



**RUTGERS CLiME**

Center on Law, Inequality and Metropolitan Equity

# BRUTALITY BY DESIGN

**UNDERSTANDING POLICE  
MISCONDUCT AS  
STRUCTURAL INEQUALITY**

**DAVID D. TROUTT,  
DISTINGUISHED PROFESSOR OF LAW,  
CLiME DIRECTOR**

**WITH**

**GATIEN LAUROL,  
2021 JURIS DOCTOR CANDIDATE &  
CLiME FELLOW**

**APRIL 2021**

# CONTENTS

INTRODUCTION .....	2
I. THE LAW AND INCIDENCE OF BRUTALITY BY STATE ACTORS.....	5
1. WHAT IS POLICE BRUTALITY AND HOW OFTEN DOES IT OCCUR?.....	5
2. THE CHALLENGE OF IMPOSING CRIMINAL PENALTIES: PROSECUTORS, THE CODE OF SILENCE & ARBITRATORS.....	9
3. IS POLICE BRUTALITY A “CRIME”? .....	12
4. CIVIL LAWSUITS BROUGHT BY VICTIMS UNDER SECTION 1983.....	14
5. QUALIFIED IMMUNITY AND “CLEARLY ESTABLISHED” LAW .....	18
6. INDEMNIFICATION .....	20
II. INSTITUTIONAL POLICE REFORMS.....	24
1. LIMITING POLICE UNION AUTHORITY.....	24
2. ABOLISH THE POLICE.....	28
3. DEFUND THE POLICE .....	29
4. DEMILITARIZE THE POLICE.....	34
III. THE STATE OF REFORM .....	37
CONCLUSION.....	40
FURTHER READING .....	41



# INTRODUCTION

Three unarmed Black men were asphyxiated by police, one violently hooded and in obvious mental distress, two watched by millions on grainy video, all pleading for their lives. A sleeping black woman, awakened by her boyfriend, rises with him only to meet a fusillade of police bullets. It's not just that these human beings died or were seriously injured along with many others in 2020 alone, the videos sparking millions to protest around the country and the world. It's that whatever form of justice their families and protesters seek—indictments, convictions, terminations, personal liability—will almost certainly never occur. Many millions of Americans believe that's how the system should work, a conflict now at the heart of our political divide in the United States.

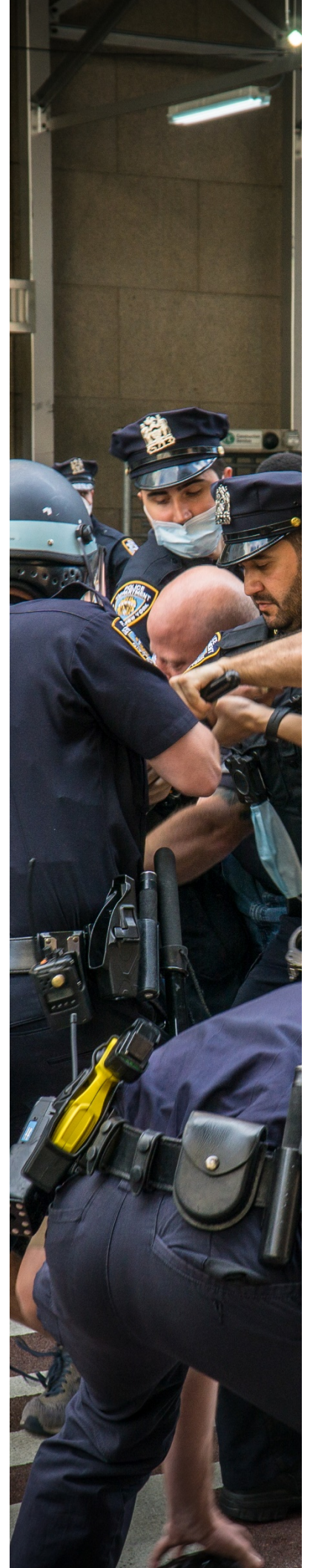
"The police are the king's men," writes historian Jill Lepore,<sup>1</sup> to describe the original role of police to protect the polity, the landed, and, once institutionalized in this country, the white power structure from the mischief of black lives. That lineage began with slave codes in the 17<sup>th</sup> century and slave patrols throughout the 18<sup>th</sup> and well into the 19<sup>th</sup>. The militarization of police forces today has roots in the dual role of militias and slave patrols, where the same men who learned military strategy exterminating native Indian tribes captured, whipped and sometimes killed enslaved Africans.<sup>2</sup> (This link between military service and violent policing remains true to this day; many cops, especially the most likely to use force, are military veterans.<sup>3</sup>) The Industrial Revolution brought immigration and new types of crimes, which hastened the modern

---

<sup>1</sup> Jill Lepore, "The Invention of the Police," *The New Yorker*, July 13, 2020, available at [https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police?utm\\_source=on-site-share&utm\\_medium=email&utm\\_campaign=on-site-share&utm\\_brand=the-new-yorker](https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police?utm_source=on-site-share&utm_medium=email&utm_campaign=on-site-share&utm_brand=the-new-yorker) (last viewed 1/27/21).

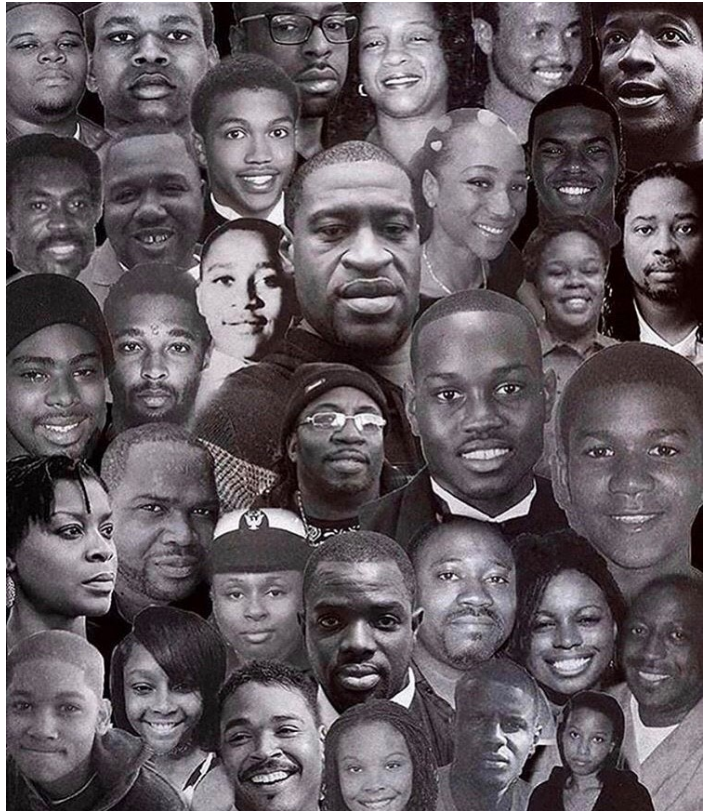
<sup>2</sup> *Id.*

<sup>3</sup> See Simone Weichselbaum, "Police With Military Experience More Likely to Shoot," The Marshall Project, at <https://www.themarshallproject.org/2018/10/15/police-with-military-experience-more-likely-to-shoot> (describing studies from multiple cities showing correlation between military service and officer shootings).



era in policing.<sup>4</sup> Other historians have noted the wide use of urban police forces against union organizers, strikers and socialists in the early 20<sup>th</sup> century.<sup>5</sup>

Yet the criminalization of blackness is one of the organizational tenets of policing,<sup>6</sup> a key social construct in the interests of a racialized social order, which explains why every generation of African Americans from before emancipation to after Trump understands the chronic threat of unjustified force. Every generation gets The Talk about how to act in the presence of police because every generation still knows people who have been mistreated by police because they were presumed to be criminally inclined. Every generation knows the names and circumstances of its George Floyds, Elijah McClains, Daniel Prudes and Breonna Taylors because law enforcement is the primary institution that both illustrates and reproduces systemic racism. Its symbolic power for each side of the police brutality issue cannot be overstated.



But symbols are sustained by structures. This is a structural analysis of police brutality, primarily the exercise of lethal force against unarmed persons, following the 2020 summer of racial reckoning when millions braved a virulent pandemic to protest the lack of legal and institutional accountability that predictably follows the police killings of unarmed black people. A consistent lack of accountability is what binds the individual acts to a design structure in which evidence clearly shows that black bodies

---

<sup>4</sup> Lepore, "The Invention of the Police," *supra* note 1.

<sup>5</sup> Howard Zinn, *A People's History of the United States* (1980).

<sup>6</sup> See generally Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* 4 (2010) ("For white Americans of every ideological stripe—from radical southern racists to northern progressives—African-American criminality became one of the most widely accepted bases for justifying prejudicial thinking, discriminatory treatment, and/or acceptance of racial violence as an instrument of public safety.")



are subordinated to some other systemic goal. We do not identify that goal, but we do evaluate the structure that produces predictable outcomes. By structure, we mean the features that make a thing go, the design elements most responsible for its function. In this paper, the function is police violence without the accountability otherwise expected from a system of laws built on notions of individual dignity, victim compensation, constraints on state action and deterrence. This is not an anti-police analysis; we know that the vast majority of police officers work hard to ensure public safety. Yet we confront a problem that is unquestionably deserving of reform attention. Our goal is to set out much of the reform landscape—the issues, approaches and proposals from law to policy—and to evaluate them on structural grounds. These include:

- barriers to prosecuting police misconduct as crimes;
- Section 1983 civil lawsuits and the judicial constraint of qualified immunity doctrine;
- indemnification rules preventing legal judgments from being personally paid by officers;
- institutional police reforms of police union influence, arbitration and demilitarization schemes;
- abolishing the police altogether;
- “defunding” or disinvesting from the share of local budgets dedicated to police; and
- finally, a look at extant federal legislation that has yet to gain passage in Congress

Our examination revolves around a question central to CLiME’s work: *How does police misconduct and its historic lack of accountability reflect structural inequality?* That is, we see a phenomenon this stable and oppressive being constructed out of powerful institutional laws, norms and practices that, like many other institutions that contribute to structural inequality, are reinforced by individual beliefs. Our legal analysis will follow the process normally associated with accountability for intentional harms—filing of criminal or civil charges, the elements of wrongfulness under federal law, the application of immunities and the question of who pays for damages. We divide the analysis into three parts: strictly legal questions of doctrine and practice, then local policies and lastly the proposed federal reform response. However, before



we describe the system design features that seem to support police misconduct, we examine the threshold questions preventing accountability for police misconduct: what is it and how do we measure it?

# I. THE LAW AND INCIDENCE OF BRUTALITY BY STATE ACTORS

## 1. What is police brutality and how often does it occur?

Every year approximately 1,000 people are fatally shot by police.<sup>7</sup> Their deaths occur under myriad circumstances, armed and unarmed, suspicious and clearly justified.<sup>8</sup> They are disproportionately black.<sup>9</sup> A recent NPR investigation found that at least 135 *unarmed* black men and women—mostly teenage boys—have been killed since 2015; seventy-five percent of the officers involved were white.<sup>10</sup> Thirteen were charged with murder; two were convicted.<sup>11</sup> Police misconduct encompasses illegal or unethical



actions or the violation of individuals' constitutional rights by police officers in the conduct of their duties. Examples include police brutality (unjustified violence), dishonesty, fraud, coercion, torture to force confessions, abuse of authority, and sexual assault, including the demand for sexual favors in exchange for leniency.<sup>12</sup>

<sup>7</sup> See Amelia Thomson-DeVeaux, Nathaniel Rakich and Likhitha Butchireddygari, *Why It's So Rare For Police Officers To Face Legal Consequences*, FIVETHIRTYEIGHT, (Aug. 25, 2020), <https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/>.

<sup>8</sup> However, most are armed during the encounter. Charles Menifield, Geigunn Shin and Logan Strother, *Do White Law Enforcement Officers Target Minority Suspects?*, (2019), PUBLIC ADMINISTRATION REVIEW, 79: #1, 56-68.

<sup>9</sup> *Id.* The same study found that white cops are *not* more likely to kill Blacks than nonwhite officers.

<sup>10</sup> See Cheryl Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NATIONAL PUBLIC RADIO, (Jan. 25, 2021), available at <https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns>.

