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Taking the Knee No More: Police Accountability and the Structure of Racism

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Abstract

From before the birth of the republic to the present day, police brutality has represented a signature injustice of state authority, especially against African Americans. Defining that injustice is the lack of accountability for official misconduct. The rule of law has systematically failed to deter lawbreaking by its law enforcement departments. This Article explores the various legal and institutional means by which accountability should be imposed and demonstrates the design elements of structured immunity. Using Critical Race Theory and traditional civil rights law notions of how structural racism operates, this Article argues that transformative change can only come about through recognition that the current system achieves the objectives for which it was designed. These objectives must change.

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* Distinguished Professor of Law, Justice John J. Francis Scholar and Director of the Rutgers Center on Law, Inequality and Metropolitan Equity. This Article would not have been possible without the capable and tireless research assistance of Gatien Laurol. I wish to thank my colleagues Penny Venetis for her critical substantive review of earlier drafts of this report and Lou Raveson for substantive guidance. All mistakes are my own.

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, rose with him only to meet a fusillade of police bullets. It is 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 is that whatever form of justice their families and protesters seek—indictments, convictions, terminations, personal liability—will almost certainly never occur.[1] This Article argues that the unjust lack

1. The murder of Daniel Prude will not yield criminal action. Greg Hanlon, *Cops Won't Face Charges in Case of Daniel Prude, Black Man Who Died After Being Put in 'Spit-Hood'*, PEOPLE (Feb. 23, 2021, 4:47 PM),

of accountability for police excessive force is as predictable as structure, a consequence of racist legal design. It is not an anti-police argument—policing is difficult and necessary work—but pro-accountability.

"The police are the king's men," writes historian Jill Lepore, describing 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.[2] That lineage began with slave codes in the seventeenth century and continued with slave patrols throughout the eighteenth century and well into the nineteenth century.[3] 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 American tribes captured, whipped, and

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https://perma.cc/UFA4-ZJJY. The murder of Elijah McClain produced indictments of the three police officers who subdued and asphyxiated him, as well as two paramedics who are alleged to have failed to render timely assistance, but their arraignments have been repeatedly delayed. Allison Sherry, *Case Against Aurora Police and Paramedics in Elijah McClain's Death Delayed Again*, CPR NEWS (Nov. 4, 2022, 3:24 PM), https://perma.cc/K3NH-M68P. In Breonna Taylor's case, none of the officers were charged with state crimes for shooting her; the single officer who was indicted for recklessly firing into Taylor's building and putting neighbors at risk was acquitted. Erin Donaghue, *No Charges in Death of Breonna Taylor; Officer Indicted for Endangering Neighbors*, CBS NEWS (Sept. 23, 2020, 11:44 AM), https://perma.cc/WA3R-V29S (last updated Sept. 23, 2020, 6:15 PM); Daniel Trotta, *Jury Acquits Only Louisville Officer Charged in Breonna Taylor Raid*, REUTERS (Mar. 3, 2022, 8:24 PM), https://perma.cc/T5Z8-5HDD. The U.S. Department of Justice, however, has filed criminal civil rights charges against four police officers, including one at the scene, for conspiracy to deprive Taylor of her civil rights based on their fraudulent procurement of a no-knock warrant. Dylan Lovan, *Breonna Taylor Supporters Relieved by Charges Against Officers Involved in Her Killing*, PBS NEWS HOUR (Aug. 5, 2022, 7:01 PM), https://perma.cc/AQ65-EMUS. In an unprecedented result, Derek Chauvin, the former Minneapolis police officer primarily responsible for the murder of George Floyd, was convicted of state murder charges as well as federal criminal civil rights charges and sentenced to decades in prison. Laurel Wamsley, *Derek Chauvin Found Guilty of George Floyd's Murder*, NPR, https://perma.cc/B9YC-FDEC (last updated Apr. 20, 2021, 5:37 PM); Steve Karnowski, *Derek Chauvin Gets 21 Years for Violating George Floyd's Civil Rights*, PBS NEWS HOUR (July 7, 2022, 4:31 PM), https://perma.cc/9D7K-G8DE.

2. Jill Lepore, *The Invention of the Police*, NEW YORKER, (July 13, 2020), https://perma.cc/2NA8-AJ2W.

3. *See id.* ("The government of slavery was not a rule of law. It was a rule of police.").

sometimes killed enslaved Africans.[4] The Industrial Revolution brought immigration and new types of crimes, which hastened the modern era in policing.[5] Other historians have noted the wide use of urban police forces against union organizers, strikers, and socialists in the early twentieth century.[6]

Yet the criminalization of Blackness is one of the organizational tenets of policing, a key social construct in the interests of a racialized social order.[7] The exception to the Thirteenth Amendment's prohibition on slavery and involuntary servitude for "punishment for crime whereof the party shall have been duly convicted"[8] was a legal and conceptual loophole to continue the exploitation of Black labor while linking servitude to state-sanctioned punishment.[9] This helps explain why every generation of African Americans, from before Emancipation to after Trump, understands the chronic threat of unjustified force by state actors. Every generation gets The Talk—a stern admonition about how to preserve one's life in an encounter with police—yet everyone knows people who have been mistreated by police because they were presumed to

4. *Id.* This link between military service and violent policing remains true to this day; many cops, especially those most likely to use force, are military veterans. *See* Simone Weichselbaum, *Police with Military Experience More Likely to Shoot*, MARSHALL PROJECT (Oct. 15, 2018, 3:22 PM), https://perma.cc/942Y-MPZQ (describing studies from multiple cities showing correlation between military service and officer shootings).

5. Lepore, *supra* note 2.

6. *See, e.g.*, HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 324–26, 331–36 (35th anniversary ed., 2015) (describing incidents of police violence across the country).

7. *See* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 4 (2019) ("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.")

8. U.S. CONST. amend. XIII, § 1. The full text of § 1, ratified on December 6, 1865, reads: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *Id.*

9. This is historically true even though in the *Civil Rights Cases*, 109 U.S. 3 (1883), the Supreme Court gave Congress the power to use the Thirteenth Amendment to "abolish[] all badges and incidents of slavery." *Id.* at 20.

be criminally inclined. Every generation knows the names and circumstances of its most publicized tragedies—the George Floyds, Elijah McClains, Daniel Prudes, and Breonna Taylors—because law enforcement is the primary institution that both illustrates and reproduces systemic racism. The criminalization of Blackness is a racist organizing principle for both the structure of policing and the denial of accountability for bad policing.

But what precisely does it mean to call these unjust outcomes the consequence of structural design? Structure is the thing that makes things go as they do. It means that even in an ambivalent system of laws and practices, where pro-Black and anti-Black forces have been in active opposition since before the American Revolution, the process by which accountability is supposed to be secured fails. Something—the rule, its interpretation, or its disregard—consistently and predictably gets in the way of enforcement.[10] For example, the Civil Rights Act of 1870[11]—which enacted the criminal statutes 18 U.S.C. § 241[12] and 18 U.S.C. § 242[13]—and the Civil Rights Act of 1871[14]—which enacted the civil statute 42 U.S.C. § 1983[15]—were Reconstruction-era statutes specifically designed to protect the right to life and liberty of freed African Americans (and Union sympathizers) against serial violence by the Ku Klux Klan, white mobs, and local police.[16] The Acts were

10. *See* L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961, 2962 (2015)

> [R]educing the problem of racial violence to the individual police-citizen interaction at issue obscures how current policing practices and culture entrench racial subordination and, thus, racial violence. This is because as a result of our nation's sordid racial history, white supremacy and racial subordination have become embedded not only within social systems and institutions but also within our minds. As a result, unless corrective structural and institutional interventions are made, racial violence is inevitable regardless of whether officers have malicious racial motives or citizens engage in objectively threatening behaviors.

11. Civil Rights Act of 1870, Pub. L. No. 41-114, 16 Stat. 140.

12. § 6, 16 Stat. at 141.

13. § 17, 16 Stat. at 144.

14. Civil Rights Act of 1871, Pub. L. No. 42-22, 17 Stat. 13.

15. § 1, 17 Stat. at 13.

16. *See* Monroe v. Pape, 365 U.S. 167, 174 (1961) ("This Act of April 20, 1871, sometimes called 'the third "force bill"' was passed by a Congress that had the [Ku Klux] Klan 'particularly in mind.' The debates are replete with

passed amid great political conflict.[17] Yet they never served their purpose. Few criminal prosecutions were ever brought against police acting violently under color of state authority.[18] The civil statute was rarely utilized to deter police misconduct until *Monroe v. Pape*[19] was decided in 1960, almost a century after the law's passage.[20] Even this structural attempt to impose federal constraints on local abuses failed to institute new norms of justice and safety from official brutality. Later, this Article examines the more contemporary aspects of judge-made impediments to § 1983's effectiveness that evolved after those inauspicious beginnings to produce the same outcomes: a predictable lack of accountability.[21] The point is to see the systemic resiliency to consequence, reproducing injustice by legal means.

This emphasis on structure is not to distract from the very real effects of state brutality on Black minds and bodies. The injustice of police abuse delivers lasting psychic and physical traumas, whose repetition with impunity deliberately degrades a sense of citizenship for the victim and community as a whole.[22] It is an arbitrarily violent putting into one's place—a place without a humanity worthy of respect. As Dennis Cherry, Sr., disclosed in an interview of police victims,

> I was at their mercy. Whatever they wanted to do to me, they were doing to me. My son was just born three months prior to that. I'm thinking I'm about to die and he's going to grow up without a father, just like I grew up without my father.

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references to the lawless conditions existing in the South in 1871." (citation omitted)), *overruled in part by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

17. *See id.* at 173–80.

18. *See* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 374–77 (5th ed. 2004).

19. 365 U.S. 167 (1961), *overruled in part by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

20. *Monroe* represented a novel (at that time) question of § 1983's reach to include local police abuses. *See id.* at 170. Derrick Bell argues that § 1983's criminal parallel, 18 U.S.C. § 242, was not revived again until the 1960s. *See* BELL, *supra* note 18, at 279–80.

21. *See infra* Part III.B.

22. *See generally* Jacob Bor et al., *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study*, 392 THE LANCET 302 (2018).

> Because, when he was born, I promised myself he would never ever be without me. And these people were about to take my fatherhood away.[23]

The random loss of Cherry's life plans as well as his power over his life—and ultimately his fatherhood—is a story likely known to his father, grandfather, and great-grandfather before him because of the design of a system that encourages and validates brutal behavior by its authorized actors. Yes, violence by Black people against other Black people also has roots in structure—and takes many more lives.[24] But it is not state sanctioned, immune to punishment, or a symbolic reinforcement of a second-class citizenship. The data on the incidence of police brutality attests to its systemic nature.[25] The analysis of its immunity from criminal prosecution or redress through civil constitutional law demonstrates its deliberate design within the rule of law.[26] The stubborn avoidance of legal consequences for police brutality is so central to American racism that the prospect of eliminating it—as the national protests around George Floyd's death seemed to demonstrate—offers the promise that *all* manifestations of systemic racism can be curbed. That is the central importance of police violence to both racism and antiracism.

Yet obstructing reform is a political and institutional incrementalism—a training here, a bodycam there—that keeps the fundamental system in place. It is fueled by powerful exculpatory themes of white authoritarian innocence.

