, 1535 (1975) ("Punishment can only be justified if it will prevent still greater evil from occurring, and if the total utility of such a system is greater than the total utility of any other possible system which also serves to encourage conformity to law.").

152. See *infra* Part IV.

153. See, e.g., Minyvonne Burke, *Officer Who Fatally Shot Tamir Rice Quits Ohio Police Department Days After He Was Hired*, NBC NEWS (Oct. 11, 2018), <https://www.nbcnews.com/news/us-news/officer-who-fatally-shot-tamir-rice-quits-ohio-police-department-n919046> [<https://perma.cc/7K46-PRB3>] (describing former police officer Timothy Loehmann's life in the aftermath of shooting and killing Tamir Rice, a Black twelve-year-old who was holding a toy gun); Jake Halpern, *The Cop*, NEW YORKER (Aug. 3, 2015), <https://www.newyorker.com/magazine/2015/08/10/the-cop> [<https://perma.cc/7ACG-EQW7>] (describing former police officer Darren Wilson's life in the aftermath of shooting and killing Michael Brown, an unarmed Black eighteen-year-old).

154. Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1092 (1997).

themselves from exploitation.<sup>155</sup> It is argued that adult offenders in statutory rape cases display substantive fault merely by *risking* that the victim might be below the age of consent.<sup>156</sup> Similarly, the model statute respects the power imbalance between officers and civilians, and it is motivated by the desire to protect unarmed, innocent civilians. Officers who violate the model statute would display substantive fault merely by *risking* deadly force against an unarmed civilian.

Furthermore, strict liability is arguably already employed in the context of homicide statutes through the felony-murder doctrine.<sup>157</sup> The doctrine of felony murder punishes as murder any homicide that is committed during the course of a felony—without requiring any *mens rea* with respect to the death of another.<sup>158</sup> Under a categorical approach, the homicide and the underlying felony would be viewed as two separate and distinct offenses.<sup>159</sup> The homicide would then be a strict-liability offense, as it is distinct from the underlying felony, which does require proof of culpability.<sup>160</sup>

Justifications for the felony-murder rule would also lend support to the model statute.<sup>161</sup> Most importantly, deterrence is often cited as a justification for the felony-murder doctrine.<sup>162</sup> While some have argued that the felony-murder rule only criminalizes accidental killings, which cannot be deterred, the felony-murder rule might also deter intentional killings as well.<sup>163</sup> Under the felony-murder rule, a person is less likely to kill intentionally because he or she will not be able to benefit from claiming the killing was accidental.<sup>164</sup> Just like the felony-murder rule, the model statute would remove an officer's ability to benefit from insincerely claiming mistake<sup>165</sup> and thus, would have a deterrent effect on intentional killings by police.

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155. Michelle Oberman, *Girls in the Master's House: Of Protection, Patriarchy, and the Potential for Using the Master's Tools to Reconfigure Statutory Rape Law*, 50 DEPAUL L. REV. 799, 800 (2001).

156. Simons, *supra* note 154, at 1092.

157. Jeffries & Stephan, *supra* note 129, at 1383 (“[I]n terms of what the prosecution has proved beyond a reasonable doubt, felony murder raises the prospect that the most serious sanctions known to law might be imposed for accidental homicide.”).

158. *Id.*

159. *Id.*

160. *Id.*

161. See David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL’Y 359, 361–76 (1985) (discussing six different justifications for the felony-murder doctrine).

162. *Id.* at 369–71 (“Even if this awareness of the doctrine is absent, repeated societal condemnation is likely to create some sentiment, in even the most ignorant felon, that one has committed an offense more serious than the underlying felony if one causes a human death.”).

163. *Id.* at 371.

164. *Id.*

165. It is not uncommon for police officers to lie in order to retroactively justify their actions. See Albert Samaha, *How Video Finally Proved That Cops Lie*, BUZZFEED NEWS (Jan. 17, 2017, 4:17 PM), <https://www.buzzfeednews.com/article/albertsamaha/blue-lies-matter> [<https://perma.cc>

Another policy concern that underlies the felony-murder rule is condemnation or the expression of societal outrage.<sup>166</sup> The felony-murder rule reinforces the sanctity of human life by distinguishing crimes that cause human deaths.<sup>167</sup> Similarly, the model statute attempts to remedy the current devaluation of human lives at the hands of the state by criminalizing killings by police of innocent, unarmed civilians.