<sup>11</sup> *Id.*

<sup>12</sup> See *Police Misconduct*, CALIFORNIA INNOCENCE PROJECT, <https://californiainnocenceproject.org/issues-we-face/police-misconduct/> (Last visited Sept. 24, 2020).



We focus here on the unreasonable use of force, particularly in circumstances where facts suggest that it was excessive, such as shooting unarmed persons. Exact information on police misconduct including use of force is deliberately hard to find. Although police often consume a majority of local budgets (before or just after education spending), and cost U.S. communities \$115 billion a year,<sup>13</sup> misconduct, police shootings and other use-of-force records generally are unavailable to the public. State law enforcement agencies are often reluctant to release any details about investigations into police wrongdoing despite the serious criminal nature of many allegations.<sup>14</sup> Currently, there is no national system for reporting police misconduct.<sup>15</sup>

Instead, data on police misconduct are produced by journalists, researchers, or political activists, not the federal government.<sup>16</sup> In 2015, The Washington Post began to log every fatal shooting by an on-duty police officer in the United States.<sup>17</sup> Since 2015, there have been more than 5,000 such shootings recorded by The Post that shows a racially disparate *rate* of fatal shootings—blacks 34 per million (1,428 total); Hispanic 26 per million (1,003 total) and white 14 per million (2,741 total).<sup>18</sup> According to The Post, most victims are male (95%).<sup>19</sup>

---

<sup>13</sup>Richard C. Auxier, *What Police Spending Data Can (and Cannot) Explain amid Calls to Defund the Police*, URBAN INSTITUTE, (June 9, 2020), <https://www.urban.org/urban-wire/what-police-spending-data-can-and-cannot-explain-amid-calls>

<sup>14</sup>Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 848 (2019), (Argues that comparison of police discipline records and criminal records is instructive because it allows us to view criminal records through a new lens. As with criminal record publication, forced PDR transparency will likely not solve the problems advocates hope it will. The Article concludes that a more nuanced regime should be put in place for PDRs, and that advocates should use law enforcement rhetoric to support a more privacy-protective regime for criminal records.)

<sup>15</sup>Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 4, (2014) (Argues that public policy and legal decisions about policing depend heavily on empirical judgments, but police chiefs and local government officials do not generate sufficient data about the police absent external regulation. The Bureau of Justice Statistics and the Federal Bureau of Investigation, the primary federal agencies charged with collecting information on policing, have focused on serving the law enforcement community rather than facilitating governance of the police. The consequence is that we do not have the information we need to secure effective and rights-protecting policing.)

<sup>16</sup> See Thomson-DeVeaux, *supra* note 7.

<sup>17</sup> See *Fatal Force*, WASHINGTON POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> (Last visited February 1, 2021).

<sup>18</sup> *Id.* For “an impartial, comprehensive and searchable national database of people killed during interactions with police,” see FatalEncounters.org, available at <https://fatalencounters.org>.

<sup>19</sup> *Fatal Force*, *supra*. A database created by Bowling Green State University Professor Phillip M. Stinson documents instances of misconduct for over 10,000 criminal arrest cases, between 2005 and 2014, involving over 8,000 non-federal sworn law enforcement officers. See *supra* Thomson-DeVeaux note 16.



Data for New Jersey are improving, though the results are disquieting. In 2018, New Jersey released The Force Report, which created the first comprehensive statewide database of police force ever created. The 16-month investigation by NJ Advance Media for NJ.com, found New Jersey's system for tracking police force is broken, with no statewide collection or analysis of the data, little oversight by state officials, and no standard practices among local departments.<sup>20</sup> The report found several trends that escaped critical scrutiny including: Just 10 percent of officers



accounted for 38 percent of all uses of force, a total of 252 officers used force more than five times the state average.<sup>21</sup> Non-lethal force is substantial. At least 9,281 people were injured by police from 2012 through 2016; 4,382 of those were serious enough to require hospitalization. At least 156 officers put at least one person in the hospital in *each* of the five years reviewed. Again, the use of force was used disproportionately against Black suspects, who over all were more than three times as likely to face police force than white people. However, in Millville in South Jersey, Black people faced police force at more than six times the rate of whites.<sup>22</sup> In South Orange, it was nearly 10 times.<sup>23</sup> In Lakewood, it was 22 times.<sup>24</sup> The report found the system for reporting use-of-force by police deeply disorganized. Different departments use

---

<sup>20</sup> Stephen Stirling & S.P. Sullivan, *Hundreds of N.J. cops are using force at alarming rates. The state's not tracking them. So we did.*, TRUE NEW JERSEY, (Nov 29, 2018), [https://www.nj.com/news/2018/11/nj\\_police\\_use\\_of\\_force\\_punch\\_kick\\_pepper\\_spray\\_sho.html](https://www.nj.com/news/2018/11/nj_police_use_of_force_punch_kick_pepper_spray_sho.html). (Last Updated October 8, 2019).

<sup>21</sup> Craig McCarthy & S.P. Sullivan, *For 17 years, N.J. had the chance to stop potentially dangerous cops. The state failed to do it.* TRUE NEW JERSEY, (Nov 29, 2018), [https://www.nj.com/news/2018/11/nj\\_broken\\_system\\_for\\_stopping\\_potentially\\_abusive\\_police\\_officers.html](https://www.nj.com/news/2018/11/nj_broken_system_for_stopping_potentially_abusive_police_officers.html) (Last Updated Feb 28, 2019).

<sup>22</sup>THE FORCE REPORT - Millville Cumberland County, <http://force.nj.com/database/pd-dept/millville-cumberland> (Last Visited September 11, 2020).

<sup>23</sup>THE FORCE REPORT - South Orange Essex County, <http://force.nj.com/database/pd-dept/south-orange-essex> (Last Visited September 11, 2020).

<sup>24</sup>THE FORCE REPORT - Lakewood Ocean County, <http://force.nj.com/database/pd-dept/lakewood-ocean> (Last Visited September 11, 2020).





different forms, making tracking difficult. Officers self-reported incidents, but thousands of reports were incomplete, illegible, lacking supervisory review or missing altogether. At least 62 times, forms were so sloppy the officers accidentally marked themselves as dead.<sup>25</sup>

Even these partial statistics about police misconduct confirm three claims about the structural problem. First, Black people are at vastly disproportionate risk today, just as they were historically targeted since the start of policing in the U.S. Second, the systemic lack of accurate, uniform, reliable data on police conduct invites distortion and enables the systemic lack of accountability for police misconduct. It's hard to fix a problem whose dimensions you can't agree on. Third, as many police advocates have long asserted, some fraction of police officers traffic in violent misconduct, in some cases, habitually. This is often erroneously called the "bad apple" problem, as if the structural inequality of police misconduct was caused by a small minority of rogue officers. Even if there were empirical truth to this argument, the systemic lack of accountability for a subset of dangerous law breakers acting under color of state authority shows how responsibility is shared across the institutions of law enforcement and criminal and civil justice. Presumably, if police brutality were merely a matter of rooting out a few bad apples, such reforms would have been done decades ago when cities exploded in riots and uprisings sparked often by acts and allegations of police brutality. As we'll see next, the difficulty of imposing accountability and effective deterrence extends beyond the acts of a minority of officers to the departments that protect them, the prosecutors who fail to charge them, the laws and judges that favor them and, if a case ever gets this far, the juries who sympathize with them. These patterns suggest that many Americans do not fundamentally believe that police misconduct is criminal or even wrongful behavior. If it is, it is unlike any other.

---

<sup>25</sup> McCarthy and Sullivan, *supra* note 21. New Jersey fails to monitor trends to flag officers who use disproportionately high amounts of force. The state recently implemented a new early warning system to identify potential problem officers but did not mandate tracking use-of-force trends as a criteria, which experts called a gaping hole in oversight.



## 2. The Challenge of Imposing Criminal Penalties: Prosecutors, the Code of Silence & Arbitrators

Of the 1,000 fatal shootings of civilians each year, only 110 law enforcement officers nationwide have been charged with murder or manslaughter for on-duty shootings.<sup>26</sup> Noted policing expert Phillip Stinson notes that: “To charge an officer in a fatal shooting, it takes something so egregious, so over the top that it cannot be explained in any rational way... It also has to be a case that prosecutors are willing to hang their reputation on.”<sup>27</sup> But even in such extreme instances, the majority of the officers have not been convicted.<sup>28</sup> In *The End of Policing*, Alex Vitale notes that there are significant legal, institutional, and social impediments to prosecuting police.

*While hard numbers are difficult to come by, a successful prosecution of a police officer for killing someone in the line of duty, where no corruption is alleged, is extremely rare... From the moment an investigation into a police shooting begins, there are structural barriers to indictment and prosecution... Police officers at the scene are sometimes the only witnesses to the event. The close working relationship between police and prosecutors, normally an asset in homicide investigations, becomes a fundamental conflict of interest in all but the most straightforward cases. As a result, prosecutors are often reluctant to pursue such cases aggressively.*<sup>29</sup>

Criminal prosecutions are rare, and convictions are even more so. In state courts, two factors influence the lack of criminal indictments of police violence even against unarmed suspects: the traditional closeness between local police departments and

---

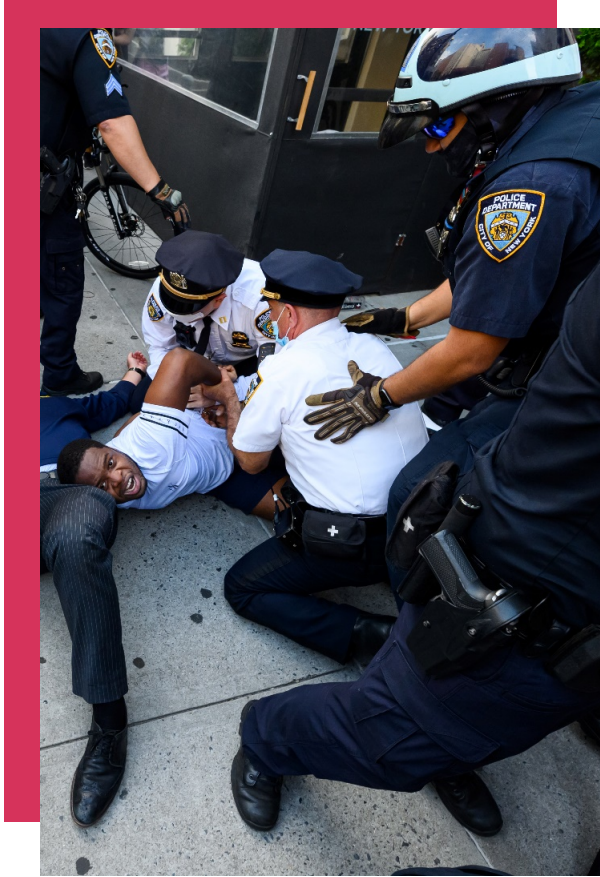
<sup>26</sup> *Id.*

<sup>27</sup> Kimberly Shelly, *Fatal Shootings by On-Duty Officers – An Analysis*, WASHINGTON POST, (Apr. 14, 2015), [https://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?wpisrc=al\\_alerthttp://](https://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?wpisrc=al_alerthttp://)

<sup>28</sup> Shaila Dewan, *Few Police Officers Who Cause Deaths Are Charged or Convicted*, N.Y. TIMES, (Sept. 24, 2020), <https://www.nytimes.com/2020/09/24/us/police-killings-prosecution-charges.html?referringSource=articleShare>; see also Tom Jackman & Devlin Barrett, *Charging Officers With Crimes Is Still Difficult for Prosecutors*, WASHINGTON POST, (May 29, 2020, 7:25 p.m.), <https://www.washingtonpost.com/crime-law/2020/05/29/charging-cops-with-crimes-is-still-difficult-prosecutors/> (Jackman and Barrett note that prosecutors typically consider themselves part of the law enforcement “team” with police, and they may even know the potential defendant. And when a case finally goes to trial, juries tend to be sympathetic to the daily challenges faced by officers on the street and are more likely to find them not guilty.