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23. Interview by Erika S. Schultz with Dennis Cherry, Sr., in Minneapolis, Minn. (Mar. 18, 2016), https://perma.cc/5FMU-6FA6; *see also* Interview by Erika S. Schultz with Joe Davis in Minneapolis, Minn. (May 26, 2016), https://perma.cc/8W9A-FLY4

> I'm—by certain standards—and I hate the standards—but I'm well-spoken, and I'm polite and I'm educated and I'm all those things, but that still doesn't exempt me from racial profiling or any other things that happen to people who look like me—yeah. So that's where that sense of powerlessness comes from. Because it's like, what can I really do to protect myself?

24. BUREAU OF JUST. STAT., DOJ, CRIMINAL VICTIMIZATION, 2021, 12 tbl.13 (2021) (tracking the number of violent incidents by race of victims and offenders)*; see also* MUHAMMAD, *supra* note 7, at 272 ("As [W. E. B.] Du Bois had subtly shown in his early research, black criminality did not and could not exist apart from the reality of inequality.").

25. *See infra* Part I.A.

26. *See infra* Parts II.A and III.B.

Narrativity is one of many Critical Race Theory (CRT) tenets applicable to systemic racism in police accountability, along with structural determinism, the social construction of a durable racial hierarchy, and the rejection of conceptions of racism grounded exclusively in individual animus. This Article reaches those organizing principles later.[27] Here, it is important to note how narratives have worked: not to better understand the painful experiences of marginalized outsiders, but to proliferate justifications for disproportionate police violence against these outsiders over generations.[28] The earliest narratives projected white fear of Black male threats—of violent resistance, criminality, or sexual conquest—and were met with organized violent suppression in slave patrols,[29] peonage,[30] massacres,[31] and lynchings.[32] This threat-control narrative was celebrated in popular culture through films like *The Birth of a Nation*.[33] The modern era of police brutality saw the growth of police departments in Northern cities, where Blacks who joined

27. *See infra* Part I.B.

28. On narrative methodology and police brutality, see generally David Dante Troutt, Screws*,* Koon*, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions,* 74 N.Y.U. L. REV. 18 (1999) [hereinafter *Routine Aberrations*].

29. Slave patrols were organized under the structure of state slave codes, which led to the widespread deputization of whites. *See, e.g.*, Lepore, *supra* note 2

> [I]f any negroe or other slave shall absent himself from his masters service and lye hid and lurking in obscure places, comitting injuries to the inhabitants, and shall resist any person or persons that shalby any lawfull authority be imployed to apprehend and take the said negroe, that then in case of such resistance, it shalbe lawfull for such person or persons to kill the said negroe or slave soe lying out and resisting.

(quoting a 1680 Virginia slave code).

30. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 484 (4th ed., 2019) (noting that, after the Civil War, "Blacks were relegated to a kind of peonage, bound laborers on the white man's land").

31. *See* BELL, *supra* note 18, at 372 ("[H]undreds of blacks lost their lives in what are generally referred to as 'race riots,' but which in most instances were simply racial massacres.").

32. *See id.* at 371 (reporting 3,446 lynchings of Black persons between 1882 and 1968).

33. *See* MUHAMMAD, *supra* note 7, at 83 (describing *The Birth of a Nation*, "one of the first motion picture blockbusters," as "put[ting] the lynching of a black rapist at the heart of a national narrative about exterminating the danger within").

the Great Migration were met with rampant and randomly administered police abuse in the name of keeping law and order.[34] The law and order narrative grew more powerful as Blacks rioted against its abuses in a series of violent civil disturbances during the early to mid-1960s.[35] As police brutality aroused concern beyond Black communities, majority narratives consistently downplayed its existence by circulating notions of aberrant or anomalous acts, unicorn events requiring only unicorn responses.[36] In the meantime, a tough-on-crime rhetoric against the pervasive "thuggification" of Black men and boys led to stunning increases in both police funding and mass incarceration.[37] Before and even after the death of George Floyd,

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34. *See* Anna North, *How Racist Policing Took Over American Cities, Explained by a Historian*, VOX, (June 6, 2020), https://perma.cc/YB32-ZTKJ

> But it wasn't really until the beginning of the 20th century, when streams of black migrants began to move to northern cities, and particularly during World War I and what became known as the Great Migration, that we began to see the increased ascription of black people as prone to criminality, as a dangerous race, as a way of essentially limiting their access to the full fruits of their freedom in the North.

35. *See* Lepore, *supra* note 2 ("[I]n the nineteen-sixties, the more people protested police brutality, the more money governments gave to police departments."); *see also* Julia Azari, *From Wallace to Trump, the Evolution of "Law and Order"*, FIVETHIRTYEIGHT (Mar. 13, 2016, 5:41 PM), https://perma.cc/WRE7-BETH.

36. *See* Chiraag Bains, *"A Few Bad Applies": How the Narrative of Isolated Misconduct Distorts Civil Rights Doctrine*, 93 IND. L.J. 29, 30 (2018) (describing "the 'Few Bad Apples' story of civil rights violations," which asserts that violations "are isolated and the product of individual rogue actors, not widespread or the product of flawed or biased systems.").

37. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 68–72 (2012) (describing the results of the "law and order perspective" throughout the second half of the twentieth century and the beginning of the twenty-first century). Note that my emphasis on African-American men and boys throughout this Article is not to deny the tremendous impact of police brutality and mass incarceration on Hispanic men and boys from many different Latino identities. *See* Silvia Foster-Frau, *Latinos Are Disproportionately Killed by Police But Often Left out of the Debate About Brutality, Some Advocates Say*, WASH. POST (June 2, 2021, 6:00 AM), https://perma.cc/L8A5-SQQP (highlighting that Latinos are killed by police at a rate of 4.2 per million people, less than the rate of 5.7 per million for Blacks but more than twice the rate of 2.3 per million for whites); UNIDOSUS, SPECIAL ADVANCE FACT SHEET: DEATHS OF PEOPLE OF COLOR BY LAW ENFORCEMENT ARE SEVERELY UNDER-COUNTED, https://perma.cc/PM5Y-MRKF (PDF) (estimating that more than 2,600 Latinos were killed by police between 2014 and 2021). Challenging my emphasis on anti-Black racism as the primary organizing

police misconduct was often excused as the deviance of "bad apples"—an individualized rebuttal to claims of systemic harms.[38] Yet even that minor concession to Black victimization would engender racial backlash in the name of "Blue Lives Matter", a counterclaim asserting a fictive racial-like police identity equal to, yet more under siege than, the Black and Latino identities targeted for abuse by state actors.[39] The powerful term, an argument for the one-upmanship of an occupational status over the humanity of a people as well as the perversion of a phrase to denote the inviolability of Black selfhood in favor of the invincibility of the badge, asserted cynically that the police were being aggrieved by their victims and needed societal protection. This use of language has been politically effective, helping to engender a swift backlash against police reform efforts only two years after Floyd's death.[40]

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feature of modern policing is a supplemental narrative of state authority (namely, Texas Rangers) used against Latinos in the American Southwest. *See, e.g.,* Julissa Arce, *It's Long Past Time We Recognized All the Latinos Killed at the Hands of Police*, TIME (July 21, 2021, 3:35 PM), https://perma.cc/Y2AY-PNBY ("The history of state-sanctioned police violence against Latinos has been largely erased, with many of the stories buried in forgotten graves.").

38. *See* Malorie Cunningham, *"A Few Bad Apples": Phrase Describing Rotten Police Officers Used to Have Different Meaning,* ABC NEWS (June 14, 2020, 11:12 AM), https://perma.cc/84XQ-5Z2K.

39. The Blue Lives Matter phenomenon is its own complicated racial dynamic and beyond the scope of this Article. Supporters sometimes describe themselves as protecting "warrior" and "hero" police officers under siege, which suggests a militarized identity in a wartime context. *See* Jake Offenhartz, *Inside the Seething White Heart of the Blue Lives Matter Movement*, GOTHAMIST (Aug. 19, 2020), https://perma.cc/J22B-KDUF (describing supporters' perception that they are "living in a war zone"). Others clearly combine so-called Blue Lives with white identity, opposing Black Lives Matter protesters with openly racist taunts and associating with known white supremacist groups. *See, e.g.*, *id.* ("During one recent demonstration in South Jersey, . . . [w]hen passing marchers chanted 'Black Lives Matter,' [a group of Blue Lives Matter supporters] replied: '. . . to no one.'"). These beliefs have become systemic, as Congress and state legislatures have taken up or passed laws creating police officers as a protected class against protests. For instance, in Congress, H.R. 4760 is called the "Blue Lives Mater Act of 2016" and criminalizes "knowingly caus[ing] bodily injury to any person, or attempt[ing] to do so, because of the actual or perceived status of the person as a police officer" as a hate crime. Blue Lives Matter Act of 2016, H.R. 4760, 114th Cong. § 2 (2016).

40. *E.g.,* Holly Otterbein & David Siders, *Dems Retreat on Crime and Police Reform,* POLITICO (Apr. 13, 2022, 4:31 AM), https://perma.cc/WEE5-ALSP (describing the recent trend in which Democratic politicians and

All of this narrative craftsmanship helps us understand the systemic nature of the reform problem and why it remains elusive even after so many brutal deaths have been videotaped, studied, and forgotten. The goal of this Article is to demonstrate how what we know as disproportionate police brutality against Blacks goes without legal and administrative accountability because of the unique design of applicable law. In Part I, it discusses the interaction between deliberate imprecision in defining and measuring police brutality and critical theoretical concepts that help explain those foundational aspects of the phenomenon. Of particular importance is the empirical fact that police violence against Blacks occurs most often in segregated Black neighborhoods, a finding that strongly suggests that associations with racialized spaces, rather than individual motivations, helps dictate police behaviors.[41] That attention to social context, another tenet of CRT, reflects the interactive dynamic between institutionalized processes (such as residential segregation and constraints on discipline of police misconduct) to determine norms of conduct. In Parts II and III, this Article examines how the design structure works in both legal and administrative settings—specifically, with respect to barriers to criminal prosecution (such as prosecutorial discretion, the code of silence among police witnesses, and arbitration rules), doctrinal impediments to federal civil rights suits against police misconduct brought under § 1983 (such as qualified immunity and indemnification), and institutional design issues such as the exercise of police union power. In Part IV, it identifies and evaluates on structural grounds several extant reform ideas, such as abolition, defunding of or divesting from police departments, and the proposed George Floyd Justice in Policing Act of 2021 that passed the House of Representatives but failed in the Senate. The point is not to prove how racism may or may not motivate individual police officer conduct through, say, implicit bias or warrior culture. Nor is it to set forth a perfect reform agenda. Rather, this Article aims to reveal that this enduring problem for racial justice represents a legal architecture designed to achieve the very outcomes it produces,

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President Biden have favored *more* police funding and a greater police role in communities).

41. *See infra* Part I.B.

and that recognizing its design features is the prerequisite to meaningful accountability, deterrence, and change.