Critics might also object to this proposal by arguing that a stricter legal standard for police use of deadly force will discourage police officers from using deadly force when they should, endangering police officers.<sup>168</sup> However, police departments throughout the country are already implementing de-escalation training that is aligned with the model statute, as the training goes beyond the objective reasonableness standard used in *Graham*.<sup>169</sup> Specifically, police departments like the Camden County Police Department have focused on using de-escalation strategies when facing “subjects who are either unarmed or armed with a weapon other than a firearm.”<sup>170</sup> In nearly four years of patrolling Camden, the Camden County Police Department responded to 7,800 calls for people with guns.<sup>171</sup> During this time, Camden County police only fired their weapons on suspects five times<sup>172</sup>—without any report that the decrease in shootings increased the danger to officers.

But beyond the successes of de-escalation strategies throughout the country, officers can be assured that in the rare case where an officer’s life is truly threatened by a civilian who is not carrying a firearm, prosecutorial discretion and jury nullification can both act as tools to prevent an officer’s

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/B5FR-SPHE] (reviewing sixty-two incidents where video footage contradicted an officer’s statement in a police report or testimony).

166. Crump & Crump, *supra* note 161, at 367.

167. *Id.* at 367–68 (“[C]haracterizing a robbery-homicide solely as robbery would have the undesirable effect of communicating to the citizenry that the law does not consider a crime that takes a human life to be different from one that does not . . .”).

168. See Lee, *supra* note 70, at 689 (noting that a tougher legal standard for police use-of-force statutes might be objected to on the basis of officer safety).

169. See *Agencies Implementing ICAT*, POLICE F., <https://www.policeforum.org/icat-agencies> [<https://perma.cc/H8LW-NEYJ>] (listing dozens of agencies throughout twenty-six U.S. states that currently implement ICAT (Integrating, Communications, Assessment, and Tactics) as part of their training curriculum). ICAT principles “include a focus on the sanctity of human life, proportionality of response, and building on the standard of ‘objective reasonableness’ established in the 1989 U.S. Supreme Court decision *Graham v. Connor*.” Matt Skoufalos, *De-Escalation Training Helps Set Higher Policing Standards in Camden County*, NJ PEN (July 13, 2017), <https://www.njpen.com/de-escalation-training-helps-set-higher-policing-standards-in-camden-county> [<https://perma.cc/BS6F-WTJH>].

170. Rebecca Everett, *How N.J.’s Most Dangerous City Is Trying to Stop Police Shootings*, NJ.COM (Aug. 22, 2017), [https://www.nj.com/camden/2017/08/how\\_njs\\_most\\_dangerous\\_city\\_is\\_trying\\_to\\_stop\\_poli.html](https://www.nj.com/camden/2017/08/how_njs_most_dangerous_city_is_trying_to_stop_poli.html) [<https://perma.cc/6X2K-DG9E>].

171. *Id.*

172. *Id.*

charge and conviction.<sup>173</sup> In exploring prosecutorial discretion, former Harvard Law professor William Stuntz has argued that American criminal law is defined by its breadth and depth, where legislatures define overly broad crimes as a menu for prosecutors to choose from.<sup>174</sup> Furthermore, Stuntz has argued that broad crimes enacted by the legislature give prosecutors the power to adjudicate.<sup>175</sup> Stuntz illustrates this point:

Suppose a given criminal statute contains elements *ABC*; suppose further that *C* is hard to prove, but prosecutors believe they know when it exists. Legislatures can make it easier to convict offenders by adding new crime *AB*, leaving it to prosecutors to decide when *C* is present and when it is not.<sup>176</sup>

Under the model statute, prosecutors can decide when a lethal threat is present in the absence of a firearm and when it is not. Thus, the model statute makes it easier for prosecutors to prosecute officers who use deadly force in the absence of a lethal threat, but it still allows prosecutors to have discretion not to prosecute if they decide that the officer's life was truly in danger. Even if prosecutors decide to prosecute, juries and judges alike are able to acquit for any reason, including that they believe that the defendant does not deserve punishment, and these acquittals are unappealable.<sup>177</sup>

#### IV. Anticipated Consequences of the Proposed Model Statute

In this Part, I will argue that the model statute might be able to repair some of the harm that killings by the police inflict on communities of color. In the short term, I argue that the model statute would likely lead to increased prosecutions, reducing the perception of impunity for police officers. Not only would an increase in prosecutions pressure police officers to hold their peers accountable, but it would also incentivize administrators to implement more stringent use-of-force policies. These changes have the ability to lead to fewer killings by the police in the long term, ultimately furthering the legitimacy of policing.