<sup>29</sup> Alex S. Vitale, *The End of Policing*, 18 (2018). See also Kimberly Kindy and Kimberly Kelly, “Thousands Dead, Few Prosecuted,” WASHINGTON POST, (Apr. 11, 2015).





districts attorneys' offices as well as jury sympathy for the on-the-job judgments of public protectors. As tens of thousands of Americans protest police brutality and demand overhauls of law enforcement, large disparities remain between public perceptions of police violence and how it is treated in criminal courts.<sup>30</sup> Union protections that shield police officers from timely investigations<sup>31</sup>, legal standards that give them the benefit of the doubt<sup>32</sup>, and a tendency to take officers at their word have added up to few convictions and little prison time for officers<sup>33</sup>. Kate Levine, an associate professor at Cardozo Law School, notes that prosecutors give favorable treatment to police officers who become

criminal suspects.<sup>34</sup> She identifies two processes that prosecutors could employ in any case but rarely do except for when police officers are suspects: pre-charge investigation and full evidentiary presentations to the grand jury.<sup>35</sup> She notes that:

*[T]he process that police suspects receive from prosecutors is harmful from another perspective because it highlights the ways in which prosecutors fail to use their discretion to investigate and decline charges in the thousands of other cases that come before them. This*

---

<sup>30</sup>See *Dewan supra* note 28.

<sup>31</sup>The Associate Press, *Police in misconduct cases stay on force through arbitration*, (June 24, 2020, 3:35 P.M.), <https://wtop.com/lifestyle/2020/06/cops-in-misconduct-cases-stay-on-force-through-arbitration/>.

<sup>32</sup> Joanna Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. Rev. 1023, 1040 (2010) (Schwartz argues that it should not be presumed that civil-rights lawsuits necessarily have a deterrent effect, because not all cities track, process, or respond to lawsuits filed against officers.)

<sup>33</sup> Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 749 (2016) (Argues that argues that, as criminal justice insiders, police have dealt themselves special protections from police questioning based on their knowledge of what protections a suspect need most when facing interrogation. Meanwhile, the police continue to argue that, without using these selfsame tactics on other suspects, their ability to catch and convict dangerous criminals will be hampered.)

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*



*prosecutorial process differential is unfair and threatens the legitimacy of the criminal law by favoring insider suspects despite the inherent benefits their status already gives them.*<sup>36</sup>

Another structural problem is the unwritten code of silence among police officers (“the blue wall”) by which corroborating testimony from other officer-witnesses at the scene of the misconduct is systematically withheld, hindering investigations and prosecutions. The unwillingness of police officers to report malfeasance by fellow officers is organizational and differs based on the department as well as other officers’ perception of the seriousness of the misconduct.<sup>37</sup> In 2000, a conference paper by the International Association of Chiefs of Police studied the phenomenon using survey research from over 3,700 officers across 42 states and reported several troubling conclusions. First, the code of silence exists and “is prompted by excessive force incidents more than for any other specific circumstance.”<sup>38</sup> A majority of officers expressed no problem with the code; many described pressure from the officer who committed the misconduct, senior officers as well as from uninvolved officers.<sup>39</sup> Significantly, the same study found that the culture of cover up and non-cooperation is strongly associated with an “us-versus-them” mentality often modeled by administrators, which, “although better camouflaged and less well known, is more destructive than when non-ranking personnel do the same thing.”<sup>40</sup>

The final impediment to accountability for criminal misconduct is arbitration. Even when police officers are disciplined or terminated for serious violations of departmental policy such as use of force, police union contracts (and some constitutional precedent)<sup>41</sup> allow for an appeal to arbitration. The idea is that officer discipline should be subject to due process in order to overcome the possibility of departmental partiality. The result, however, has been a pattern of disciplinary actions

---

<sup>36</sup> *Id.* at 768.

<sup>37</sup> Carl Klockars, Sanja Ivkovich, William Harver and Maria Haberfield, *The Measurement of Police Integrity*, NATIONAL INSTITUTE OF JUSTICE RESEARCH IN BRIEF, May 2000, available at <https://www.ncjrs.gov/pdffiles1/nij/181465.pdf> (last viewed Feb. 2, 2021).

<sup>38</sup> Neal Trautman, *Police Code of Silence Facts Revealed*, INTERNATIONAL ASSN. OF CHIEFS OF POLICE, (2000), available at <https://www.aele.org/loscode2000.html> (last visited Feb. 2, 2021).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 546 (1985) (“The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story”) (citing *Arnett v. Kennedy*, 416 U.S., at 170-171 (opinion of POWELL, J.)).



that are reduced or overturned more often than not, and a culture of accountability replaced by a culture of compromise, as officers disciplined for even the most egregious misconduct are reinstated, sometimes on procedural technicalities.<sup>42</sup> One impediment is the “past precedent” rule of equal treatment for the same transgressions, a rule with origins in racial equality that has since been used to bar discipline where past offenses have gone unpunished.<sup>43</sup> Another is the arbitrator selection process. Professor Stephen Rushin conducted an empirical study of police arbitration in order to determine whether past precedent played an outsized role in outcomes and if arbitrator selection procedures created a premium for arbitrators known to compromise.<sup>44</sup> Rushin found that arbitrators overturned or reduced 52 percent of cases, ordered reinstatement in 46 percent and, on average, reduced the length of suspension by 49 percent.<sup>45</sup> The current system, he and others argue, replaces a predictable method of discipline by public actors (police chiefs) with a privatized forum that will in most cases limit accountability.<sup>46</sup>

### 3. Is police brutality a “Crime”?

The foregoing analysis demonstrates that treating serious police misconduct as criminal behavior is contested by both sides of the issue. The idea that brutality by police represents a unique kind of transgression cuts two ways. To police critics, the irrefutable history of policing as race-based social control coupled with the fact that officers are trained and employed by the state and its



<sup>42</sup> New York Times Editorial Board, *To Hold Police Accountable, Ax the Arbitrators*, Oct. 3, 2020, available at <https://www.nytimes.com/2020/10/03/opinion/sunday/police-arbitration-reform-unions.html>

<sup>43</sup> *Id.*

<sup>44</sup> Stephen Rushin, *Police Arbitration*, 74 *Vanderbilt L. Rev.* \_\_ (forthcoming 2021) (Article examined a national dataset of 624 police disciplinary appeals litigated before over 200 arbitrators between 2006 and 2020 from wide range of law enforcement agencies).

<sup>45</sup> *Id.*, at 7.

<sup>46</sup> Some states are passing legislation to reform the arbitration selection process. See Rob Hubbard, *House Labor Committee approves arbitration changes for police discipline*, MINNESOTA HOUSE OF REPRESENTATIVES, (Jan. 16, 2020), available at <https://www.house.leg.state.mn.us/sessiondaily/Story/15365>.



citizens to uphold the law makes their violent misconduct more morally egregious than ordinary crimes and unintentional harms. Such a breach of trust warrants *more* punishment. To police defenders, as trained guardians of public safety who commonly face and suppress the threats that others fear, police officers should not face the same laws and procedures used in ordinary criminal prosecutions. Police misconduct merits the benefit of the doubt and therefore greater leniency.

Yet this conflict reflects two related problems with why police misconduct escapes accountability. The first is that policing Black people is a socially constructed enterprise in every corner of the country, full of cultural significance, a vehicle for myth. That a protective call for “Black Lives Matter” was first countered with a communitarian demand that “All Lives Matter”, soon replaced with the explicitly tribal assertion that “Blue Lives Matter” shows the depth of polarization over the relationship between Black citizenship and law enforcement as an arbiter of that citizenship. The conflict over what justifies state violence against Black bodies is loaded with generations of belief about Black humanity and American belonging.

The second problem is achieving deterrence, normally a straightforward norm of accountability for either criminal or tortious wrongdoing. A system of accountability for wrongfully committed harms should do justice first by making victims whole, but also by deterring future misconduct of the same type. The two goals of compensation and deterrence are rooted in basic legal norms about punishment. Yet, unique in the police misconduct realm, whatever accountability occurs through victim compensation is almost never accompanied by deterrence.<sup>47</sup> There is no price to pay by the wrongdoer that promotes behavior change; there is no painful consequence to internalize and therefore avoid in the future. The money for civil settlements against police comes primarily from taxpayers, as we discuss *infra*, not police departments or the police themselves.<sup>48</sup> Officers who use excessive force are more likely than others to use it again.<sup>49</sup> And those who do and are somehow sanctioned typically suffer only

---

<sup>47</sup> Joanna Schwartz, *Myths and Mechanics of Deterrence*, 57 UCLA L. Rev. at 1040 (2010).

<sup>48</sup> See Amelia Thomson-DeVeaux, *supra* note 7; Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. Law Review 3 (2014) (Critically examines the issue central to judicial and scholarly debate about civil rights damages actions: whether law enforcement officials are financially responsible for settlements and judgments in police misconduct cases.)

<sup>49</sup> Thompson, *supra* note 10, at <https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns>.



mild penalties, like being fired—only to be rehired in another police department.<sup>50</sup> Yet police officers are in the business of deterring others. And police departments are top-down organizations where obedience to rank is culturally engrained. If anyone were susceptible to deterrence after being held accountable for misconduct, it should be police.

These two problems—socially constructed racial polarization around the existence of wrongdoing and the systemic abandonment of deterrence as a norm of accountability—come together to frame police brutality as a design feature of racial injustice. If we are serious about dismantling the structure of racial inequality—and myriad legal, moral, economic, social and democratic reasons demand that we do—then making transformative change in violent police behavior is an overdue imperative on the way to becoming a more just nation.

#### 4. Civil Lawsuits Brought by Victims under Section 1983



Americans often believe that justice comes at the end of a lawsuit. Yet police misconduct rarely makes it to court, and even then results in little accountability or deterrence. This section explores why this is so, and whether these outcomes reflect those for which legal rules were designed.

The vast majority of police misconduct cases are private civil actions. Private plaintiffs may hire their own lawyers and bring suit under state tort law for claims such as false arrest, assault and battery, including wrongful death. Here, we look primarily at federal civil lawsuits as well as the complicated judge-made doctrine of qualified immunity that has severely blunted the effectiveness of an already challenging legal remedy.

---

<sup>50</sup> See *id.*; Kimbriell Kelly, Wesley Lowery and Syeven Rich, “Fired/Rehired: Police chiefs are often forced to put officers fired for misconduct back on the streets,” *The Washington Post*, Aug. 3, 2017, available at <https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired/> (describing the pattern of officers fired for misconduct being rehired after appeals through police union contracts).



Federal suits against the police are brought under civil rights statutes that date back to the Reconstruction Era when protecting the rights of formally enslaved Black people against official violence was an acute federal interest. Section 242<sup>51</sup> is the federal criminal statute, only occasionally brought against police officers, based on deprivations of constitutional rights, including life and liberty. Section 242 contains a state-of-mind requirement of “willful” deprivation—a standard higher than mere intent—that significantly works to curtail its use.

The civil alternative is suits brought under 42 U.S.C. Section 1983<sup>52</sup> by private plaintiffs directly against a police officer. Without an onerous state-of-mind requirement, Section 1983 requires plaintiffs to show:

1. state action by an official acting under color of state law
2. to violate plaintiff’s federally protected rights.<sup>53</sup>

For the sake of discussion, let’s imagine a plaintiff suing police for excessive or lethal force. The rights protected include constitutional claims for life and liberty, and follow the Fourth Amendment prohibition on the state committing unlawful searches and seizures of the person.<sup>54</sup> Indeed, force used by an officer acting under color of law must rise to the level of a seizure, according to the Supreme Court in *Tennessee v. Garner*.<sup>55</sup> A seizure constitutes “an intentional acquisition of physical control”, occurring “only when there is a governmental termination of freedom of movement through means intentionally applied.”<sup>56</sup> It must also be deliberate, purposeful or knowing, not merely negligent.<sup>57</sup> Thus, the seizure may start when the officer stops a suspect or at the point when force is used.

Yet for this use of force—even lethal force—to be actionable, it must be objectively unreasonable. This standard often poses a significant hurdle for plaintiffs. *Garner* was

---

<sup>51</sup> 18 U.S.C. § 242.

<sup>52</sup> 42 U.S.C. § 1983.

<sup>53</sup> *Gomez v. Toledo*, 446 U.S. 635, 640, (1980) (citing *Monroe v. Pape*, 365 U.S. 167, 171 (1961)).

<sup>54</sup> *Calif. v. Hodari D.*, 499 U. S. 621, 628 (1991). No seizure occurs unless cops intentionally use physical force in effecting a stop, or a suspect submits to a show of authority.