I. THE LAW AND INCIDENCE OF BRUTALITY BY STATE ACTORS

A. "Police Brutality" and Its Occurrence

The systemic prevention of accountability begins with the impossibility of defining and measuring the thing itself. Every year approximately 1,000 people are fatally shot by police.[42] Their deaths occur under myriad circumstances: armed and unarmed, suspicious and clearly justified.[43] They are disproportionately Black.[44] 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.[45] Thirteen were charged with murder; two were convicted.[46]

> 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, dishonesty, fraud, coercion, torture to force confessions, abuse of authority, and sexual assault, including the demand for sexual favors in exchange for leniency.[47]

There is no universally agreed-upon definition of police brutality.

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42. *See* Amelia Thomson-DeVeaux et al., *Why It's So Rare for Police Officers to Face Legal Consequences*, FIVETHIRTYEIGHT (Jun. 4, 2020, 6:00 AM), https://perma.cc/X85E-X472.

43. Charles E. Menifield et al., *Do White Law Enforcement Officers Target Minority Suspects*?, 79 PUB. ADMIN. REV. 56, 57–58 (2019). However, most are armed during the encounter. *See id.* at 60–61 (finding that across all racial groups, more than sixty-five percent of victims of police killings possessed a firearm at the time of their death).

44. *See id.* at 56. However, white cops are *not* more likely to kill Blacks than nonwhite officers. *Id.* at 61–62.

45. Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 25, 2021, 5:00 AM), https://perma.cc/QLZ9-Z6GB.

46. *Id.*

47. *Police Misconduct*, CAL. INNOCENCE PROJECT, https://perma.cc/5AJA-LAEE.

This Article focuses 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.[48] Although police often consume a majority of unrestricted funds in local budgets (before or just after education spending) and cost U.S. communities $115 billion a year,[49] records on misconduct, police shootings, and other uses of force generally are unavailable to the public.[50] State law enforcement agencies are often reluctant to release any details about investigations into police wrongdoing despite the serious criminal nature of many allegations.[51] Currently, there is no national system for reporting police misconduct.[52]

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48. *See* Kenny Jacoby, *Police Use of Force Data "A Huge Mess" Across the U.S.*, USA TODAY NETWORK NEWS (Aug. 25, 2019), https://perma.cc/9RNA-F8RD ("Despite decades of credible allegations of police brutality, and a 25-year-old federal law requiring the government to collect national data on excessive force, the United States still has little or no reliable information to show for it.").

49. *See* Richard C. Auxier, *What Police Spending Data Can (and Cannot) Explain amid Calls to Defund the Police,* URB. INST., (June 9, 2020), https://perma.cc/5PNK-PAP7.

50. Jacoby, *supra* note 48.

51. *See id.* For a comparison of the similarities between the rhetoric surrounding the publication of police disciplinary records and that surrounding the publication of criminal records, see Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839 (2019). As with criminal record publication, forced policy disciplinary record ("PDR") transparency will likely not solve the problems that advocates hope it will. *Id.* at 848. Instead, Professor Levine concludes that

> the intermediate step of allowing some litigants and police administrative organizations access to PDRs but keeping those records from being seamlessly accessible online strikes an appropriate balance between necessary disclosure and full transparency. This approach preserves the ability of . . . criminal justice reform advocates to hold the treatment of police in the criminal justice system up both as a mirror—reflecting the way the system treats ordinary criminal defendants too harshly . . . .

Id. at 905.

52. TEXAS S. UNIV. CTR. FOR JUST. RSCH., POLICE REFORM ACTION BRIEF: NATIONAL POLICE MISCONDUCT DATABASE 2 (2021), https://perma.cc/KY2K-NHBL (PDF); *see also* Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119, 1122 (2013) ("[W]e do not have the data we need to secure effective and rights-protecting policing."). Without external regulation, local government officials are not generating enough data to make the empirical judgments necessary for public policy and legal decisions about policing. *Id.* at 1122, 1128. The Bureau of Justice Statistics and the Federal

Instead, data on police misconduct are produced by journalists, researchers, or political activists, not the federal government.[53] In 2015, the *Washington Post* began to log "every fatal shooting by an on-duty police officer in the United States."[54] Since then, there have been more than 5,000 such shootings, with the record showing a racially disparate *rate* of fatal shootings: for Blacks, forty-one per million (1,689 total); for Hispanics, twenty-nine per million (1,131 total); and for whites, sixteen per million (3,199 total).[55] According to the *Post*, over ninety-five percent of victims are male.[56] One irony about the lack of standardized data on police misconduct is its contrast with the importance of racialized crime statistics in social science narratives about inherent Black criminality that led to the expansion of modern policing in the late nineteenth and early twentieth century.[57] Empirical justifications were heavily relied on to expand policing, yet not to measure it.

New Jersey offers an example of the data problem. In 1999, the state's Attorney General ordered police departments within the state to record use-of-force data on templates; however, there was no corresponding duty to analyze the results, take action against officers or, until 2017, release the data to the public.[58] In 2018, NJ.com released "The Force Report," which

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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. *See id.* at 1132–45.

53. Thomson-DeVeaux et al., *supra* note 42; *e.g.*, Ryan Gabrielson et al., *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014, 11:07 AM), https://perma.cc/Z3QS-TL7A (last updated Dec. 23, 2014) (showing that young Black men were twenty-one times more likely to be shot dead by police than their white counterparts).

54. *See Fatal Force*, WASH. POST, https://perma.cc/9BZZ-C36Z (last updated Sept. 23, 2022).

55. *Id.* For "an impartial, comprehensive and searchable national database of people killed during interactions with police," see *Fatal Encounters*, https://perma.cc/U5FN-4978.

56. *Fatal Force*, *supra* note 54. The Henry A. Wallace Police Crime Database, created by Bowling Green State University Professor Phillip M. Stinson, documents instances of misconduct for over 15,000 criminal arrest cases involving over 12,000 nonfederal sworn law enforcement officers between 2005 and 2017 and is available at https://perma.cc/DM7M-VYFT.

57. *See generally* MUHAMMAD, *supra* note 7.

58. Craig McCarthy & S.P. Sullivan, *For 17 Years, N.J. Had the Chance to Stop Potentially Dangerous Cops. The State Failed to Do It.*, NJ.COM (Nov.

created the first comprehensive statewide database of police force.[59] The sixteen-month investigation found that 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.[60] The report found several trends that escaped critical scrutiny, including the fact that just 10% of officers were responsible for 38% of all uses of force and the fact that a total of 252 officers used force more than five times the state average.[61] Non-lethal force is substantial. At least 9,281 people were injured by police from 2012 through 2016; 4,382 of those injuries were serious enough to require hospitalization.[62] "At least 156 officers put at least one person in the hospital in *each* of the five years reviewed."[63] Again, the use of force was used disproportionately against Black suspects, who overall were more than three times as likely to face police force than white people.[64] "The Force Report" also found that brutality, especially against Blacks, was much greater in certain municipalities than others.[65] Further, the system for reporting use of force by police is confusingly disorganized, with different departments using different forms, making tracking difficult.[66] "Officers self-reported incidents, but thousands of reports were incomplete, illegible, lacking supervisory review or missing

29, 2018, 3:11 PM), https://perma.cc/4BPT-NL2E (last updated Feb. 28, 2019, 3:06 PM).

59. 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.*, NJ.COM (Nov. 29, 2018, 3:15 PM), https://perma.cc/4786-B2Z4 (last updated Aug. 3, 2021, 2:48 PM)

60. *Id.*

61. McCarthy & Sullivan, *supra* note 58.

62. Stirling & Sullivan, *supra* note 59.

63. *Id.* (emphasis in original).

64. *Id.*

65. For instance, in the city of Millville in South Jersey, Black people faced police force at more than six times the rate of whites. *Millville, Cumberland County*, NJ.COM: FORCE REP., https://perma.cc/4872-5CBZ. In South Orange, it was nearly ten times. *South Orange, Essex County*, NJ.COM: FORCE REP., https://perma.cc/UE64-JJUD. In Lakewood, it was twenty-two times. *Lakewood, Ocean County*, NJ.COM: FORCE REP., https://perma.cc/8Y5E-F6KY.

66. Sterling & Sullivan, *supra* note 59.

altogether. At least 62 times, forms were so sloppy the officers accidentally marked themselves as dead."[67]

As inconsistent and unofficial as these attempts to quantify police violence are, recent research indicates that incidents of police violence are severely undercounted because of fundamental problems with source data from non-police sources.[68] Police killings appear to be twice as frequent as generally reported, with a much greater racial impact as well.[69] Researchers publishing in the *Lancet* developed a methodology to correct for the systemic misclassification and undercounting by coroners and medical examiners of causes of death that appear on death certificates and comprise the universe of cases included in the National Vital Statistics System (NVSS) from which most estimates of police killings come.[70] For this paper, researchers compared deaths reported as police violence in the NVSS with three nongovernmental open-source databases: Fatal Encounters, The Counted, and Mapping Police Violence.[71] The authors summarized their results as follows:

> Our analysis of police violence in the USA shows that the NVSS misclassified and subsequently under-reported 55.5% . . . of our estimated deaths from police violence between 1980 and 2018. Consistent with the estimated rates of fatal police violence in this group, the highest under-reporting in the NVSS occurred for deaths of Black Americans at 59.5% . . . . However, the issue of under-reporting does not only affect Black Americans. The NVSS missed 56.1% . . . of deaths of non-Hispanic White

67. *Id; see id*. ("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.")

68. *See* Fablina Sharara et al., *Fatal Police Violence by Race and State in the USA, 1980-2019: A Network Meta-Regression*, 398 THE LANCET 1239, 1250 (2021) (describing the factors leading to failure by coroners and medical examiners to indicate police involvement on death certificates, including omission, misclassification, and pressure from officials to change the reported manner of death).

69. *See id.* at 1243.

70. *See id.* at 1241–43.

71. *See id.* ("The Fatal Encounters, Mapping Police Violence, and The Counted databases cover all 50 states and Washington, DC[,] and were compiled by collating news reports and public records requests.").

> people, 32.6% . . . of non-Hispanic people of other races, and 50.0% . . . of Hispanic people of any race. The police have disproportionately killed Black people at a rate of 3 [to] 5 times higher than White people, and have killed Hispanic and Indigenous people disproportionately as well. The rate of fatal police violence was higher in every year for Black Americans than for White Americans.[72]

The study not only demonstrates a failure to accurately record the deaths of over half the victims of police violence. It further suggests a structural complicity between one arm of the state—law enforcement—and another—coroners and medical examiners on whom the public relies for vital statistics.[73] Importantly, the study further demonstrates that, contrary to aspirational hopes that the lethal impact of racism fades over time, corrected statistics on police violence against Black bodies shows that this historic form of American racism has grown steadily worse since 1980.[74]

Overall, statistics about police misconduct confirm three claims about police brutality as a structural problem. First, Black people are at vastly disproportionate risk today, just as they were historically targeted since the start of policing in the United States.[75] Second, the systemic lack of accurate, uniform, reliable data on police conduct is a factual premise to the systemic lack of accountability for police misconduct.[76] It is hard to fix a problem whose dimensions you cannot agree on. Third, as many police advocates have long asserted, some fraction of police officers traffic in violent misconduct—in some cases, habitually.[77] This is often erroneously called the "bad apple" problem, as if the structural inequality of police misconduct was

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72. *Id.* at 1247.