Killings by the police inflict great harm on communities, particularly communities of color.<sup>178</sup> Butler has emphatically stated:

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173. See Aaron McKnight, Comment, *Jury Nullification as a Tool to Balance the Demands of Law and Justice*, 2013 B.Y.U. L. REV. 1103, 1127 (finding that prosecutorial discretion and jury nullification are both exercises of discretion "regarding whether criminal punishment is appropriate in a given case").

174. William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512 (2001).

175. *Id.* at 519.

176. *Id.*

177. *Id.* at 596.

178. See ZIMRING, *supra* note 71, at 19 ("[T]he magnitude of the harm inflicted by police killings makes it the single greatest problem in current circumstances in police-community relations in the United States.").

[N]othing since slavery—not Jim Crow segregation, not forced convict labor, not lynching, not restrictive covenants in housing, not being shut out of New Deal programs like Social Security and the GI Bill, not massive resistance to school desegregation, not the ceaseless efforts to prevent African Americans from voting—nothing has sparked the level of outrage among African Americans as when they have felt under violent attack by the police.<sup>179</sup>

The proposed model statute seeks to repair some of this harm by increasing the prosecutions of officers who kill civilians. As discussed in Part I, there are several explanations for limited prosecutions of killings by police beyond issues with the substantive criminal law.<sup>180</sup> However, the model statute's strict-liability regime would aid in increasing prosecutions of police officers by dispensing with the difficulty-of-proof issues discussed in Part I,<sup>181</sup> and it would also create new pressure on prosecutors to prosecute police officers. Prosecutors are often unmotivated to bring charges against police officers, given the close working relationship between prosecutors and police.<sup>182</sup> Without the broader reasonableness standard, prosecutors might find it easier to bring charges against officers who violate the model statute, given that the prohibition is so explicit. At a minimum, it will be difficult for prosecutors to justify their decision not to bring charges in such clear-cut cases, creating more intense political pressure for prosecutors to prosecute officers who kill unarmed civilians.

Zimring has hypothesized that increased prosecutions in even a small number of especially egregious killings by the police would reduce the perception that police are immune from criminal liability for killing civilians.<sup>183</sup> He further suggests that removing the widespread perception of police impunity would likely impact how officers police each other.<sup>184</sup> Because police officers believe that their colleagues will not face

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179. PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN 2* (2017).

180. See Levine, *supra* note 102, at 745, 749 (discussing how the precharge process and law-enforcement culture contribute to the limited prosecutions of police officers); Rushin, *supra* note 106, at 1198, 1222, 1228 (noting that union contracts and state labor laws can make prosecuting police officers more difficult).

181. See ZIMRING, *supra* note 71, at 180–82 (demonstrating that the reasonableness standard applied in prosecutions of police officers drastically increases the difficulty of conviction); Lee, *supra* note 70, at 645–55 (explaining how Supreme Court and state court precedent contribute to the difficulty of convicting excessively violent police officers); Lopez, *supra* note 90 (noting that the difference in perceived credibility between police officers and eyewitnesses requires a prosecutor to make an especially strong case in order to secure a conviction).

182. See ZIMRING, *supra* note 71, at 183 (“The most important single obstacle to securing charges and convictions in police killing cases is . . . the powerful support that police efforts to avoid prosecution get from the discretionary actors in both the criminal justice system and local government.”).

183. *Id.* at 172.

184. *Id.*

consequences for using excessive force—and therefore they believe that their complaints would be in vain—officers are often reluctant to report the conduct of their fellow officers.<sup>185</sup> This belief in police impunity allows an officer to justify his or her decision to frustrate prosecutions of an offending colleague.<sup>186</sup> Thus, increased successful prosecutions might make police officers feel a greater duty to complain about their colleagues and aid in their prosecutions. Furthermore, increased prosecutions might encourage police officers to hold one another accountable to help each other avoid criminal liability.