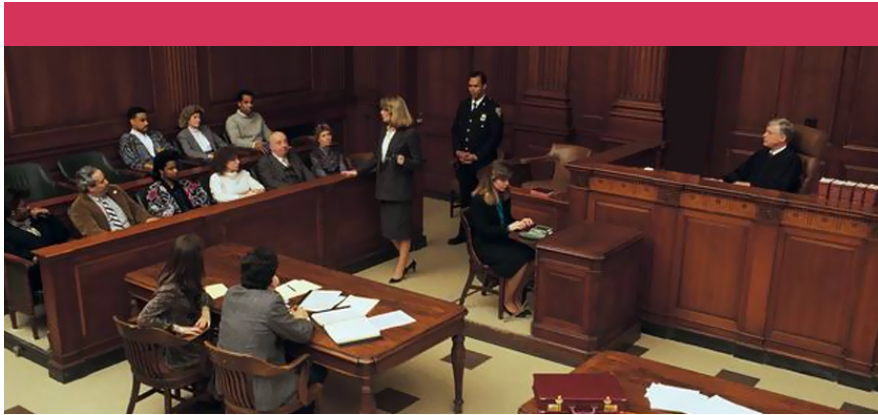
<sup>55</sup> 471 U.S. 1, 7 (1985) (“While it is not always clear just when minimal police interference becomes a seizure...there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.”)(Opinion of WHITE, J.).

<sup>56</sup> *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989).

<sup>57</sup> *Kingsley v Hendrickson*, 135 S. Ct. 2466, 2472 (2015).







a lethal force case in which a police officer shot and killed a fleeing felon. The Supreme Court held that a cop may use deadly force to prevent escape only where he has probable

cause to believe that the suspect poses a threat of death or serious harm to the officer or others. The shooting was the seizure. Its reasonableness would be measured by a balancing of interests—the nature and quality of the intrusion on personal liberty vs. the government interests justifying force. A later case applied this reasoning to all excessive force cases. In *Graham v. O'Connor*,<sup>58</sup> the Supreme Court said the reasonableness of the officer's action was subject to a "totality of the circumstances" approach from the perspective of the reasonable officer. This includes "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."<sup>59</sup> The question of objective reasonableness, the Court has said, is answered "from the perspective of a reasonable officer on the scene."<sup>60</sup>

Pause here to consider how this "reasonableness standard" for finding whether a constitutional violation occurred of Section 1983 divides those who believe police misconduct is rampant from those who view it with deep skepticism. The language of the standard itself, suggests how rare misconduct is, that its interpretation is highly contextualized yet starts from the perspective of the officer, who is "often forced to make split-second judgments about the amount of force used in a particular situation."<sup>61</sup> In order to do their jobs effectively, police officers certainly deserve some

---

<sup>58</sup> 490 U.S. 386, 387 (1989).

<sup>59</sup> 490 U.S. at 396.

<sup>60</sup> *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2020 (2014).

<sup>61</sup> Michael Avery, David Rudovsky, Karen Blum and Jennifer Laurin, *POLICE MISCONDUCT: Law and Litigation*, THIRD ED. (2015-2016), (2:19, p. 132). Commentators have called into question how often police actually face split-second decisionmaking, and whether they should receive deference in situations where, through unnecessary escalation, the officer himself creates the need for fast action. See, e.g., Michael Avery, "The Myth of Split-Second Decision-Making," in Michael Avery, "Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to



level of deference that they act reasonably, and that legal standards should be designed to insulate them from constant second-guessing of their conduct at the risk of liability. Yet, for those who have witnessed or experienced serial police misconduct and come to expect it, this notion of reasonableness defers too much to officer judgment, and takes them out of the equation completely. That runs counter to the Constitution itself, which is supposed to protect people against government abuse, and not the government (here the police) against the public. The current legal standard allows officers to exploit beliefs unrelated to the evidence of particular encounters. Much of the lack of accountability over police misconduct may be attributable to the inherent deference to police judgments about reasonableness, particularly where the essence of the police officer's asserted reason for using force is a perception of needing self-defense in a dangerous situation.<sup>62</sup>



The popular deference to police judgment is also strengthened by a judicial narrowing of relevant context. The “totality of the circumstances” standard suggests a wide breadth of evidence admissible to show reasonableness/unreasonableness in relevant context. Yet the only evidence that is actually considered is one-sided. Plaintiffs commonly attempt to portray the officer’s initial aggressiveness, such as getting too close too soon, drawing a weapon when simple de-escalation techniques might be used or misreading an ordinary situation as unusually dangerous, to show how the officer’s unreasonable conduct *before* the use of force created the circumstances that led to the moment force was used. Cops defend on the opposite

---

Assessing the Police Use of Force Against Emotionally Disturbed People,” 34 Col. Human Rts. R. 261, 320-323 (Spring, 2003).

<sup>62</sup> See *supra* Thompson, note 10. Regarding jury deference, Professor Stinson of Bowling Green University says, “The courts are very reluctant to second-guess the split-second decisions of police officers in potentially violent street encounters that might be life-or-death situations. They somehow seem to take everything that’s been presented in the case, in the trial, and just disregard the legal standard.”



grounds, that only the moments directly before and during the use of force are relevant to an estimation of reasonableness. By rejecting officer provocation as grounds to show unreasonable police conduct, the Supreme Court has declined to address the full scope of the totality of circumstances surrounding police violence, with predictably exculpatory results for police officers.<sup>63</sup> The lack of a clear standard indicating that the totality of relevant circumstances includes all the contextual facts that influence behavior in a conflict between cops and civilians runs counter to how tort law typically interprets that standard<sup>64</sup> and contributes to a sense among many in the public that the law is not designed to hold police officers accountable.

## 5. Qualified Immunity and “Clearly Established” Law

Section 1983 mentions immunity only for the judiciary. The Supreme Court, however, has created a broad spectrum of immunity for state actors who violate the Constitution. This immunity undercuts the very purpose of Section 1983 as a means for holding bad actors liable.

Judge-made immunity arose in 1967<sup>65</sup> and has gained so much strength in immunizing the police and other public officials from liability that even many conservative writers have called for its abolition.<sup>66</sup> Qualified immunity offers additional insulation from external judgments of police use of force, following a complicated, sometimes convoluted, jurisprudential path to a pre-trial determination that a plaintiff cannot bring suit at all. In essence, “qualified immunity will be available when a reasonable official would not have known that his actions would violate a right that was ‘clearly established’ at the time of the incident.”<sup>67</sup> However, “Police officers are not entitled to qualified immunity only if “(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was ‘clearly established

---

<sup>63</sup> See Chiraag Bains, “After Creating Danger, Can Cops Use Force with Impunity?”, The Marshall Project, June 15, 2017, available at <https://www.themarshallproject.org/2017/06/15/after-creating-danger-can-cops-use-force-with-impunity>, discussing *County of Los Angeles v. Mendez*, 137 S.Ct. 1539, 198 L.Ed.2d 52 (2017).

<sup>64</sup> See, e.g., *Blazovic v. Andrich*, 124 N.J. 90, 112 (1991)(holding that verbal provocation by victim of violent assault constitutes contributory negligence comparable to intentional conduct).

<sup>65</sup> *Pierson v. Ray*, 386 U.S. 547.

<sup>66</sup> E.g., BRIEF OF CROSS-IDEOLOGICAL GROUPS DEDICATED TO ENSURING OFFICIAL ACCOUNTABILITY, RESTORING THE PUBLIC’S TRUST IN LAW ENFORCEMENT, AND PROMOTING THE RULE OF LAW AS AMICI CURIAE IN SUPPORT OF PETITIONER, December 20, 2019, available at [https://www.supremecourt.gov/DocketPDF/19/19-679/126410/20191220142234327\\_Corbitt%20v.%20Vickers%20crossideological%20brief.pdf](https://www.supremecourt.gov/DocketPDF/19/19-679/126410/20191220142234327_Corbitt%20v.%20Vickers%20crossideological%20brief.pdf).

<sup>67</sup> Avery, POLICE MISCONDUCT, (Sec. 3:4, p.318).



at the time.”<sup>68</sup> Abstractly, the doctrine makes a certain sense, shielding police officers from liability for on-the-job conduct they couldn’t know was constitutionally unlawful because the applicable law was unclear.<sup>69</sup> But the application is flawed. Instead of applying a broad reading of what is “clearly established law,” courts apply a very narrow lens and usually examine only appellate law from the same circuit as the case arose. Additionally, although the Supreme Court has stated that federal courts should not be too literal in their analysis of whether a law was clearly established, some lower federal courts still mainly examine whether the *precise* misconduct an officer is accused of committing was found to be a constitutional violation.<sup>70</sup> This generous expansion of qualified immunity to require factual sameness contradicts earlier



Supreme Court precedent holding only that officers must have “fair warning” that their conduct invaded a constitutional right.<sup>71</sup>

On its face, the doctrine presents significant hurdles for plaintiffs. Is what’s relevant the law regarding the constitutional right at issue, or the law regarding the officer’s conduct?<sup>72</sup> How clearly must the *particular* conduct by

the officer be established—e.g., punching with a fist yes, but punching with a found object no?<sup>73</sup> What level of agreement among courts clearly establishes illegal conduct?<sup>74</sup>

<sup>68</sup> *Kisela v. Hughes*, 138 S.Ct. 1148, 1155 (2018)(Sotomayor, J., dissenting).

<sup>69</sup> *Harlowe v. Fitzgerald*, 457 U.S. 800 (1982).

<sup>70</sup> *Anderson v. Creighton*, 483 U. S. 635 (1987).

<sup>71</sup> *Anderson*, 483 U.S. at 640; *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). *Kisela v. Hughes*, 138 S. Ct. 1148, 1161 (2018) (“[T]hat is not the law, for our cases have never required a factually identical case to satisfy the “clearly established” standard. *Hope*, 536 U.S. at 739)(Sotomayor, J., dissenting).

<sup>72</sup> *Avery*, at sec. 3:6, p.339.

<sup>73</sup> See, e.g., *Padilla v. Yoo*, 678 F. 3d 748 (9th Cir. 2012) (multiple means of torturing suspect had never been adjudicated as “torture”).

<sup>74</sup> *Ashcroft v. al-Kidd*, 563 U.S. 731, 746 (2011) (Kennedy, J., concurring) (“[Q]ualified immunity is lost when plaintiffs point either to ‘cases of controlling authority in their jurisdiction at the time of the incident’ or to ‘a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful’ ”



As if these obstacles aren't sufficiently burdensome for plaintiffs in Section 1983 cases, the Supreme Court has created more hurdles that harm plaintiffs and protect abusive police officers. Police officers can raise qualified immunity immediately after a complaint is filed, even before any discovery has occurred.<sup>75</sup> At this point, all litigation literally stops so that the court can consider the qualified immunity claim. If the police officer loses, he gets an automatic interlocutory appeal. The litigation is a standstill during this time. No discovery is allowed. The process can take years, particularly if the Supreme Court agrees to hear the case. This disadvantages plaintiffs. Key evidence is "lost" and "inadvertently destroyed" while federal courts sort out the legal issue of whether the law was clearly established. The procedure invites abuse by defendants, and severely harms plaintiffs.

Both the very architecture of qualified immunity and the interpretive means by which courts have expanded it have worked a reversal of deterrence, preventing lawsuits rather than misconduct. As one commentator put it:

*The barriers raised by qualified immunity, as currently administered, far exceed the rationales that support limiting damages liability. The result is an inversion of sensible policy. Damages liability for constitutional torts should be the rule, from which exceptions are created only for good reasons, and only to the extent justified by those reasons. The reality today for excessive-force claims is the reverse. Immunity is the general policy, and liability the exception. This should change.*<sup>76</sup>

## 6. Indemnification

Should a police officer found liable for violating a person's civil rights or otherwise intentionally inflicting harm have to pay a damage award out of their own pocket?

This is the question posed by indemnification. Legally and philosophically, we might

---

(quoting *Wilson v. Layne*, 526 U.S. 603, 617, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) ). See also *City and County of S.F. v. Sheehan*, 135 S. Ct. 1765 (2015),

*Taylor v. Barkes*, 135 S.Ct. 2042 (2015) (denying circuit precedent), *Carroll v. Carman*, 135 S.Ct. 348 (2015).