73. *See id.* at 1250 ("There are . . . substantial conflicts of interest within the death investigation system that could disincentivise certifiers from indicating police involvement, including the fact that many medical examiners and coroners work for or are embedded within police departments.").

74. *See id.* at 1245; *see also* Tim Arango & Shaila Dewan, *More Than Half of Police Killings Are Mislabeled, New Study Says*, N.Y. TIMES (Sept. 30, 2021), https://perma.cc/3WYJ-AEXR ("[O]ne of the starkest findings [of the *Lancet* study] was that racial disparities in police shootings have widened since 2000.").

75. *See supra* notes 1–4 and accompanying text.

76. *See supra* notes 48–52 and accompanying text.

77. *See supra* notes 62–65 and accompanying text.

caused by a small minority of rogue officers.[78] Even if there was empirical truth to this argument, the systemic lack of accountability for a subset of dangerous lawbreakers 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 occurred decades ago when cities exploded in deadly and destructive riots and uprisings, often sparked by acts and allegations of police brutality.[79] Instead, the "bad apples" narrative serves a larger colorblind scheme in which racist results are narrowly viewed within a prism of individual acts and motivations, not as patterns reflecting social constructions of Black men, Black places, and structured responses. It says that the institution of policing remains colorblind, occasionally tainted by a few racist actors within it.

B. Critical Race Perspectives on the Incidence of Violent Policing

This denialism is a design feature of a system virtually immune to accountability, meaning it is a functional part of what makes police brutality structurally determined. Structural determinism is a part of CRT's conception of structural racism more generally. When Derrick Bell wrote of the "permanence of racism," he was emphasizing its embedded nature in a system of interacting rules and norms across institutions designed for white advantage, rather than forever condemning the hearts and minds of individual whites.[80] Many other race scholars who write about residential segregation and systemic limits on economic mobility, including this Author, argue that as racism structured spatialized disadvantage, it cannot be understood outside of a systems perspective.[81] As John Calmore wrote from

78. *See supra* notes 36–38 and accompanying text.

79. *See supra* note 35 and accompanying text.

80. *See* Derrick Bell, *The Permanence of Racism*, 22 SW. U. L. REV. 1103, 1105 (1993) (describing racism as "a principal stabilizing force" in the United States).

81. *See generally* Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to the New Regionalism,* 88 GEO. L.J. 1985 (2000); Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295

the fair housing context in 1998, "This view of racism would claim that in the United States today, the principal flaw in analyzing racism is the failure to recognize or accept this dynamic, structured, systemic, and contextualized nature of racism."[82] The structuralist view is informed in part by Title VIII's[83] disparate impact approach to showing discrimination as well as causation.[84] Racial harms are understood consequentially from their patterns, rather than their alleged motivations.[85] Causation is often cumulative, taking into account a broader totality of relevant circumstances that reach beyond individual actors to various institutional policies and practices that often interact in predictable dynamics.[86] As john a. powell has noted:

> Institutional racism shifts our focus from the motives of individual people to practices and procedures within an institution. Structural racism shifts our attention from the single, intra-institutional setting to inter-institutional arrangements and interactions. Efforts to identify causation

(1999); David Dante Troutt, *Ghettoes Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427 (2000); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843 (1994); Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401 (2010).

82. John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1078 (1998).

83. Fair Housing Act of 1968, Pub. L. No. 90–284, Title VIII, §§ 801–819, 82 Stat. 73, 81–89 (codified as amended at 42 U.S.C. §§ 3601–3619).

84. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11459, 11479 (Feb. 15, 2013) (previously codified at 24 C.F.R. § 100.500) (defining a "discriminatory effect" as "occur[ing] where a facially neutral practice . . . results in a discriminatory effect on a group of persons protected by the Act (that is, has a disparate impact), or on the community as a whole on the basis of a protected characteristic (perpetuation of segregation)"). For an explanation of the 2013 rule's recent history, see Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33590, 33591–33596 (to be codified at 24 C.F.R. pt. 100).

85. john a. powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 793 (2008) (noting the importance of the structural model of racism for "analyz[ing] how housing, education, employment, transportation, health care, and other systems interact to produce racialized outcomes").

86. *See id.* at 796.

> at a particular moment of decision within a specific domain understate the cumulative impact of discrimination.[87]

Like CRT scholarship in the fair housing context, the same understanding of systemic racism in policing has led to empirical study. Although the New Jersey "Force Report" noted differences among municipalities, it did not analyze those geographic differences for types of neighborhoods. Other scholars have, and they have found clear correlations across the United States between segregated places and racially disproportionate use of force. Michael Siegel's research shows "[d]isparity in [d]isparities," so much that rates of police shootings of unarmed Black men were greatest—sometimes by thirty-six-fold—in areas highest in structural racism.[88] Siegel argues "that racial disparities in the lethal use of force are a consequence of structural racism, especially residential segregation, that results in police officers viewing and policing not Black individuals but Black neighborhoods in inherently different ways."[89] A significant body of empirical evidence supports Siegel's claims.[90]

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87. *Id.*

88. Michael Siegel, *Racial Disparities in Fatal Police Shootings: An Empirical Analysis Informed by Critical Race Theory*, 100 B.U. L. REV. 1069, 1080 (2020); *id.* at 1080–81

> [W]e found that among the fifty states with at least one fatal police shooting of a Black individual between 2013 and 2017, the ratio of rates of fatal police shootings of unarmed Black victims compared to that of White victims ranged from 0.7 in South Carolina to 20.8 in Illinois—a thirty-fold difference. During the same time period, we found that among the sixty-nine largest cities with at least one fatal police shooting of a Black individual, the ratio of rates of fatal police shootings of Black victims compared to White victims ranged from 1.3 in Fresno to 46.7 in Santa Ana—a thirty-six-fold difference.

89. *Id.* at 1079.

90. *See, e.g.*, Brad W. Smith & Malcolm D. Holmes, *Police Use of Excessive Force in Minority Communities: A Test of the Minority Threat, Place, and Community Accountability Hypotheses*, 61 SOC. PROBS. 83, 89 (2014) ("[S]imply entering disadvantaged minority neighborhoods may activate various emotional and cognitive processes that can trigger the use of excessive force by the police."). *See generally also* Frank Edwards et al., *Risk of Police-Involved Death by Race/Ethnicity and Place, United States, 2012–2018*, 108 AM. J. PUB. HEALTH 1241 (2018); Keon L. Gilbert & Rashawn Ray, *Why Police Kill Black Males with Impunity: Applying Public Health Critical Race Praxis (PHCRP) to Address the Determinants of Policing Behaviors and "Justifiable" Homicides in the USA*, 93 J. URB. HEALTH S122

The empirical evidence about who gets abused and where most of the abuse occurs raises strong inferences about the dynamic interaction between racial animus and racialized place, suggesting that racist policies of residential organization converge with racist beliefs among individual officers to facilitate brutality against Black people. But the issue with which this Article is most concerned here is what accounts for the lack of accountability. The empirical studies show that whatever the motivations, police officers clearly believe they can act more brutally against Black bodies in Black-identified spaces and get away with it. The moment of violent encounter begins the causal chain. The act of brutality ends with the injustice of unaccountability. What causes *that* immunity is cumulative, making its way through various legal checkpoints ordinarily meant to punish and deter misconduct. But not here. This is how causation works to show systemic racism in policing.

If structure determines outcomes, then we should see exculpatory design features throughout the legal and institutional architecture governing police misconduct. As this Article discusses 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 legal doctrines and judges that favor them and, if a case ever gets this far, the juries who sympathize with them. These patterns show that many Americans do not fundamentally believe that police misconduct is criminal or even wrongful behavior. They are mostly satisfied that the system is working to produce the very normative outcomes for which it was designed.

II. DESIGNING INJUSTICE: CRIMINAL SANCTIONS, CIVIL RIGHTS RELIEF AND ADMINISTRATIVE DISCIPLINE

This Part explores the evidence of exculpatory architecture at the key points when deterrence would ordinarily occur in the commission of misconduct. First, it looks at why criminal penalties are almost never brought against police for committing acts that would constitute crimes by civilians.

(2016); Kendra Scott et al., *A Social Scientific Approach Toward Understanding Racial Disparities in Police Shooting: Data from the Department of Justice (1980–2000)*, 73 J. SOC. ISSUES 701 (2017).

Second, this Part examines the design features that make federal civil rights claims—claims enacted for the specific legislative purpose of dignifying the rights of free Black people after the Civil War—doctrinally deficient. Last, it looks at the design obstacles to administrative discipline by law enforcement institutions themselves.

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

Notwithstanding the criminal prosecution of Derek Chauvin, the Minneapolis police officer sentenced to 22½ years by a state court in the killing of George Floyd, and over 20 years in a federal plea bargain for violating the constitutional rights of Floyd and a 14-year-old victim, police officers are almost never charged with crimes or suffer criminal penalties.[91] Despite approximately 1,000 fatal shootings of civilians each year, only 121 law enforcement officers nationwide have been charged with murder or manslaughter for on-duty shootings since 2005.[92] Noted policing expert Phillip Stinson observes that "[t]o 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."[93] But even in the extreme instances where prosecution occurs, the majority of the officers have not been convicted.[94] In *The End of Policing*, Alex Vitale

91. *See supra* note 1 and accompanying text; *see also* Press Release, U.S. Department of Justice Office of Public Affairs, Former Minneapolis Police Officer Derek Chauvin Sentenced to More Than 20 Years in Prison for Depriving George Floyd and a Minor Victim of Their Constitutional Rights (July 7, 2022), https://perma.cc/3CU4-4QN6 (asserting that Chauvin's federal sentence "represents a measure of justice and accountability").

92. Shaila Dewan, *Few Police Officers Who Cause Deaths Are Charged or Convicted*, N.Y. TIMES (Sept. 24, 2020), https://perma.cc/XDU3-ZUAY (last updated Nov. 30, 2021).

93. Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted,* WASH. POST (Apr. 11, 2015), https://perma.cc/Y7GW-NN7K.

94. Dewan, *supra* note 92; *see also* Tom Jackman & Devlin Barrett, *Charging Officers with Crimes Is Still Difficult for Prosecutors*, WASH. POST (May 29, 2020, 7:25 PM), https://perma.cc/L6SG-54BN

> 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

notes the 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.[95]

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 districts attorneys' offices, and jury sympathy for the on-the-job judgments of public protectors.[96] Large disparities remain between public perceptions of police violence and how it is treated in criminal courts.[97] Union protections that shield police officers from timely investigations,[98] legal standards that give them the benefit of the doubt,[99] and a tendency to take officers

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challenges faced by officers on the street and are more inclined to vote "not guilty."

95. ALEX S. VITALE, THE END OF POLICING 17–18 (2018); *see* Kindy & Kelly, *supra* note 93 ("Winning a conviction against an officer is tough. And the cases can come with bruising headlines and strained relations with the very police department that prosecutors rely on daily to help build other criminal cases.").

96. *See* Kindy & Kelly, *supra* note 93 ("Most laws that apply to on-duty shootings require jurors to essentially render a verdict on the officer's state of mind: Was the officer truly afraid for his life or the lives of others when he fired his weapon? Would a reasonable officer have been afraid?").