Additionally, the model statute's effect on perception of police impunity might pressure administrators to experiment with more restrictive protocols on deadly force.<sup>187</sup> It is evident that the Supreme Court's reasonableness jurisprudence has affected how officers and administrators understand the limits of police use of force.<sup>188</sup> As part of its *Critical Issues in Policing Series*, the Police Executive Research Forum (PERF) published a report on the *Guiding Principles on Use of Force*.<sup>189</sup> In the report, Executive Director of the Police Executive Research Forum, Chuck Wexler, acknowledged that all police agencies in the United States must have use-of-force policies that meet the standards provided by *Graham v. Connor*.<sup>190</sup> But Wexler encouraged agencies to go beyond the “bare requirements of *Graham*,”<sup>191</sup> and the preceding guidelines gave a range of suggestions for how this could be done. In response to the guidelines, the International Association of Chiefs of Police sent an e-mail to its membership saying that it was “extremely concerned about calls to require law enforcement agencies to unilaterally, and haphazardly, establish use-of-force guidelines that exceed the ‘objectively reasonable’ standard set forth by the U.S. Supreme Court nearly 30 years ago (*Graham v. Connor*).”<sup>192</sup>

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185. *Id.*

186. *Id.*

187. *Id.* at 172–73.

188. See, e.g., Matthew Stiehm, *Applying and Understanding Graham as a Patrol Officer*, LAW OFFICER (June 10, 2015), <http://lawofficer.com/laws/applying-and-understanding-graham-as-a-patrol-officer/> [<https://perma.cc/5BRM-BK8R>] (explaining to officers that “no case is more pivotal for the application of force than *Graham v. Connor*”); Ken Wallentine, *How Police Officers Can Avoid Claims of Excessive Force*, POLICEONE (Sept. 5, 2007), <https://www.policeone.com/police-products/firearms/articles/1271618-How-police-officers-can-avoid-claims-of-excessive-force/> [<https://perma.cc/DX6V-XGY3>] (explaining that the Supreme Court has created a “realistically generous test” for deciding when police use of force is permissible).

189. POLICE EXEC. RESEARCH FORUM, *GUIDING PRINCIPLES ON USE OF FORCE* (2016).

190. Chuck Wexler, *Why We Need to Challenge Conventional Thinking on Police Use of Force*, in *GUIDING PRINCIPLES ON USE OF FORCE*, *supra* note 189, at 4, 16.

191. *Id.* at 16–17.

192. Greg Meyer, *A Revolution in Use-of-Force Police and Training?*, POLICE MAG. (Mar. 7, 2016), <https://www.policemag.com/341989/a-revolution-in-use-of-force-policy-and-training> [<https://perma.cc/XRB8-T6AH>].

Though the police community is divided on whether or not to exceed the standards mandated by *Graham*, the model legislation would answer this question for it. This would put pressure on police administrators to experiment with policies like those outlined by PERF, including adopting de-escalation as a formal agency policy,<sup>193</sup> prohibiting shooting at vehicles,<sup>194</sup> and training officers on the principles of “distance, cover, and time” instead of outdated concepts such as the “21-foot rule.”<sup>195</sup>

The model legislation would likely reduce killings by the police because it could lead to increased successful prosecutions of killings by the police, changes in the ways that officers hold each other accountable, and pressure on administrators to experiment with more restrictive protocols on use of deadly force. This harm reduction would likely have a positive impact on how the public views the legitimacy of policing.<sup>196</sup> Not only is legitimacy important for legal compliance,<sup>197</sup> but the dialogic character of legitimacy can also push social systems toward more just outcomes as dialogues develop between power holders and a given group of citizens.<sup>198</sup> In this way, the increased dialogue created by the model statute could push forward conversations between police and citizens about excessive-force claims more generally.

### Conclusion

Because the reasonableness standard that is used to justify police use of force currently has allowed egregious killings—those like the killing of Stephon Clark—to be deemed legal, a stricter standard is necessary to turn this type of legal police conduct into illegal police misconduct. A police-specific, strict-liability misdemeanor that criminalizes the killing of unarmed civilians by police officers would not only increase prosecutions of police officers and pressure police officers to reassess current use-of-deadly-force protocols, but it would also signal condemnation of the current system’s devaluation of black and brown lives. In this way, the statute would likely lead to fewer killings by police while also increasing the legitimacy of policing, furthering dialogue on use-of-force tactics generally.

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193. POLICE EXEC. RESEARCH FORUM, *supra* note 189, at 40.

194. *Id.* at 44.

195. *Id.* at 54.

196. See ZIMRING, *supra* note 71, at 173 (“In short, the very legitimacy of policing in the public mind may depend on the perception that unlawful use of force by police is subject to prosecution and punishment.”).

197. Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119, 120–21 (2012).

198. See *id.* at 159–60 (discussing how the dialogic nature of legitimacy led to a momentous change to a criminal justice agency in the aftermath of the 1981 Brixton riots in London).