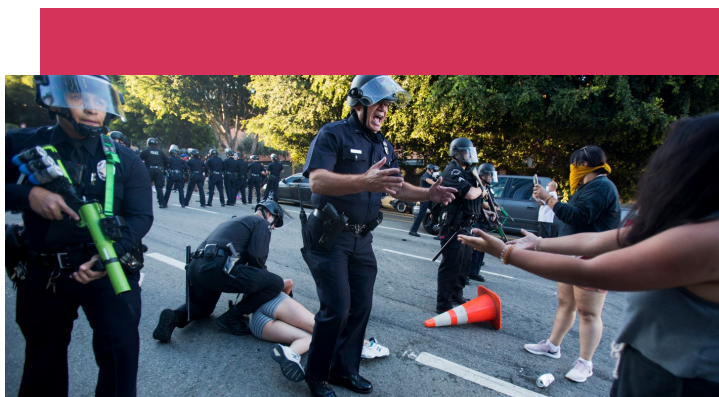
<sup>75</sup> See, e.g., *Gardenhire v. Schubert*, 205 F.3d 303, 311 (6<sup>th</sup> Cir. 2000) ("The ultimate burden is on the plaintiff to show that the defendant is not entitled to qualified immunity.")

<sup>76</sup> John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 269 (2013).



expect the answer to be yes. Nothing in the Section 1983 legislative history or case law compels a municipality to pay for the misdeeds of the police officers they train and employ, unless the misconduct was committed as part of an official policy or custom.<sup>77</sup> The Supreme Court long ago held that cities may be sued for violations of civil rights, but they are not responsible under *respondeat superior* for judgments against their officers.<sup>78</sup> Certainly, forcing officers to internalize the costs of their own misconduct has been a feature of basic deterrence in American law since its beginnings. Having to take personal responsibility for legal judgments against you may be considered a fundamental aspect of accountability.

Yet police officers almost never pay the judgments against them, because of generous, universally recognized norms of indemnification. Judicial doctrines such as qualified immunity come from the erroneous assumption that the harsh financial effects of judgments against police should be ameliorated.<sup>79</sup> The public often assumes the opposite is true, or if indemnification occurs it must be compelled by law.



Neither is the case. An analysis by Professor Joanna C. Schwartz reveals that police officers are virtually always indemnified: she found that governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement.<sup>80</sup>

*Officers contributed to a miniscule proportion of lawsuits resolved in plaintiffs' favor during this six-year period. Approximately 9225 civil rights cases were resolved with payments to plaintiffs between 2006 and 2011 in the forty-four largest jurisdictions in my study. Officers*

---

<sup>77</sup> *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

<sup>78</sup> *Id.* at 697.

<sup>79</sup> Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 *Fordham L. Rev.* 479, 496 (2011).

<sup>80</sup> Joanna Schwartz, *Police Indemnification*, 89 *N.Y.U. LAW REVIEW* 885-885, 893 (2014) (Critically examines the issue central to judicial and scholarly debate about civil rights damages actions: whether law enforcement officials are financially responsible for settlements and judgments in police misconduct cases.)



financially contributed to settlements or judgments in approximately .41% of those cases. Officers were also responsible for a miniscule percentage of the settlements and judgments as measured in dollars. The forty-four jurisdictions paid an estimated \$735,270,772 in settlements and judgments involving civil rights claims on behalf of their law enforcement officers between 2006 and 2011. Officers were financially responsible for \$151,300 to \$171,300 during this period; approximately .02% of the total dollars paid.<sup>81</sup>



Her findings show that law enforcement officers never satisfy a punitive damages award entered against them<sup>82</sup> and almost never contribute anything to settlements or judgments—even when indemnification was prohibited by law or policy, and even when officers were disciplined, terminated, or prosecuted

for their conduct.<sup>83</sup> Many cases of police brutality settle.<sup>84</sup> For example, from 2011 to 2017, New York City spent a total of \$630 million on police misconduct settlements, including paying more than \$100 million each fiscal year from 2015 to 2018.<sup>85</sup> Similarly, from 2011 to 2018, the city of Chicago spent \$389 million on police misconduct settlements.<sup>86</sup> Yet taxpayers—or the insurance premiums they pay on behalf of municipal government—paid for all of it.

---

<sup>81</sup> *Id.* at 913.

<sup>82</sup> “Punitive damages against municipalities are prohibited in part because, the Court has reasoned, ‘neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.’” *Id.* at 888, citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981).

<sup>83</sup> *Id.*

<sup>84</sup> Cheryl Corley, *Police Settlements: How The Cost Of Misconduct Impacts Cities And Taxpayers*, (Sept. 19, 2020), NATIONAL PUBLIC RADIO, available at <https://www.npr.org/2020/09/19/914170214/police-settlements-how-the-cost-of-misconduct-impacts-cities-and-taxpayers> (Corley notes that cities can face hundreds of lawsuits every year charging, among other things, that police used excessive or deadly force or made a false arrest. Many times, the details of settlements are hidden behind confidentiality agreements.)

<sup>85</sup> Claims Report: Fiscal Year 2018, <https://comptroller.nyc.gov/wp-content/uploads/documents/Claims-Report-FY-2018.pdf#page=20> (Last viewed September 5, 2020).

<sup>86</sup> Jonah Newman, *Chicago spent more than \$113 million on police misconduct lawsuits in 2018*, THE CHICAGO REPORTER, (March 7, 2019), <https://www.chicagoreporter.com/chicago-spent-more-than-113-million-on-police-misconduct-lawsuits-in-2018/>.



Indeed, widespread indemnification of police officers by municipalities—often a term in the collective bargaining agreement with police unions—is a direct repudiation of Monell’s reading of Section 1983 liability. As Schwartz argues,

*Although the Court's municipal liability doctrine rests on the notion that there should not be respondeat superior liability for constitutional claims, blanket indemnification practices are functionally indistinguishable from respondeat superior. And although the Court's prohibition of punitive damages against municipalities is rooted in a sense that imposition of punitive damages awards on taxpayers would be unjust, my study reveals that taxpayers almost always satisfy both compensatory and punitive damages awards entered against their sworn servants.<sup>87</sup>*

Many commentators have suggested ways to reform indemnification. Schwartz, for instance, would eliminate qualified immunity entirely in light of indemnification<sup>88</sup>; and, instead of *de facto respondeat superior* she would instead impose financial sanctions on officers as *part* of settlements and judgments depending on culpability.<sup>89</sup> She and others have argued that police departments themselves should have to pay damages awards.<sup>90</sup> Civil rights lawyer Richard Emery offers a scheme of partial indemnity, based on a judge’s determination of several factors arising from each specific case.

*An officer who is more culpable, who commits intentional wrongdoing, or who acts brutally or with particular disregard for a victim's constitutional rights, or whose behavior could not have been anticipated or controlled by the city, should pay a greater percentage of the judgment... The court also should examine the officer's prior disciplinary history... This would put the city on notice*

---

<sup>87</sup> See *supra* Schwartz note 80 at 890. And see generally Barbara E. Armacoast, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 3, (2004) (argues that because the stories police departments tell themselves (and us) about the causes of police violence are flawed and incomplete in essential ways, it is not surprising that judicial, administrative, and departmental responses to police violence are notoriously unsuccessful.)

<sup>88</sup> *Id.*, at 943.

<sup>89</sup> *Id.*, at 944.

<sup>90</sup> *Id.*, at 958, n. 347. See John C. Liu, City of New York Office of the Comptroller, Claims Report Fiscal Year 2011, at 8 (2012).





that its disciplinary procedures are inadequate, and provide financial incentives to improve them. Conversely, if an officer has a history of police misconduct, and received proper and adequate discipline by the city, then the officer should be required to pay more of the judgment himself.<sup>91</sup>

## II. INSTITUTIONAL POLICE REFORMS

### 1. Limiting Police Union Authority

Police unions represent one of the most important but least understood sources of resistance to public accountability for misconduct, especially excessive force.<sup>92</sup> This

resistance comes in the form of union protections against local and state regulation, a problem primarily of state labor law, collective bargaining and local politics, rather than the constitutional rights of aggrieved citizens.<sup>93</sup> Since 1962 when



municipal unions were granted federal rights to bargain collectively with municipalities,<sup>94</sup> police contracts have typically included numerous disciplinary protections that work together with state labor laws, civil service rules and Law Enforcement Bills of Rights (LEOBORs) to frustrate discipline. Justified on due process grounds and concerns that police will be the target of arbitrary discipline, police

<sup>91</sup> Richard Emery, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 597 (2000).

<sup>92</sup> See Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS U. PUB. L. REV. 57, 71 (2012) ("It seems that virtually everyone with an interest in policing - citizens, civic leaders, reform activists, and scholars - believes that police unions are extremely powerful, have a major influence on police practices, and are a principal obstacle to change.").

<sup>93</sup> See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 763 (arguing that "the problem of regulating police power through law has been shoehorned into the narrow confines of constitutional criminal procedure").

<sup>94</sup> Dylan Matthews, *How police unions became so powerful - and how they can be tamed*, VOX, June 24, 2020, available at <https://www.vox.com/policy-and-politics/21290981/police-union-contracts-minneapolis-reform>.



union contracts afford police greater procedural safeguards than citizens suspected of a crime and offer employment assurances that are not available to other public servants. A 2016 report written by Campaign Zero outlines six ways wherein police contracts and bills of rights contribute to making it more difficult to hold police accountable for misconduct:

- Disqualifying misconduct complaints that are submitted too many days after an incident occurs or if an investigation takes too long to complete;
- Preventing police officers from being interrogated immediately after being involved in an incident or otherwise restricting how, when, or where they can be interrogated;
- Giving officers access to information that civilians do not get prior to being interrogated;
- Limiting disciplinary consequences for officers or limiting the capacity of civilian oversight structures and/or the media to hold police accountable;
- Requiring cities to pay costs related to police misconduct including by giving officers paid leave while under investigation, paying legal fees, and/or the cost of settlements;
- Preventing information on past misconduct investigations from being recorded or retained in an officer's personnel file;<sup>95</sup>
- Expunging violations from the record of the guilty officer after little or no time.<sup>96</sup>

Further, there are studies showing that the existence of police union collective bargaining rights are associated with an increase in misconduct and killings by police.<sup>97</sup>

William Finnegan notes that police unions operate in a unique social and political space that differs from traditional unions. "Police unions enjoy a political paradox. Conservatives traditionally abhor labor unions but support the police. The left is critical of aggressive policing yet has often muted its criticism of police unions—which are, after all, public-sector unions, an endangered and mostly progressive species."<sup>98</sup>

---

<sup>95</sup> DeRay McKesson, Samuel Sinyangwe, Johnetta Elzie and Brittany Packnett, *Police Union Contracts And Police Bill Of Rights Analysis*, (June 19, 2016), <https://static1.squarespace.com/static/559fbf2be4b08ef197467542/t/5773f695f7e0abbdfe28a1f0/1467217560243/Campaign+Zero+Police+Union+Contract+Report.pdf>

<sup>96</sup> See *supra* Thomson-DeVeaux note 7.

<sup>97</sup> See Benjamin Sachs, "It's Time to Change the Law and End the Abuse," ONLABOR, (June 4, 2020), citing studies.

<sup>98</sup> William Finnegan, *How Police Unions Fight Reform*, NEW YORKER, (July 27, 2020), <https://www.newyorker.com/magazine/2020/08/03/how-police-unions-fight-reform>.



They derive from a different tradition, too. Before the New Deal created the National Labor Relations Board, police departments were often private (e.g., Pinkertons) and called into labor conflicts by industry leaders to clash physically with union members and break up strikes.<sup>99</sup> As police began to form their own unions, the Great Migration dramatically increased the Black population of northern cities, heralding the era of



urban policing. Along with rising crime rates, came a more concentrated police presence in ghetto communities, leading to the routinely abusive practices that eventually set off riots in cities like Watts, Detroit and Newark in the 1960s.<sup>100</sup> Especially in the Northeast, police unions grew politically stronger as a

useful symbol of law and order, their ranks consistently filled working-class white ethnic conservatives.<sup>101</sup> Their attitudes could be explicitly racist, as they were when 10,000 police officers in New York City rioted in 1992 against the city's first black mayor David Dinkins, some waving signs like "Dump the Washroom Attendant", after he called for the creation of a civilian review board.<sup>102</sup> In 2015, the International Union of Police Associations endorsed Donald Trump for president. Yet union power changed what had been in most places a job with weak pay into a prized status, where in cities like New York, cops often retire after twenty years with full pensions that average \$74,500 a year.<sup>103</sup>

The use of police union power to control officer discipline and frustrate accountability is classically structural. The point of collective bargaining is to contract for the

---

<sup>99</sup> See *supra* Matthews, note 94.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* Quoting Aaron Bekemeyer, Matthews writes, "It's a broader white ethnic politics that uses the language of tradition, neighborhood integrity, hard work, etc., to defend segregated institutions that they benefit from, from schools to certain union jobs in the trade to religious institutions."