97. *See, e.g.*, Dewan, *supra* note 92 ("The death of Michael Brown in Ferguson, Mo., in 2014 illustrates the disconnect between public views and prosecutorial reality: After nationwide protests over his death and a federal review of the case, the officer, Darren Wilson, was not indicted.").

98. *See* Martha Bellisle, *Police in Misconduct Cases Stay on Force Through Arbitration*, AP NEWS (June 24, 2020), https://perma.cc/B5Y7-HUBS.

99. *See* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1040 (2010) [hereinafter Schwartz, *Myths and Mechanics*] (arguing that it should not be presumed that civil rights lawsuits necessarily have a deterrent

at their word[100] have added up to few convictions and little prison time for officers. Kate Levine notes that prosecutors give favorable treatment to police officers who become criminal suspects, identifying 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.[101]

> [T]he process that police suspects receive from prosecutors is harmful . . . 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 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.[102]

A second structural problem is the unwritten code of silence among police officers ("the blue wall of silence") by which corroborating testimony from other officer-witnesses at the scene of the misconduct is systematically withheld, hindering investigations and prosecutions.[103] 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.[104] In 2000, a paper prepared by the National Institute of Ethics for the annual conference of the International Association of Chiefs of Police studied the phenomenon using survey research from

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effect, because not all cities track, process, or respond to lawsuits filed against officers).

100. *See* Kate Levine, *How We Prosecute the Police,* 104 GEO. L.J. 745, 749 (2016) (arguing that, as criminal justice insiders, officers have insulated themselves based on their knowledge of what protections suspects need most when facing interrogation, even while law enforcement continues to argue that these protections prevent them from catching and convicting dangerous criminals).

101. *Id.*

102. *Id.* at 768.

103. *See id.* at 749 (noting critics' concerns that the "blue wall of silence, in which police either refuse to testify against one another or collude to present their stories in the least criminal light" makes police "seem to be virtually above the criminal law").

104. *See* CARL B. KLOCKARS ET AL., THE MEASUREMENT OF POLICE INTEGRITY 3, 6–8 (2000), https://perma.cc/KZB6-ABSA (PDF).

over 3,700 officers and recruits across forty-two states and reported several troubling conclusions.[105] The authors found that the code of silence exists and "is prompted by excessive force incidents more than for any other specific circumstance."[106] A majority of officers expressed no problem with the code; many described pressure to remain silent from the officer who committed the misconduct, senior officers, and uninvolved officers.[107] Significantly, the same study found that the culture of cover-up and noncooperation 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."[108]

The final impediment to accountability for criminal misconduct is arbitration.[109] 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[110]—allow for an appeal to arbitration.[111] 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 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.[112] One constraint is the "past precedent" rule of

105. *See generally* NEAL TRAUTMAN, POLICE CODE OF SILENCE: FACTS REVEALED (2000), https://perma.cc/P8KX-EQAE (PDF).

106. *Id.* at 3.

107. *Id.* at 2.

108. *Id.* at 3.

109. *See* Bellisle, *supra* note 98 (describing the reinstatement by arbitrators of officers fired for violating policy as "an all-too-common practice that some experts in law and policing say stands in the way of real accountability").

110. *See* Cleveland Bd. of Educ. 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." (citations omitted)).

111. *See* Bellisle, *supra* note 98.

112. *See* The Editorial Board, Opinion, *To Hold Police Accountable, Ax the Arbitrators,* N.Y. TIMES (Oct. 3, 2020), https://perma.cc/NM79-V6G4 (reporting

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, thus institutionalizing leniency based on prior failures to discipline misconduct.[113]

A related constraint 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.[114] Professor Rushin found that arbitrators overturned or reduced discipline in 52% of cases, ordered reinstatement in 46%, and, on average, reduced the length of suspension by 49%.[115] 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 in part because of the known tendencies of popular arbitrators.[116]

III. DESIGNING EXCULPATION

A. The Contest Over Police "Criminality"

The foregoing analysis demonstrates that treating serious police misconduct as criminal behavior is contested by both sides

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a study by Professor Stephen Rushin that found that "arbitrators forced departments to rehire officers 46 percent of the time, frequently with backpay").

113. *See id.* (noting that this concept "has become the root of impunity" and "often means that an officer can't be fired for abusive behavior or racist misconduct if other officers have committed similar offenses in the past and gotten away with them").

114. *See generally* Stephen Rushin, *Police Arbitration*, 74 VAND. L. REV. 1023 (2021) (examining a national dataset of 624 police disciplinary appeals litigated before over 200 arbitrators between 2006 and 2020 across a wide range of law enforcement agencies).

115. *Id.* at 1030.

116. *See id.* at 1069 (observing that "arbitrators may arguably supplant the judgment of city leaders and police chiefs with their own judgments"). Some states are passing legislation to reform the arbitration selection process. *See, e.g.*, Rob Hubbard, *House Labor Committee Approves Arbitration Changes for Police Discipline*, MINN. HOUSE OF REPRESENTATIVES (June 16, 2020, 9:42 PM), https://perma.cc/884A-FSJL.

of the issue. The idea that police brutality 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 citizens to uphold the law, makes their violent misconduct more morally egregious than ordinary crimes and unintentional harms.[117] Such a breach of trust warrants *more* punishment, not less. 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.[118] Police misconduct merits the benefit of the doubt and therefore greater leniency.

Yet this conflict reflects two related problems regarding 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 vessel for myth.[119] That a protective call that "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.[120] The conflict over what justifies state violence against Black bodies is shot through with generations of belief about Black humanity and American belonging.[121] That is, many Americans may believe that

117. *See* Katherine Hawkins, *Unqualified Immunity: When Government Officials Break the Law, They Often Get Away with It*, PROJECT ON GOV'T OVERSIGHT: THE CONST. PROJECT (Oct. 22, 2020), https://perma.cc/5NE2-W926 (noting that, despite the common police motto "to protect and serve," officers "[t]oo often . . . violate[] people's rights with impunity—particularly the rights of Black Americans, immigrants, and other minority groups").

118. *See* Jackman & Barrett, *supra* note 94 (describing a "reluctance on the part of the citizenry . . . to hold police officers accountable because of the unique nature of the role they have").

119. *See supra* notes 7–9 and accompanying text.

120. *See* I. India Thusi, *Blue Lives & the Permanence of Racism*, 105 CORNELL L. REV. ONLINE 14, 30 (2020) ("The influence of 'Blue Lives Matter' is a referendum on Black political opportunity in the United States. When Black people assert their humanity and demand accompanying rights, there will likely be a competing claim to undermine these assertions in the absence of a material benefit to white elites.").

121. *See id.* at 25–27.

predictable instances of brutal assaults on unarmed Black people may be lamentable yet excusable when considered against the alternative invasion of their rights by symbols of their greatest fears of crime.[122]

The second problem is failing to achieve the goal of deterrence, normally a straightforward norm of accountability for criminal wrongdoing.[123] 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, deterrence is a suspended norm because whatever accountability occurs through victim compensation is almost never accompanied by deterrence.[124] There is no price to pay by the wrongdoer that promotes behavior change; there is no painful consequence to internalize and therefore to avoid in the future.[125] The money for civil settlements against police comes primarily from taxpayers, as discussed later in Part III.B.1, not police departments or the police officers themselves.[126] Officers who use excessive force are more likely than others to use it again.[127] And those who do and are somehow sanctioned typically suffer only mild penalties, like

122. *See id.* at 30 ("[Blue Lives Matter] is intended to qualify and negate the concerns of Black Lives Matter activists. It is a form of epistemic violence that relies on the myth of Black criminality to justify the need for aggressive policing.").

123. *See supra* Part II.A.

124. *See* Schwartz, *Myths and Mechanics*, *supra* note 99, at 1040, 1067 (explaining that the deterrent effect of lawsuits for police misconduct requires knowledge of these lawsuits that the evidence shows police officials do not actually possess).

125. *See* Kindy & Kelly, *supra* note 93, at 2 (explaining that even in the most extreme instances the majority of officers whose cases have been resolved were not convicted, and that those who are convicted tend to get little time behind bars).

126. *See* Thomson-DeVeaux et al., *supra* note 42 ("[P]olice almost never pay the settlements out of pocket—instead, the money comes from cities or police departments, and often in ways that don't put financial strain on police departments."); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 960 (2014) [hereinafter Schwartz, *Police Indemnification*] ("[O]fficers almost never contribute anything to settlements and judgments in police misconduct suits . . . even when they were disciplined, terminated, or criminally prosecuted for their misconduct.").

127. *See* Thompson, *supra* note 45.

being fired—only to be rehired in another police department.[128] Yet police officers are in the business of deterring others.[129] Police departments are top-down organizations where obedience to rank is culturally ingrained.[130] If anyone were susceptible to deterrence after being held accountable for misconduct, it should be police. That deterrence is not an operative norm in police brutality is a striking feature of its architecture.[131]

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 these characteristics of police governance have to bend in order for ours to become a more just society.

B. The Design of Federal Civil Relief Under § 1983

Americans often believe that justice comes at the end of a civil lawsuit.[132] Yet police misconduct rarely makes it to court—and even then, the legal system results in little accountability or deterrence.[133] This Subpart 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.[134] Private plaintiffs may hire their own lawyers

128. *See id.*; *see also* Kimbriell Kelly et al., *Fired/Rehired*, WASH. POST (Aug. 3, 2017), https://perma.cc/M8ZW-EQZ4 (describing a pattern of officers fired for misconduct being rehired after appeals required by their police union contracts).

129. CMTY. RELS. SERV., DEP'T OF JUST., COMMUNITY RELATIONS SERVICES TOOLKIT FOR POLICING: POLICING 101 2 (2015), https://perma.cc/XJZ7-ZJU9 (PDF).

130. *Id.*

131. *See supra* Part II.

132. *See* Schwartz, *Myths and Mechanics*, *supra* note 99, at 1025–26 (discussing the rationale behind civil rights litigation as a deterrence to police misconduct).

133. *See* Thomson-DeVeaux et al., *supra* note 42.

134. *See* U.S. COMM'N ON C.R., NO. 005-901-00074-0, REVISITING *WHO IS GUARDING THE GUARDIANS?*: A REPORT ON POLICE PRACTICES AND CIVIL RIGHTS IN AMERICA 64 (2000), https://perma.cc/8MXE-LQ6U (PDF) ("The most

and bring suit under state tort law for claims such as false arrest, assault, battery, and wrongful death.[135] Here, this Article focuses primarily on 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.

Federal suits against the police are brought under civil rights statutes that date back to the Reconstruction Era, when protecting the rights of formerly enslaved Black people against official violence was an acute federal interest.[136] 18 U.S.C. § 242 is the federal criminal statute, only occasionally brought against police officers, based on deprivations of constitutional rights, including life and liberty.[137] Section 242 contains a state-of-mind requirement that the rights deprivation be "willful"—a standard higher than mere intent—that significantly curtails its use.[138]

The civil alternative is suits by private plaintiffs under 42 U.S.C. § 1983, which can be brought directly against a police officer[139] or against a department acting pursuant to an allegedly unconstitutional policy.[140] Without an onerous state-of-mind requirement, § 1983 requires plaintiffs to show (i) state action by an official acting under color of state law, and (ii)

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common avenue of redress available to victims of police abuse is initiating a civil action for damages under state law.").

135. *Id.*

136. *See* Troutt, *Routine Aberrations*, *supra* note 28, at 54–60 (describing the postbellum federal focus on protecting the rights of formerly enslaved Black people and the backlash against the Reconstruction legislation enacted for that purpose).

137. *See* U.S. COMM'N ON C.R., *supra* note 134, at 67.

138. *See id.* (noting that the limited use of § 242 is "partly due to . . . the evidentiary requirement where the accused officer's specific intent to violate a federally protected right must be proven beyond a reasonable doubt"); Troutt, *Routine Aberrations*, *supra* note 28, at 106 ("In federal court, the addition of section 242's willfulness requirement adds a difficult element of proof.").

139. *See* Monroe v. Pape, 365 U.S. 167, 172 (1961) (concluding that Congress intended "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position" when it enacted § 1983), *overruled in part by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

140. *Monell*, 436 U.S. at 694 ("[W]hen execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").

that the action violated the plaintiff's federally protected rights.[141]

The rights protected include constitutional claims for life and liberty,[142] as well as the Fourth Amendment protection against unlawful searches and seizures of the person by the state.[143] Force used by an officer acting under color of law must rise to the level of a seizure to be a violation of the Fourth Amendment, according to the Supreme Court in *Tennessee v. Garner*.[144] A seizure constitutes "an intentional acquisition of physical control,"[145] occurring "only when there is a governmental termination of freedom of movement *through means intentionally applied*."[146] It must also be deliberate, purposeful, or knowing, not merely negligent.[147] Thus, the seizure may start when the officer stops a suspect or at the point when force is used.[148]

Yet for use of force, including lethal force, to be actionable, it must be objectively unreasonable.[149] This standard often poses a significant hurdle for plaintiffs.[150] *Garner* was a lethal force

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141. Gomez v. Toledo, 446 U.S. 635, 640 (1980) (citing *Monroe*, 365 U.S. at 171).

142. *Monroe*, 365 at 171 (observing that the purpose of § 1983 was to provide for the enforcement of the rights articulated in the Fourteenth Amendment).

143. *See* California v. Hodari D., 499 U. S. 621, 624 (1991) ("We have long understood that the Fourth Amendment's protection against 'unreasonable . . . seizures' includes seizure of the person . . . ." (citing Henry v. United States, 361 U.S. 98, 100 (1959)). No seizure occurs unless cops intentionally use physical force in effecting a stop, or a suspect submits to a show of authority. *See id.* at 621.

144. 471 U.S. 1 (1985); *see id.* at 7 ("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." (citation omitted)).

145. Brower v. County of Inyo, 489 U.S. 593, 596 (1989).

146. *Id.* at 597 (emphasis in original).

147. Kingsley v Hendrickson, 576 U.S. 389, 396 (2015).

148. *See Hodari D.*, 499 U.S. at 626 ("An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority." (emphasis in original)).

149. *Kingsley*, 576 U.S. at 391.

150. *See* Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1810 (2016).

case in which a police officer shot and killed a fleeing felon.[151] The Supreme Court held that cops may use deadly force to prevent escape only where they have probable cause to believe that the suspect poses a threat of death or serious harm to officers or others.[152] The shooting was the seizure.[153] Its reasonableness would be measured by a balancing of interests—the nature and quality of the intrusion on personal liberty versus the government interests justifying force.[154] In *Graham v. Connor*,[155] the Supreme Court said that the reasonableness of the officer's action was subject to a totality of the circumstances approach "from the perspective of a reasonable officer on the scene."[156] 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."[157]

Pause here to consider how § 1983's reasonableness standard for finding whether a constitutional violation occurred 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: 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 that is necessary in a particular situation,"[158] and the officer's

151. *Garner*, 471 U.S. at 3–4.

152. *Id.* at 3.

153. *See id.* at 7 ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person.").

154. *See id.* at 8 (quoting United States v. Place, 462 U.S. 696, 730 (1983)).

155. 490 U.S. 386 (1989).

156. *Id.* at 396 (first citing Tennessee v. Gardner, 471 U.S. 1, 8–9 (1985); and then citing Terry v. Ohio, 392 U.S. 1, 20–22 (1968)).

157. *Id.* (citation omitted).

158. MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION § 2:19, Westlaw (database updated November 2022). Commentators have called into question how often police actually face split-second decision-making, and whether they should receive deference in situations where, through unnecessary escalation, officers themselves create the need for fast action. *See, e.g.*, Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police*

perception is typically assumed to be accurate enough to be trustworthy.[159] In order to do their jobs effectively, police officers certainly deserve some level of deference to the presumption that they act reasonably; 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, as well as researchers who have studied it, this notion of reasonableness often defers too much to officer judgment.[160] It frequently allows in too much supposition while interrogating too little about the reasonableness of actual police perception.[161] Police defendants often claim to suspect murderous intentions on the part of people they kill,[162] including the probability of reaching for a weapon or fleeing to escape arrest for a recent felony when the limited research about these claims indicates that most people who flee traffic stops fear only a misdemeanor violation, such as a suspended registration, or being beaten by police, or were driving under the influence.[163] The officer reasonableness standard often allows officers to exploit beliefs unrelated to the evidence of particular encounters in order to facilitate doubt. This opening creates a tension with the Constitution itself, which is supposed to protect people against government abuse, and not the government (here, the police) against the public. Much of the lack of accountability over police misconduct may

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Use of Force Against Emotionally Disturbed People, 34 COLUM. HUM. RTS. L. REV. 261, 320–31 (2003) (arguing that proper police training should eliminate the need for split-second decision making).

159. *See* Anna Lvovsky, *Rethinking Police Expertise*, 131 YALE L.J. 475, 488 (2021) ("A trained, experienced officer, as the Supreme Court has repeatedly explained, views the facts through the lens of his police experience and expertise, attuned to potential malfeasance in conduct which would be wholly innocent to the untrained observer." (internal quotations omitted)).

160. *See id.* at 495–97.

161. *See id.* at 527 ("[T]he Court has consistently embraced police judgment purely on considerations of necessity, lamenting the uncertainties inherent in violent encounters in the field . . . , emphasizing only the difficulty of mak[ing] split-second judgments in tense, uncertain, and rapidly evolving circumstances, and directing lower courts to take the perspective of a reasonable officer . . . ." (internal quotations omitted) (alteration in original)).

162. *E.g.*, Avery, *supra* note 158, at 276 n.65; Thompson, *supra* note 45.

163. *See* Roger G. Dunham et al., *High-Speed Pursuit: The Offenders' Perspective*, 25 CRIM. JUST. & BEHAV. 30, 38–40 (1998).

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 perceived need for self-defense in a life-threatening situation.[164] Police officers commonly overstate the threat, especially during traffic stops—that is, they simply guess wrong.[165]

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 or unreasonableness in relevant context.[166] Yet the evidence considered is often 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.[167] Police officers typically defend on the opposite grounds, that only the moments directly before and during the use of force are relevant to an estimation of reasonableness.[168] 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

164. *See* Thompson, *supra* note 45. Regarding jury deference to officer judgment, Professor Stinson 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." *Id.*

165. The relative danger to police from traffic stops, for example, is far less than police lead the public to believe. *See* Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 694 (2019)

> Under a conservative estimate, the rate for a felonious killing of an officer during a routine traffic stop was only 1 in every 6.5 million stops, the rate for an assault resulting in serious injury to an officer was only 1 in every 361,111 stops, and the rate for an assault against officers (whether it results in injury or not) was only 1 in every 6,959 stops.

166. *See* Avery, *supra* note 158, at 265.

167. *See id.* at 274.

168. *See id.*

results for police officers.[169] Yet "before-the-final-frame" analyses by researchers and journalists increasingly reveal the extent to which officer behavior itself—often in violation of training protocols—contributes to or creates the occasion to use deadly force that is later exculpated by the *Graham v. Connor* standard of split-second decision-making.[170] 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[171] and supports arguments that the law itself is simply not designed to hold police officers accountable.[172]

1. Qualified Immunity and "Clearly Established" Law

Section 1983 mentions immunity only for the judiciary.[173] The Supreme Court, however, has created a broad spectrum of

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169. *See* Chiraag Bains, *After Creating Danger, Can Cops Use Force with Impunity?*, MARSHALL PROJECT (June 15, 2017, 7:00 AM), https://perma.cc/FJ4H-K9CT (discussing *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017), in which the court declined to evaluate a claim of excessive force beyond the moment of the shooting).

170. For a comprehensive investigation of three illustrative police shootings showing a "striking pattern" of the kind of "officer-created jeopardy" that goes unexamined under the "final-frame" approach that only considers the officer's final split-second judgment, see Robin Stein et al., *Before the Final Frame: When Police Missteps Create Danger*, N.Y. TIMES (Oct. 31, 2021), https://perma.cc/WGX8-6LXY.

171. *See, e.g.*, Blazovic v. Andrich, 590 A.2d 222, 231 (N.J. 1991) (holding that intentional verbal provocation by a victim of violent assault could be considered by the jury during apportionment of compensatory damages, similar to considering a plaintiff's contributory negligence).

172. According to a *New York Times* investigation of traffic-stop killings of unarmed drivers, police very rarely face legal consequences. *See* David D. Kirkpatrick et al., *Why Many Police Traffic Stops Turn Deadly*, N.Y. TIMES (Oct. 31, 2021), https://perma.cc/PBH5-FYD3 (last updated Nov. 30, 2021)

> In the more than 400 killings of unarmed drivers, The Times identified charges brought against officers in 32 cases. Among the five officers who were convicted, one got probation, another served seven months, one is awaiting sentencing and a fourth will soon have his appeal heard by the Texas Supreme Court.

see also id. ("The legal standard, [a prosecutor] said, 'overwhelmingly errs on the side of sheltering police misconduct.'").

173. *See* 42 U.S.C. § 1983.

immunity for state actors who violate the Constitution.[174] This immunity undercuts the very purpose of § 1983 as a means for holding substandard state actors liable—and is one of the most powerful design features in circumventing police accountability under law.[175]

Judge-made qualified immunity arose in 1967[176] 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.[177] Qualified immunity offers additional insulation from external judgments of police use of force, traveling a complicated, sometimes convoluted, jurisprudential path to a pretrial determination that a plaintiff cannot bring suit at all.[178] In essence, "qualified immunity will be available . . . when a reasonable official would not have known that his actions would violate a constitutional right that was 'clearly established' at the time of the incident."[179] However, as Justice Sonia Sotomayor has cautioned, "[p]olice officers are

174. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6 (2017) [hereinafter Schwartz, *Qualified Immunity*] ("The Supreme Court has long described qualified immunity as robust—protecting 'all but the plainly incompetent or those who knowingly violate the law.'" (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986))).

175. *See id.* at 71

> [I]t is far from clear that qualified immunity doctrine is well designed to weed out only "insubstantial" cases. Available evidence suggests that some people may decline to file or pursue their claims because of the cost of litigating qualified immunity, even when they might succeed on the merits. And cases alleging clearly unconstitutional behavior may be dismissed on qualified immunity grounds simply because no prior case has held sufficiently similar conduct to be unconstitutional.

176. Pierson v. Ray, 386 U.S. 547, 557 (1967) (holding that a "defense of good faith and probable cause" is available to officers in § 1983 actions).