<sup>102</sup> See James C. McKinley Jr., *Officers Rally And Dinkins Is Their Target*, THE NEW YORK TIMES (Sept. 17, 1992) ("The officers alternated chants of 'No justice! No police!' with slogans like 'The Mayor's on Crack.'").

<sup>103</sup> Finnegan *supra* note 100.



applicable rules and practices that will guide the institution in its essential roles according to agreed-upon norms. Since the rise of police union power in the aftermath of Detroit's 1967 riot—a riot, ironically, brought about in part because of a police incident that inflamed a long history of outrageous police misconduct, a riot in which police officers executed three Black male students at the Algiers Motel<sup>104</sup>— police unions understood that they needed to formalize their institutional power.<sup>105</sup> In fact, the union bargaining approach was reduced to an influential playbook that teaches negotiators to be unyielding and to “throw out all those traditional notions of right and wrong.”<sup>106</sup> The campaigns go beyond the bargaining table to raising union funds for selective political donations, distributing pamphlets to smear elected officials negotiating on behalf of the public and blatant fear mongering about public safety lapses if police do not get the pay, pension, overtime, health benefits and control over discipline they seek.<sup>107</sup> The approach has been so successful that police unions across the country have used it to such great effect that the playbook's author, Ron DeLord, now believes police unions have gone too far and “need to be prepared to bargain over things that their community thinks are fair.”<sup>108</sup>

Proposals to reform police unions have taken many forms, beginning with public referenda in Portland and other U.S. cities that strip the power to negotiate discipline from collective bargaining agreements. Stephen Rushin, who has conducted extensive empirical research on police unions, proposes making collective bargaining public, so that city officials' concessions to police union will subject them to voter scrutiny.<sup>109</sup> Others have proposed “minority unionism” inside the bargaining unit to compel consideration of minority viewpoints within police unions.<sup>110</sup> These are structural proposals—most would change fundamental institutional operating rules

---

<sup>104</sup> Deneen L. Brown, “‘Detroit’ and the police brutality that left three black teens dead at the Algiers Motel,” THE WASHINGTON POST, August 4, 2017.

<sup>105</sup> See Kim Barker, Michael H. Keller and Steve Eder, “How Cities Lost Control of Police Discipline,” The New York Times, Dec. 22, 2020. See also Steve Greenhouse, *How Police Unions Enable and Conceal Abuses of Power*, NEW YORKER, June 18, 2020. <https://www.newyorker.com/news/news-desk/how-police-union-power-helped-increase-abuses>.

<sup>106</sup> The manual is *Police Association Power, Politics, and Confrontation: A Guide for the Successful Police Labor Leader* by Ron DeLord, John Burpo and Michael Shannon, quoted in Michael H. Keller and Kim Barker, “Police Unions Won Power Using His Playbook. Now He’s Negotiating the Backlash.” The New York Times, March 10, 2021, available at <https://www.nytimes.com/2021/03/10/us/police-unions.html?referringSource=articleShare>.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191 (2017).

<sup>110</sup> Catherine L. Fisk and L. Song Richardson, *Police Unions*, 85 GEO.WASH. L. REV. 712, 721 (requiring “police departments to meet and confer with labor representatives other than the certified police union”).



and procedures. Early experimentation with them only months since last summer's protests over the killing of George Floyd indicates that the once unshakeable power of police unions over discipline may be undermined by the exercise of that power itself.

## 2. Abolish the Police

Abolitionists call for the disbandment of police altogether. According to abolitionists, policing is a self-replicating system of violence against black and brown communities and is inseparable from structural racism. Unlike reformists, abolitionists assert that



more training, increasing police surveillance (e.g. body cams), or using civilian review to address police misconduct, does not lead to structural changes in policing. This is due to the current framework of policing that centers punishment instead of restorative justice.<sup>111</sup>

Opponents of abolitionism raise concerns about the potential rise of violent crime resulting from the disbandment of policing.<sup>112</sup> A growing body of research shows a negative correlation between police presence and violent crime.<sup>113</sup> However, residents and local organizations can play a central role in creating safe and strong communities if they are provided with the same resources that are given to police departments. There is data to suggest that a communal model of collective efficacy may be highly effective in reducing violent crime.<sup>114</sup> The idea is to empower local

---

<sup>111</sup>Sean Illing, *The "Abolish The Police" Movement, Explained By 7 Scholars And Activists*, VOX, (June 12, 2020), <https://www.vox.com/policy-and-politics/2020/6/12/21283813/george-floyd-blm-abolish-the-police-8cantwait-minneapolis>.

<sup>112</sup> Patrick Sharkey, *The Long Reach of Violence: A Broader Perspective on Data, Theory, and Evidence on the Prevalence and Consequences of Exposure to Violence*, ANNUAL REVIEWS, (October 13, 2017), <https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-032317-092316> (Discusses the need for a broader conceptualization of exposure to violence, and offers an expanded, more creative set of methods to measure and identify the long reach of violence. Over the past 10 years, an expanding body of research demonstrates that violence negatively impacts community life, children's academic trajectories and healthy child development.)

<sup>113</sup> Steve Mello, *More COPS, less crime*, Journal of Public Economics Vol. 12 Pages 174-200, (2018), <http://www.princeton.edu/~smello/papers/cops.pdf>, (Discussing the results of a unique natural experiment generated by the distribution of grants to hire over 7000 police officers to estimate the causal effect of police on crime.)

<sup>114</sup> Robert J. Sampson, Stephen W. Raudenbush, Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, (2007), SCIENCE, pp. 918-924, <https://science.sciencemag.org/content/277/5328/918> (Discusses multilevel analyses that shows that a collective efficacy yields a high between-neighborhood reliability and is



residents and local coalitions, to hire and train professionals in various fields of community service including: conflict mediation, violence interrupters, youth outreach teams, case workers, mental health counselors, crisis response teams, maintenance and beautification crews, data analysts, liaisons to public agencies. Under this model and a long-term commitment from local municipalities, it is hoped that this would yield an effective substitute for placing community safety in the hands of the residents. Nonetheless, abolition has garnered substantial skepticism even from within communities where police misconduct is a problem.

### 3. Defund the Police

The proposal to defund the police became one of the starkest rallying cries of the 2020 summer protests over police brutality. Frequently confused for abolition, the idea has variants along a spectrum ranging from the more efficient reallocation of scarce resources to the punitive withholding of funding as restitution for institutional abuses. The essential idea is that spending on police continues to grow along with the power of police, and that this fiscal and lethal growth comes at the expense of other important public services, such as education, mental health assistance and employment programs, that are more effective at preventing crime and building people's human capital.<sup>115</sup>

City (and sometimes county) budgets reveal a tremendous commitment to law enforcement, even as crime has gone down. From 1977 to 2017, state and local government spending on police increased from \$42 billion to \$115 billion.<sup>116</sup> While crime has decreased in most places, poverty and economic immobility has not. For instance, Baltimore had a poverty rate of about 22% in 2017. That year, according to one comprehensive account, Baltimore devoted 19% of its total operating budget to police and sheriff spending, but only 16.1% to all of the following services: public education, substance abuse and mental health, housing and community

---

negatively associated with variations in violence, when individual-level characteristics, measurement error, and prior violence are controlled).

<sup>115</sup> For basic arguments in favor of divestment, see Paige Fernandez, *Defunding Police Isn't Punishment--Will Actually Make Us Safer*, COSMOPOLITAN.ORG, (June 4, 2020), available at <https://www.cosmopolitan.com/politics/a32757152/defund-police-black-lives-matter/>

<sup>116</sup> Polly Mosendz and Jameelah D. Robinson, *While Crime Fell, the Cost of Cops Soared*, BLOOMBERG NEWS, (June 4, 2020), <https://www.bloomberg.com/news/articles/2020-06-04/america-s-policing-budget-has-nearly-tripled-to-115-billion>



development, educational grants, employment development, and the Office of Human Services which includes services for the homeless and low- and moderate-income families.<sup>117</sup> In L.A., it was 25.7% of operating funds to police while New York's relatively low 8.2% represented total spending on police of almost \$5 billion.<sup>118</sup> These facts buttress a fiscal efficiency argument in favor of defunding or "invest/divest."

Opponents argue that defunding misses the point in a punitive and counterproductive way. The neighborhoods most in need of police protection do not favor a diminished police presence, even if they object to police misconduct. Policing needs to improve through reform, not divestment of resources. Reform is expensive, which may require *more funding*, as the Biden administration has suggested, not less.<sup>119</sup>

From a structural point of view, this is an important local government issue. It's possible that *both* critical non-police services are severely underfunded while police forces should maintain their funding levels. It need not necessarily entail a zero sum between the two sets of services. But the argument for defunding goes further than pointing to inefficiency and underinvestment in community social capital. It unmistakably implies that current police funding levels feed an abusive power

hierarchy at taxpayer expense but without taxpayer consent. For some proponents, this reflects the immoral nature of many local budgets.<sup>120</sup> They argue, therefore, that overspending on police and underspending



<sup>117</sup> See Kate Hamaji et al., "Freedom to Thrive: Reimagining Safety & Security in Our Communities," THE CENTER FOR POPULAR DEMOCRACY, (Jul. 2, 2017), available at <https://populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf>

<sup>118</sup> *Id.*, at 2.

<sup>119</sup> See Reuters Staff, *Biden suggests more police funding, no jail for drug offenders*, REUTERS, (Feb. 16, 2021) available at <https://www.reuters.com/article/us-usa-biden-police/biden-suggests-more-police-funding-no-jail-for-drug-offenders-idUSKBN2AHOC6> ("We have to put more money for this to work so we have legitimate community policing, and we are in a situation where we can change the legislation," he added.)

<sup>120</sup> See generally Hamaji, "Freedom to Thrive" *supra* note 117.

(2017), <https://populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf>.



on institutions of opportunity is a structural flaw in the system of public budgeting, that the misallocation of public funds to police departments not only robs from more productive expenditures but finances the very disadvantages that contribute to criminal conduct in the first place.<sup>121</sup>

Law professors Stephen Rushin and Roger Michalski offer an empirically based argument against defunding by showing how inequalities among police forces demonstrate the need to treat law enforcement as a public good, paid for equitably by all state or federal taxpayers, rather than through local property taxes.<sup>122</sup> They describe huge regional differences in pay between small rural, often Southern towns with a handful of officers, compared to larger cities in California and New York. Even nearby departments compete with each other, increasing pay disparities. Further, fiscal disparities reflect training resources (and surely the capacity of officers to pay their own liability damages). Many municipalities rely on part-time officers, and many officers work part-time across multiple departments. Applications to become officers are down nationally, especially among people of color.<sup>123</sup> In all, Rushin and Michalski present a descriptive case about the structural problems of police underfunding caused by tax base disparities across municipalities that suggests a community tends to get only the quality of policing it's able to pay for.

As informative as their analyses are, they may miss the crux of the defund issue. The target of many defund campaigns are in fact the well-funded police forces of larger municipalities where the target disparity is not across police departments but between the city police department and other services in the same city. Those social services play a remedial, sometimes safety net, role in poorer communities damaged by the structural inequality the authors decry. While law enforcement budgets (and union power) have grown, those agencies, nonprofit contractors and service providers have seen their budgets grow slowly or get cut. The police underfunding argument, therefore, compares apple jurisdictions to oranges.

---

<sup>121</sup> *Id.* at 3, "Elected officials have stripped funds from mental health services, housing subsidies, youth programs, and food benefits programs, while pouring money into police forces, military grade weapons, high-tech surveillance, jails, and prisons."