177. *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 at 1–5, Corbitt v. Vickers, 141 S. Ct. 110 (2019) (No. 19-679) (listing parties including Americans for Prosperity, the NAACP Legal Defense & Educational Fund, the National Association of Criminal Defense Lawyers, and the R Street Institute as "reflect[ing] the growing cross-ideological consensus" that qualified immunity is an "unworkable doctrine").

178. *See* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) (describing the litigation of qualified immunity as "a mare's nest of complexity and confusion").

179. AVERY ET AL., *supra* note 158, § 3:6.

not entitled to qualified immunity if (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time."[180] In the abstract, this doctrine makes a certain sense, shielding police officers from liability for on-the-job conduct they could not know was constitutionally unlawful because the applicable law was unclear.[181] 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 from.[182] 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,[183] some lower federal courts still mainly examine whether the *precise* misconduct an officer is accused of committing was found to be a constitutional violation.[184] 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.[185]

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180. Kisela v. Hughes, 138 S. Ct. 1148, 1156 (2018) (Sotomayor, J., dissenting) (internal quotations omitted).

181. *See* Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) ("[W]here an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" (quoting *Pierson*, 386 U.S. at 554)).

182. *See* Jeffries, *supra* note 178, at 858–59.

183. *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987) (noting that clearly established law does not require "the very action in question [to have] previously been held unlawful").

184. *See generally, e.g.*, Baxter v. Bracey, 751 Fed. App'x 869 (6th Cir. 2018) (finding that a police officer's use of a police dog to apprehend a suspect seated with his hands raised did not violate clearly established law despite the existence of binding circuit precedent holding that using a police dog to apprehend a prone suspect violates the Fourth Amendment).

185. *See Anderson*, 483 U.S. at 640 ("[O]ur cases establish that the right the official is alleged to have violated must have been 'clearly established' . . . . The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . ."). *But see* Hope v. Pelzer, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."); *Kisela*, 138 S. Ct. at 1161 (Sotomayor, J., dissenting) ("[O]ur cases have never required a factually identical case to satisfy the 'clearly established' standard." (citation omitted)).

On its face, the doctrine presents significant hurdles for plaintiffs. Is the most relevant precedent the law regarding the constitutional right at issue, or the law regarding the officer's conduct?[186] How clearly must the *particular* conduct by the officer be established as a violation of a constitutional right—for example, is punching with a fist permissible, but not jabbing with a found object?[187] What level of agreement among courts clearly establishes illegal conduct?[188]

As if these obstacles are not sufficiently burdensome for plaintiffs in § 1983 cases, the Supreme Court has created more procedural hurdles that harm plaintiffs and protect abusive police officers.[189] Police officers can raise qualified immunity immediately after a complaint is filed, often before any discovery has occurred.[190] At this point, all litigation literally stops so that

186. *See* AVERY ET AL., *supra* note 158, § 3:8 ("The Supreme Court has since *Anderson*, and increasingly in recent terms, admonished that this inquiry must be made with a sufficiently high degree of factual particularity that 'a reasonable official would understand that *what he is doing* violates the right.'" (quoting *Anderson*, 483 U.S. at 640) (emphasis in original)).

187. *See, e.g.*, Padilla v. Yoo, 678 F.3d 748, 762–67 (9th Cir. 2012) (finding that defendant official was entitled to qualified immunity because the "interrogation techniques" used on plaintiff had not been clearly established by law as torture).

188. *See* 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.'" (quoting Wilson v. Layne, 526 U.S. 603, 617 (1999)); *see also* City & County of San Francisco v. Sheehan, 575 U.S. 600, 617 (2015) (finding no "robust consensus of cases of persuasive authority" that would have given "fair and clear warning of what the Constitution requires" of police officers engaging with people with mental illness (internal quotations omitted)); Taylor v. Barkes, 575 U.S. 822, 827 (2015) (finding "no precedent on the books . . . that would have made clear to petitioners they were overseeing a system that violated the Constitution"); Carroll v. Carman, 574 U.S. 13, 20 (2015) (finding that there was no "constitutional rule . . . beyond debate" regarding whether police officers may constitutionally conduct "knock and talks" at entrances to a home other than the front door (internal quotation omitted)).

189. *See* Gardenhire v. Schubert, 205 F.3d 303, 311 (6th Cir. 2000) ("The ultimate burden of proof is on the plaintiff to show that the defendant is not entitled to qualified immunity." (citation omitted)); AVERY ET AL., *supra* note 158, § 3:21 ("Placing on the plaintiff the burden of overcoming qualified immunity . . . affects the outcome of motions to dismiss and for summary judgment . . . .").

190. *See* AVERY ET AL., *supra* note 158, § 3:21.

the court can consider the qualified immunity claim. If police officers lose at this stage, they get an automatic interlocutory appeal.[191] The litigation is at a standstill during this time. No discovery is allowed.[192] The process can take years, particularly if the Supreme Court agrees to hear the case. This disadvantages plaintiffs.[193] Key evidence may be lost or inadvertently destroyed while federal courts sort out the legal issue of whether the law was clearly established. The procedure invites abuse by defendants and puts plaintiffs at severe risk.[194]

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.[195]

2. 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 expect the answer to be yes. Nothing in § 1983's legislative history or case law compels a municipality to pay for the misdeeds of the police officers they train and employ, unless

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191. *See id.* § 3:23.

192. *See id.* § 3:7.

193. *See id.* § 3:23.

194. *See id.* ("The interlocutory appellate process affords defendants a mechanism which easily can be used, resulting in serious prejudice to legitimate claims."); *see also* Schwartz, *Qualified Immunity*, *supra* note 174, at 60 ("[Q]ualified immunity may actually increase the costs and delays associated with Section 1983 litigation.").

195. John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 269 (2013).

the misconduct was committed as part of an official policy or custom.[196] 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.[197] Certainly, forcing bad actors to internalize the costs of their own misconduct has been a feature of basic deterrence in American law since its beginnings.[198] Having to take personal responsibility for legal judgments against you may be considered a fundamental aspect of accountability.[199]

Yet police officers almost never pay the judgments against them because of generous, universally recognized norms of indemnification.[200] Judicial doctrines such as qualified immunity arose, in part, from the erroneous assumption that the harsh financial effects of judgments against police should be ameliorated.[201] The public often assumes the opposite is true, or that if indemnification occurs it must be compelled by law.[202] Neither is the case.[203] An analysis by Professor Joanna C. Schwartz reveals that police officers are virtually always indemnified: she found that governments paid approximately

196. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978).

197. *Id.* at 691.

198. *See* Schwartz, *Myths and Mechanics*, *supra* note 99, at 1024 ("The United States Supreme Court considers it 'almost axiomatic' that civil rights damages actions deter government employees and policymakers. (citations omitted)).

199. *See id.* ("Being sued and even the threat of suit are expected to cause government officials to conform their conduct to the law.").

200. *See* Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 496 (2011) ("[M]ost scholars appear to believe that many, and perhaps most, officials are indemnified by their employers for some or all constitutional violations for which they might be sued.").

201. *See id.* at 495–96 ("In recalibrating the qualified immunity standard . . . , the Court relied heavily on the assumption that officials, absent immunity, would face the threat of personal liability for constitutional violations committed in the ostensible performance of their official duties.").

202. *See* Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 893 (2014).

203. *See generally* 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).

99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement.[204]

> 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 [Professor Schwartz's] study. Officers 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.[205]

Her findings show that law enforcement officers almost never satisfy punitive damages awards entered against them[206] or contribute to settlements and judgments,[207] even when indemnification was prohibited by law or policy[208] or the officers involved were disciplined, terminated, or prosecuted for their conduct.[209] Many cases of police brutality settle.[210] For example,

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204. *See* Schwartz, *supra* note 202 at 913.

205. *Id.* at 912–13 (footnotes omitted).

206. *See id.* app. F at 974–75 (showing one officer out of twenty who was not indemnified for a punitive damage award, although even that award was never paid). This is in contrast to the fact that "[p]unitive damages against municipalities are prohibited in part because, the Court has reasoned, '[n]either reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.'" *Id.* at 888 (quoting City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981)).

207. *See id.* app. H at 978–81 (showing that police officers nationwide were required to contribute financially to fewer than one hundred settlements or judgments against them between 2006 and 2011).

208. *See id.* at 919.

209. *See id.* at 923.

210. *See* Cheryl Corley, *Police Settlements: How the Cost of Misconduct Impacts Cities and Taxpayers*, NPR (Sept. 19, 2020, 7:00 AM), https://perma.cc/C7DQ-39PM ("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.").

from 2011 to 2017, New York City spent a total of $630 million on police misconduct settlements and paid more than $100 million each fiscal year from 2015 to 2018.[211] Similarly, from 2011 to 2018, the city of Chicago spent $389 million on police misconduct settlements.[212] Yet taxpayers—or the insurance premiums they pay on behalf of municipal government—paid for all of it.[213]

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 § 1983 liability.[214] As Professor 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.[215]

Many commentators have suggested ways to reform indemnification. Schwartz, for instance, would eliminate

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211. OFF. OF THE N.Y.C. COMPTROLLER, CLAIMS REPORT: FISCAL YEAR 2018 13 chart 7 (2019), https://perma.cc/E2WU-U8BR (PDF).

212. *See* Jonah Newman, *Chicago Spent More Than $113 Million on Police Misconduct Lawsuits in 2018*, CHI. REP. (Mar. 7, 2019), https://perma.cc/PVP8-G5N7.

213. *See id.* For an account of the contemporary market for liability insurance in the policing context and the effects of insurance on police behavior, see John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539 (2017).

214. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978) (concluding that Congress did not intend for municipalities to be liable under 42 U.S.C. § 1983 "unless action pursuant to official municipal policy of some nature caused a constitutional tort").

215. Schwartz, *supra* note 202, at 890; *see also* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 455 (2004) ("[B]ecause the stories police departments tell themselves (and us) about the causes of police violence are flawed, it is not surprising that judicial, administrative, and departmental responses to police violence have been notoriously unsuccessful.").

qualified immunity entirely in light of indemnification;[216] and, instead of de facto respondeat superior, she would instead impose financial sanctions on officers as part of settlements and judgments depending on culpability.[217] She and others have argued that police departments themselves should have to pay damages awards.[218] Civil rights lawyers Richard Emery and Illann Margalit Maazel offer 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 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.[219]

3. The Design of Police Union Authority

Police unions represent one of the most important but least understood sources of resistance to public accountability for police misconduct, especially excessive force.[220] This resistance

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216. *See* Schwartz, *supra* note 202, at 943 ("Qualified immunity should be eliminated or restricted to comport with this evidence unless and until, an alternative, empirically grounded justification can be offered for the defense.").

217. *See id.* at 954.

218. *See id.* at 958 (proposing that municipalities "requir[e] police departments to bear more financial responsibility for litigation costs"); OFF. OF THE N.Y.C. COMPTROLLER, CLAIMS REPORT: FISCAL YEAR 2012 7 (2013), https://perma.cc/U877-C5LK (PDF) (recommending the implementation of risk management tools and "a process whereby agencies bear some financial accountability for claim activity").