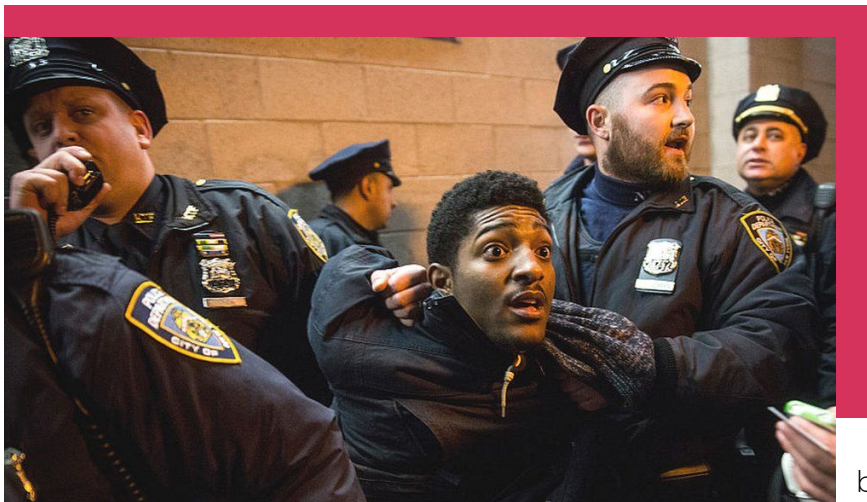
<sup>122</sup> Rushin and Michalski, *Police Funding*, 72 FLA. L. REV. 277 (2020).

<sup>123</sup> *Id.*, at 296-98.





Nevertheless, the Rushkin and Michalski conclusions represents one of a variety of arguments asserting that police reform is very costly and justifies more spending on police, not less. This may or may not be true. But it is fair to pause and ask if insistence on mere obedience to constitutional rules—a requirement of police in all communities since the dawn of policing—should cost more than it already does. Much of this analysis of police misconduct and the absence of accountability indicates that deliberate structures in place protect patterns of known and repeated police misconduct from being punished, taxed, investigated or internally disciplined. The idea that these same institutions should command even more public resources



to reform their conventional practices lacks a certain credibility from a structuralist perspective. This is because a structural approach presumes a high degree of identity between institutional

outcomes—police misconduct disproportionately exercised against people of color—and institutional design—rules, practices and organizational norms. It asks why law enforcement would even be compelled to use extra reform dollars to institute reforms of practices that have always enjoyed favor. What is the incentive for police departments that in recent years have spent millions militarizing their equipment and tactics, for example, to spend millions more implementing de-escalation and accountability measures? Police misconduct is not a new phenomenon requiring fresh institutional thinking. It may instead be instrumental to long-internalized beliefs about good policing, which, if true, would require more externally imposed constraints on institutional practice.

On the other hand, supporting the reform-is-costly argument is evidence from consent decrees entered into between the Department of Justice pursuant to its Section 14141 authority and police forces shown to follow a pattern and practice of



excessive force. For instance, the DOJ's investigation of Cleveland, Ohio's police force up to and including the killing of 12-year-old Tamir Rice called for internal reforms that could cost up to \$55 million dollars over five years.<sup>124</sup> However, these changes would follow attempts by the DOJ just ten years earlier to get the Cleveland Police Department to reform.<sup>125</sup> If police departments under federal consent decrees routinely ignore or negligently implement reforms, the taxpaying public is at risk of subsidizing police misconduct *three* times—first, in paying the cost of unsuccessful reform efforts, second in suffering the offenses themselves, whose immediate costs are born by members of the public, and third in indemnifying the civil liability awards won by litigants against the wrongful conduct of police officers. This pattern of serial cost-shifting threatens deterrence and therefore accountability.

Yet there is a growing movement to defund police in schools that may demonstrate how the reallocation/defund approach may work in a more selective way. It may also indicate a preference for disinvestment mainly in cities and police departments above a certain size. The most traction has occurred in the school policing context where a few large city districts (e.g., Los Angeles, Minneapolis, Oakland, Denver, Portland and Seattle) have diverted billions of dollars from their education budgets to forgo cops with guns in favor of other trained professionals.<sup>126</sup> The persuasive logic of some form of investment/divestment is more apparent when focusing solely on the interest in school safety and the particular interactions between children and school resource officers.

---

<sup>124</sup> U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE CLEVELAND POLICE DEPARTMENT 7-9 (2014), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland\\_division\\_of\\_police\\_findings\\_letter.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf)[<https://perma.cc/8CKM-53GF>] (describing the background that led to the investigation of the Cleveland Police Department and explicitly mentioning "serious allegations that CDP officers use excessive force, and that the Division fails to identify, correct, and hold officers accountable for using force in violation of the Constitution").

<sup>125</sup> According to the DOJ, "CDP's systemic failures are such that the Division is not able to timely, properly, and effectively determine how much force its officers are using, and under what circumstances, whether the force was reasonable and if not, what discipline, change in policy or training or other action is appropriate." *Id.*, at 5. Investigators admitted bias in favor police officers and evaluated conduct against a deferential standard not supported by the law. Discipline was extremely rare in a department the DOJ found suffered from extreme systemic problems of officer misconduct. Many of the same structural deficiencies at the CDP had already been found and investigated by the DOJ *ten years before*. *Id.*

<sup>126</sup> See Jill Cowan, Shawn Hubler and Kate Taylor, "Protesters Urged Defunding the Police. Schools in Big Cities Are Doing It." THE NEW YORK TIMES, (Feb. 18, 2021), at <https://www.nytimes.com/2021/02/17/us/los-angeles-school-police.html?referringSource=articleShare>.



Finally, the defund, or invest/divest, debate is further evidence of the structural nature of brutality and police misconduct. Defund proponents recognize the significance of police authority to the state as a matter of its fiscal commitments. What governments spend on they value most. So defunding police would be more than a rhetorical gesture at reform; it would reposition law enforcement in the hierarchy of public goods and take away some of its budgetary power. (It should be noted that other public union members, such as teachers, see this occur with some frequency.) Defunding also takes policing out of a vacuum and into the larger context of moral budgeting and what it costs to create a more equitable society. By proposing alternative interventions to the problem of crime and public safety, it at least alters the paradigm toward a consideration of ideas whose effectiveness can be tested empirically, such as whether de-escalation specialists, mental health intervenors or enhanced school funding have a measurable long-term effect on protecting and improving lives.

#### 4. Demilitarize the Police

Police militarization is “the process whereby civilian police increasingly draw from, and pattern themselves around, the tenets of militarism and the military model”.<sup>127</sup> In recent years, the federal government and local police have enabled an increase in military grade weapons and armor.<sup>128</sup> American police are armed with more than seven billion dollars’ worth of surplus military equipment supplied by the Pentagon to eight thousand law-enforcement agencies since 1997.<sup>129</sup> In the 1990s, Congress created the 1033 Program as part of the National Defense Authorization Act. As Anne Kim of the Washington Monthly explains, it is a very costly program:

*Since its inception, the U.S. Defense Department has doled out more than \$7.2 billion in weapons and gear, including armored personnel carriers, assault rifles, and other items that have no place on our*

---

<sup>127</sup> Peter B. Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, (December 13, 2007), Available at <https://cjmasters.eku.edu/sites/cjmasters.eku.edu/files/21stmilitarization.pdf>

<sup>128</sup> CHARLES KOCH INSTITUTE, *A History of Law Enforcement in America*, <https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/militarization-of-police/> (Last visited July 20, 2020).

<sup>129</sup> Christopher Ingraham, The Pentagon gave nearly half a billion dollars of military gear to local law enforcement last year, THE WASHINGTON POST, (August 14, 2014 at 8:56 a.m. PD), <https://www.washingtonpost.com/news/work/wp/2014/08/14/the-pentagon-gave-nearly-half-a-billion-dollars-of-military-gear-to-local-law-enforcement-last-year/>.



streets. The initial intent of the program was to provide local law enforcement with the needed resources to combat the “war on terror” and the “war on drugs.” Instead, the war that’s being waged is against communities of color, especially when they dare to protest yet another killing of an unarmed black man by a white officer.

As it stands, the Section 1033 program is a deadly pipeline that is turning American cities into battlefields. That’s why House Democrats have rightly proposed to curtail it in their new police reform legislation,

called the Justice in Policing Act. In

addition to banning chokeholds and no-knock warrants, the bill would ban the transfer of certain kinds of military equipment to



local police, including bayonets, grenade launchers, grenades, armored drones, armored vehicles, and silencers.<sup>130</sup>

Further evidence of militarization is the tactic of no-knock raids. As Peter B. Kraska explains, no-knock raids “constitute a proactive contraband raid”.<sup>131</sup> According to Kraska:

*“The purpose of these raids is generally to collect evidence (usually, drugs, guns, and/or money) from inside a private residence. This means that they are essentially a crude form of drug investigation. A surprise ‘dynamic entry’ into a private residence creates conditions that place the citizens and police in an extremely volatile position necessitating extraordinary measures. These include conducting*

---

<sup>130</sup>Anne Kim, *A Simple Way to Demilitarize the Police*, WASHINGTON MONTHLY, (June 17, 2020), <https://washingtonmonthly.com/2020/06/17/a-simple-way-to-demilitarize-the-police/>.

<sup>131</sup> See Kraska *supra* note 79.



*searches often during the predawn hours, usually in black military BDUs, hoods, and military helmets; a rapid entry into the residence using specialized battering rams or entry explosives; the occasional use of flash-bang grenades designed to temporarily disorient the occupants; a frantic room-by-room search of the entire residence where all occupants are expected to immediately comply with officers' urgent demands to get into the prone position; and handcuffing all occupants. If a citizen does not comply immediately more extreme measures are taken—these situations may involve nonlethal and lethal weaponry.”<sup>132</sup>*

Consider the case of 26-year-old emergency medical technician Breonna Taylor. Taylor was fatally shot by Louisville Metro Police Department (LMPD) officers Jonathan Mattingly,

Brett Hankison, and Myles Cosgrove on March 13, 2020. Police used a battering ram and entered Taylor’s apartment. The police were investigating two men who they believed were selling drugs out of a house that was far from Ms. Taylor’s home. Because a judge-



signed warrant allowed the police to search Ms. Taylor’s residence, police were permitted to enter without warning or without identifying themselves<sup>133</sup> as law enforcement.<sup>134</sup>

---

<sup>132</sup> *Id.*

<sup>133</sup> Tess Duvall & Darcy Costello, “Louisville police pursued ‘no-knock’ search warrant in fatal shooting of ER tech in her home,” *Courier Journal*, May 12, 2020, available at <https://www.courier-journal.com/story/news/2020/05/12/breonna-taylor-louisville-emt-not-main-target-drug-investigation/3115928001/>

<sup>134</sup> Inside Edition Staff, *Breonna Taylor Case: Judge Signed 5 No-Knock Warrants in 12 Minutes: Report*, (June 22, 2020, 11:54 AM PDT), <https://www.insideedition.com/breonna-taylor-case-judge-signed-5-no-knock-warrants-in-12-minutes-report-60273>.



### III. THE STATE OF REFORM

In this paper, we have examined some of the key structural problems preventing meaningful accountability for excessive use of force by police and several possible approaches to solving them. Writing around the anniversary of many of the deaths of Black people killed by police that set off massive demonstrations last summer, we turn finally to the state of reform. At the local and state level, the well-organized intensity of focus on legislative reform has produced some notable structural changes. The Portland, Oregon city council cut the Portland Police Bureau budget by \$27 million and voters approved a new independent police oversight board in November, with a new collective bargaining agreement and state legislative proposals up for consideration.<sup>135</sup> Local officials in Minneapolis, MN, where George Floyd was killed, cut over \$8 million from the police budget and are locked in a battle over whether to take public safety out of police hands entirely.<sup>136</sup> Following the killing of Breonna Taylor by police executing a no-knock warrant, a bill was introduced in the Kentucky General Assembly that addresses many aspects of policing as well as police officer disciplinary proceedings. “Breonna’s Law” would require police to give notice before entering to execute a warrant, activate body-worn cameras and establish rebuttable presumptions in investigative proceedings regarding unrecorded conduct. The law would also expand the scope of suits against state and local governments and limit defenses.<sup>137</sup> We earlier noted that several cities have begun diverting funding originally intended for police, especially in schools, to other municipal services.

However, no reform effort is as structurally ambitious as the George Floyd Justice in Policing Act of 2021 that passed the House of Representatives on June 17, 2020. In its current state, H.R. 1280 would address multiple aspects of police accountability, record-keeping and transparency, training, racial profiling and a separate section on body cameras.<sup>138</sup> As structuralist national legislation, the proposed law would

---

<sup>135</sup> See Jim Redden, “Police reform will move forward in 2021,” PORTLAND TRIBUNE, March 16, 2021, available at <https://pamplinmedia.com/pt/493062-395505-police-reform-will-move-forward-in-2021>.

<sup>136</sup> Joshua Vaughn, “How George Floyd’s Death Is Pushing Minneapolis to Rethink Public Safety,” The Appeal, February 19, 2021.

<sup>137</sup> See House Bill 21, available at <https://apps.legislature.ky.gov/record/21rs/hb21.html>.

<sup>138</sup> H.R. 1280 – 117<sup>th</sup> Congress (2021-2022), available at <https://www.congress.gov/bill/117th-congress/house-bill/1280/text>.



centralize through federal oversight (principally by the Department of Justice Civil Rights Division) what is mostly local decisionmaking and would standardize the practice of policing in key respects. Specifically, the Act would mandate state data collection, increase investigatory powers of independent bodies, create a national police misconduct registry, ban no-knock warrants in drug cases, incentivize a ban on chokeholds, require body cameras, prohibit racial profiling, improve training and hiring of diverse law enforcement departments, study ways to change the culture of law enforcement and significantly increase funding for federal enforcement of the Act itself. Some of this would follow enhancement of traditional powers of the Attorney General’s office, such as pattern and practice investigations.<sup>139</sup> Still more would occur through substantive changes in the law—for instance, the elimination of qualified immunity as a defense<sup>140</sup> and replacement of Section 242’s virtually unattainable “willfully” standard with a “knowingly or recklessly”<sup>141</sup> depriving a person of their constitutional rights. The proposed statute uses significant incentives and penalties to reach areas of local control, such as whether a municipality can collectively bargain certain disciplinary measures with police unions. For instance, Section 103(d) of the Act would deny significant federal grants to government units that entered into or renewed any agreement with a labor organization that would hinder pattern and practice relief or conflicts with the terms of a consent decree.

As a structural remedy it seems as fair to ask will it work as whether it can become law. The comprehensive logic of the Act suggests that if you properly train officers in a diverse department and in a de-militarized culture of violence prevention, report the true dimensions of police misconduct locally and in comparison to national standards, impose discipline from within as well as facilitate more certain criminal and civil consequences from without, the system of policing will change. This would be welcome, not least of all for the communities of color, who, in the cruelest irony of systemic oppression, have *a/ways* had the greatest unmet need for quality public safety. Yet right now, the politics of the current Congress make passage of the law unlikely. The events of the past year have hardened pro-police instincts into backlash;

---

<sup>139</sup> *Id.*, Section 103.

<sup>140</sup> *Id.*, Section 102.

<sup>141</sup> *Id.*, Section 101.



at least half the country sees the proposed statute as a radical gesture of hard-left lawlessness. Democrats and Republicans unveiled competing proposals to tackle the issues. As noted by Emily Cochrane and Luke Broadwater of the *New York Times*:

*The Democratic measure would make federal grant money contingent on the entity or agency receiving the funds explicitly prohibiting racial, religious or other discriminatory profiling, and mandating anti-bias training for all of its officers. It would also increase funding at the Justice Department for “pattern or practice” investigations.*

*The Republican bill does not address racial profiling. It would establish a program through the National Museum of African American History and Culture in Washington that focuses on the history of racism in America, with the goal of training people to educate state and local law enforcement personnel about racial reconciliation. And it would create a Commission on the Social Status of Black Men and Boys that would study rates of homicide, arrest and incarceration and death, among other things.<sup>142</sup>*

The Republican bill situates the problem in reconciliation and educational training about race relations, the proper subjects for museums, not courtrooms or disciplinary hearings.

This is not a disconnect over structure or its meaning. Both sides in Congress understand what structure is—the thing that makes things go. Instead it is a dispute as old as emancipation over what a system of police accountability should be designed to do.



---

<sup>142</sup>Emily Cochrane and Luke Broadwater, *Here Are the Differences Between the Senate and House Bills to Overhaul Policing*, N.Y. TIMES, (Updated June 23, 2020), <https://www.nytimes.com/2020/06/17/us/politics/police-reform-bill.html>.





# CONCLUSION

In this paper, we endeavored to crystallize the protests of an historic time of racial reckoning over police brutality into a structural accounting of the problem and its possible solutions. We examined the legal impediments to police accountability for excessive force as well as the institutional obstacles, all perceived as system design features rather than procedural aberrations. As of this writing, the need for sober analysis remains strong. The police officers who suffocated a mentally distressed Daniel Prude with a hood over his head in Rochester, New York will not face criminal charges.<sup>143</sup> The police officers who took Elijah McClain’s life with the injection of a toxic chemical will not be prosecuted.<sup>144</sup> The police officers who shot into the nighttime home of Breonna Taylor will not be prosecuted for her death—although one will face charges for recklessly risking life to her neighbors.<sup>145</sup> The City of Minneapolis has settled with the family of George Floyd for a record \$27 million dollars.<sup>146</sup> The first officer charged in his death is on trial as we go to press.<sup>147</sup> These are not stories every generation of Americans should be able to tell.



<sup>143</sup>See Michael Hill and Carolyn Thompson, *No Charges Against Rochester Police Officers Involved in Daniel Prude's Death*, TIME, (Feb. 23, 2021), available at <https://time.com/5941946/no-charges-police-officers-daniel-prude-rochester-new-york/>

<sup>144</sup>See Claire Lampen, *What We Know About the Killing of Elijah McClain*, THE CUT, (Feb. 22, 2021), available at <https://www.thecut.com/2021/02/the-killing-of-elijah-mcclain-everything-we-know.html>

<sup>145</sup>See Associated Press Staff, *Police officers not charged for killing Breonna Taylor*, POLITICO (Sept. 23, 2020), available at <https://www.politico.com/news/2020/09/23/grand-jury-indicts-police-officer-breonna-taylor-death-420606>.

<sup>146</sup>See, Rachel Treisman, *Minneapolis Reaches \$27 Million Settlement With Family Of George Floyd*, NATIONAL PUBLIC RADIO, (Mar. 12, 2021), available at <https://www.npr.org/2021/03/12/976525200/minneapolis-reaches-27-million-settlement-with-family-of-george-floyd>

<sup>147</sup>See, Bill Chappel, *Chauvin Trial: Judge Reinstates 3rd-Degree Murder Charge Over George Floyd's Killing*, NATIONAL PUBLIC RADIO, (Mar. 11, 2021)

<https://www.npr.org/2021/03/11/976008607/chauvin-trial-judge-reinstates-3rd-degree-murder-charge-over-george-floyds-killi>



## FURTHER READING

Brentin Mock, "The Price of Defunding the Police", July 14 2017, <https://www.bloomberg.com/news/articles/2020-07-13/churches-are-building-housing-developments-in-god-s-back-yard>.

Prior to George Floyd's murder, conversations were already in place about efforts to curb police budgets with rising cases of police killings of unarmed black people. This article breaks down the comparative costs of policing across major metropolitan cities as well as how those funds could be used in inner city communities.

Ian Millhiser, "Why police can violate your constitutional rights and suffer no consequences in court", June 3, 2020, <https://www.vox.com/2020/6/3/21277104/qualified-immunity-cops-constitution-shaniz-west-supreme-court>

This article explains the legal significance of qualified immunity in handling police misconduct and the hopes of bipartisan agreement to dismantle it moving forward.

Jeffrey A Butts, Caterina Gouvis Roman, Lindsay Bostwick, Jeremy R Porter. "Cure violence: a public health model to reduce gun violence." Annual review of public health (2015): 39–53.

This article suggests a public health approach to gun violence reduction that seeks to change individual and community attitudes and norms about gun violence. It is through this model that communities can improve without the surveillance of law enforcement.

Jill McCorkel, "Police unions are one of the biggest obstacles to transforming policing", June 17, 2020, <https://theconversation.com/police-unions-are-one-of-the-biggest-obstacles-to-transforming-policing-140227>

This article goes into how police unions use their political clout to avoid transformational change to into their respective departments and the methods they use to obstruct structural police reform.



Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 1 (2017), Available at: <https://digitalcommons.law.yale.edu/ylj/vol127/iss1/1>

This Article reports the findings of the largest and most comprehensive study to date of the role qualified immunity plays in constitutional litigation.

John Kelly and Mark Nichols, "We Found 85,000 Cops Who've Been Investigated for Misconduct. Now You Can Read Their Records" June 11, 2020, <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002>

This article provides a public database to access the records of police officers who are guilty of police misconduct.

John Rappaport, "How Private Insurers Regulate Public Police.", *Harvard Law Review* (2017): 1541-1613.

This article describes and assess the contemporary market for liability insurance in the policing context and the effects of insurance on police behavior. The article offers proposals into how local municipalities can purchase their own respective insurance coverage which would lead to substantive police reform.

JOHN J. DONOHUE III and PETER SIEGELMAN. "ALLOCATING RESOURCES AMONG PRISON AND SOCIAL PROGRAMS IN THE BATTLE AGAINST CRIME." *Yale Law Review* (1998): 1-44.

This article illustrates that cutting spending on prisons and using the savings to fund intensive preschool education would reduce crime.

Mariame Kaba. "Yes, We Mean Literally Abolish the Police". June 12, 2020. <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html>

This article breaks down the arguments in favor of abolishing the police and what it would mean for communities of color in policing their own communities.

Maya Dukmasova. "Police abolitionists find fuel in the protests", June 1, 2020, <https://www.chicagoreader.com/chicago/george-floyd-protests-police->



abolition/Content?oid=80349691

This article speaks on the importance of the uprising in addressing the longstanding practice of extrajudicial killings of black people.

Meghan G. McDowell & Luis A Fernandez. "Disband, Disempower, and Disarm': Amplifying the Theory and Practice of Police Abolition." *Crit Crim* 26 (2018): 373–391.

This essay uses the history of abolitionism in American politics in developing a nuance theory of policing and restorative justice. This essay argues that by attacking the police as an institution, by challenging its very right to exist, the contemporary abolitionist movement does contain the potential to make a more radical turn.

Michael Schwartz and Ali Watkins. "Why the \$6 Billion N.Y.P.D. Is Now a Target of 'Defund the Police'". June 28, 2020.

<https://www.nytimes.com/2020/06/28/nyregion/nypd-budget-defund-police.html>

This article attacks the NYPD budget and how their budget is not justifiable given its history of mistreatment against Black and Latino communities.

Niall McCarthy, "How Much Do U.S. Cities Spend On Policing?" June 12, 2020, <https://www.statista.com/chart/10593/how-much-do-us-cities-spend-on-policing>

This cite illustrates how much money US cities on their respective policing departments in major metropolitan cities.

Noam Scheiber, Farah Stockman and J. David Goodman. "How Police Unions Became Such Powerful Opponents to Reform Efforts", June 20, 2020.

<https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html>

This article details the history of how police unions became a powerful institution in and of itself in obstructing structural police reform.

Reade Levinson. "Across the U.S., police contracts shield officers from scrutiny and discipline" January 13, 2017, <https://www.reuters.com/investigates/special-report/usa-police-unions>

This article investigates the contents of how police contracts perpetuate the



pattern of corruption and misconduct at the cost of public trust.

Robert Iafolla, "Defunding Is One Place Police Unions See Vaunted Powers Limited" June 12, 2020. <https://news.bloomberglaw.com/daily-labor-report/defunding-is-one-place-police-unions-see-vaunted-powers-limited>

This article illustrates how police unions certainly could make defunding maneuvers drawn out and politically complicated. Police defunding measures that take certain duties away from cops could run into a legal obstacle depending on the specificity of a police union's collective bargaining agreement.

Teresa E. Ravenell & Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 Vill. L. Rev. 839 (2017), <https://digitalcommons.law.villanova.edu/vlr/vol62/iss5/1>

This law review article explores indemnification decisions in Philadelphia and found that they are seldom dictated by § 1983's elements or indemnification statutes, but instead are guided by policy considerations, which overwhelmingly direct decision-makers towards indemnification. The article concludes that although indemnification undermines officers' financial accountability by blurring the line between individual and municipal liability, it furthers several policy goals and addresses multiple policy concerns and, accordingly, is an appropriate end to most § 1983 disputes.