219. Richard Emery & Illann Margalit Maazel, *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).

220. *See* Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS U. PUB. L. REV. 57, 71 (2012) ("[I]t seems that virtually everyone with an interest in policing—citizens, civic leaders, reform activists, and scholars—believes that

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.[221] Since 1962, when municipal employees were granted federal rights to bargain collectively with municipalities,[222] police contracts have typically included numerous disciplinary protections that work together with state labor laws, civil service rules, and law enforcement officer bills of rights to frustrate discipline.[223] Justified on due process grounds and concerns that police will be the target of arbitrary discipline, police union contracts afford officers greater procedural safeguards than citizens suspected of a crime and offer employment assurances that are not available to other public servants.[224] A 2016 report written by Campaign Zero outlines six ways by which police union contracts and bills of rights contribute to the existing difficulties of holding police officers accountable for their misconduct:

1. Disqualifying misconduct complaints that are submitted too many days after an incident occurs or if an investigation takes too long to complete
2. Preventing police officers from being interrogated immediately after being involved in an incident or

police unions are extremely powerful, have a major influence on police practices, and are a principal obstacle to change.").

221. *See* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 764 (2012) ("[C]ourts tailor their interpretation of § 1983 and the exclusionary rule to encourage changes in police behavior, yet civil service law, collective bargaining law, and federal and state employment discrimination law simultaneously discourage the same reforms.").

222. Dylan Matthews, *How Police Unions Became So Powerful—And How They Can Be Tamed*, VOX (June 24, 2020, 9:00 AM), https://perma.cc/9B4W-ZQV3.

223. *See* Harmon, *supra* note 221, at 795–801.

224. *See* Noam Scheiber et al., *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES (June 6, 2020), https://perma.cc/32AD-5X5V (last updated Apr. 2, 2021) ("Unions can be so effective at defending their members that cops with a pattern of abuse can be left untouched, with fatal consequences."); Reade Levinson, *Across the U.S., Police Contracts Shield Officers From Scrutiny and Discipline*, REUTERS (Jan. 13, 2017, 1:18 PM), https://perma.cc/DN88-GVDG ("Nearly half of the [police union] contracts allow officers accused of misconduct to access the entire investigation file—including witness statements, GPS readouts, photos, videos and notes from the internal investigations—before being interrogated.").

otherwise restricting how, when, or where they can be interrogated
3. Giving officers access to information that civilians do not get prior to being interrogated
4. Limiting disciplinary consequences for officers or limiting the capacity of civilian oversight structures and/or the media to hold police accountable
5. 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
6. Preventing information on past misconduct investigations from being recorded or retained in an officer's personnel file[225]

When disciplinary information is recorded, police union contracts may require the information to be kept secret or quickly destroyed.[226] 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.[227]

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."[228] They derive from a different tradition, too. Before the New Deal created the National Labor Relations Board and legalized a broad swath of

225. DERAY MCKESSON ET AL., CAMPAIGN ZERO, POLICE UNION CONTRACTS AND POLICE BILL OF RIGHTS ANALYSIS 2 (2016), https://perma.cc/544W-JK8F (PDF).

226. *See* William Finnegan, *How Police Unions Fight Reform*, NEW YORKER (July 27, 2020), https://perma.cc/ZHP9-EXVK.

227. *See, e.g.*, Benjamin Sachs, *Police Unions: It's Time to Change the Law and End the Abuse*, ON LAB. (June 4, 2020), https://perma.cc/D76S-DYG7 ("A study using data from America's 100 largest cities found that police protections created via union contract were significantly and positively correlated with the killing of unarmed civilians.").

228. Finnegan, *supra* note 226.

union activity, police departments were often private or drawn from private detective agencies like the Pinkertons and called into labor conflicts by industry leaders to clash physically with union members and break up strikes.[229] 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.[230] 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.[231] Especially in the Northeast, police unions grew politically stronger as a useful symbol of law and order, their ranks consistently filled with working-class white ethnic conservatives.[232] These 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, with some waving signs like "Dump the Washroom Attendant," after he called for the creation of a civilian review board.[233] In 2016, the National Fraternal Order of Police endorsed Donald Trump for President.[234] 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.[235]

The use of police union power to control officer discipline and frustrate accountability is classically structural. The point

229. *See* Matthews, *supra* note 222 ("Police departments emerged and evolved as adjuncts to the sheriff's departments and private detective agencies . . . that bosses typically enlisted to fight union activists.").

230. *See id.* ("Policing of Black neighborhoods, drug policing, gang policing become what these big-city police forces do . . . .").

231. *See id*. ("[T]he rise of tough-on-crime policing targeted at Black neighborhoods also enhanced the political power of police unions.").

232. *See id.* ("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 . . . .").

233. James C. McKinley, Jr., *Officers Rally and Dinkins Is Their Target*, N.Y. TIMES (Sept. 17, 1992), https://perma.cc/5PAX-T7QP. Additionally, "[t]he officers alternated chants of 'No justice! No police!' with slogans like 'The Mayor's on Crack.'" *Id.*

234. Alan Neuhauser, *Nation's Biggest Police Union Endorses Trump*, U.S. NEWS (Sept. 16, 2016), https://perma.cc/WZ9K-9MJP.

235. Finnegan, *supra* note 226.

of collective bargaining is to contract for the applicable rules and practices that will guide the institution in its essential roles according to agreed-upon norms.[236] 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[237]—police unions understood that they needed to formalize their institutional power.[238] 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."[239] 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.[240] Police unions have used this approach to

236. *See* Sachs, *supra* note 227 ("[Collective action] is the source of power that has enabled workers to secure . . . fairness and dignity at work, living wages, protection against discrimination and harassment, and safe and healthy working conditions.").

237. *See* Deneen L. Brown, *'Detroit' and the Police Brutality That Left Three Black Teens Dead at the Algiers Motel*, WASH. POST (Aug. 4, 2017, 8:00 AM), https://perma.cc/BX7L-WYLV ("The medical examiner would later rule the teenagers lay in 'non-aggressive postures' when they were killed. Though the police maintained they were killed in self-defense, no gun was found at the motel.").

238. *See* Kim Barker et al., *How Cities Lost Control of Police Discipline*, N.Y. TIMES (Dec. 22, 2020), https://perma.cc/DA6M-3GAZ (last updated Mar. 10, 2021) ("The Detroit Police Officers Association [negotiated] the country's first comprehensive police contract, seeking a raise and a new disciplinary process to replace one it considered arbitrary. In what became a blueprint for union negotiations across the country, police officers promised to restore order but demanded something in return."); Steven Greenhouse, *How Police Unions Enable and Conceal Abuses of Power,* NEW YORKER (June 18, 2020), https://perma.cc/FL8V-QLZK ("Since the eighties, police contracts . . . have added one protection after another that have made it harder to hold officers accountable for improper use of force or other misconduct.").

239. Michael H. Keller & Kim Barker, *Police Unions Won Power Using His Playbook. Now He's Negotiating the Backlash*, N.Y. TIMES (March 10, 2021), https://perma.cc/5TH3-BCXQ (last updated Sept. 23, 2021) (quoting RON DELORD ET AL., POLICE ASSOCIATION POWER, POLITICS, AND CONFRONTATION: A GUIDE FOR THE SUCCESSFUL POLICE LABOR LEADER (1997)).

240. *See id*.

such successful 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."[241]

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.[242] Professor 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.[243] Others have proposed "minority unionism" inside the bargaining unit to compel consideration of minority viewpoints within police unions.[244] These are structural proposals—most would change fundamental institutional operating rules and procedures. Early experimentation with these proposals, only months since the 2020 summer protests over the killing of George Floyd, indicated that the once-unshakeable power of police unions over discipline may be undermined by the exercise of that power itself.

IV. IMAGINING STRUCTURAL CHANGE

Finally, this Part examines from a structural perspective the major ideas arising from the national popular and legislative debates around police use of force: abolishing and defunding the police. It concludes with an analysis of the federal George Floyd Justice in Policing Act proposal.

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241. *Id.*

242. *See, e.g.*, Everton Bailey, Jr., *Portland Voters Approve Creating New Civilian-Run Police Oversight Board*, THE OREGONIAN (Nov. 3, 2020, 8:12 PM), https://perma.cc/9QJ5-ZCZB (last updated Nov. 3, 2020, 11:11 PM) (describing the passage of a Portland ballot measure to "create the framework for the new, civilian-run police oversight board that would investigate all city officer misconduct complaints and impose discipline in all cases where infractions were found").

243. Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1253 (2017).

244. *See* Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 721 (2017) (advocating for a "minority union" for the purpose of "enabl[ing] the minority of officers in a department who favor reform to discuss police practices even if the majority union prefers not to, or is legally prohibited from, negotiating over those practices").

A. Abolish the Police

The nascent movement to abolish the police calls for the disbandment of police altogether.[245] According to abolitionists, policing is a self-replicating system of violence against Black and Latino communities and is inseparable from structural racism.[246] Unlike reformists, abolitionists assert that more training, increasing surveillance of police (for example, by using body cams), or using civilian review to address police misconduct do not lead to structural changes in policing.[247] Abolitionists believe that the current framework of policing that centers punishment instead of restorative justice is fundamentally flawed and cannot be reformed.[248]

Although abolition butts up against concerns for pragmatism, its proponents offer a radically structural view of policing that recognizes the various institutional intersections of marginalization that American policing has historically enforced. As one abolition scholar explained, "Police abolition . . . is a framework for thinking about and imagining alternatives to the nation's current model of policing. . . . Abolition is an orientation toward changing our current model of policing that puts policing's role in managing the deep racial and class inequality in the United States at the forefront."[249] As a framework, abolition is critical of policing's function yet aspirational about public safety. Abolitionists imagine residents and local organizations playing a central role in creating safe and strong communities if they are provided

245. Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://perma.cc/7W23-7E5Y.

246. Sean Illing, *The "Abolish The Police" Movement, Explained By 7 Scholars And Activists*, VOX (June 12, 2020, 11:00 AM), https://perma.cc/3YSY-2UZ7.

247. *See id.* ("Administrative and procedural changes do not address the inequality and systemic racism that got us to this point and may actually legitimate fundamentally unjust practices and institutions.").

248. *See* Kaba, *supra* note 245; Illing, *supra* note 246 ("Our current model of policing and accountability is rooted in punishment and was constructed as a mechanism to maintain slavery, segregation, and the protection of property rights."); *see also* Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1110 (2020) ("It is time to call modern policing what it is: a badge and incident of slavery that Congress should abolish under the Thirteenth Amendment.").

249. Illing, *supra* note 246.

with the same resources that are given to police departments.[250] There is data to suggest that a communal model of collective efficacy may be highly effective in reducing violent crime.[251] The hope is to empower local residents and local coalitions and to hire and train professionals in various fields of community service including conflict mediation, violence interruption, youth outreach, and mental health counselling.[252]

Opponents of abolitionism raise concerns about the potential rise of violent crime resulting from the disbandment of policing.[253] They argue that, as a practical matter, the idea of police abolition is a political nonstarter and a distraction from

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250. *See* Kaba, *supra* note 245

> People . . . who want to abolish prisons and police, however, have a vision of a different society, built on cooperation instead of individualism, on mutual aid instead of self-preservation. What would the country look like if it had billions of extra dollars to spend on housing, food and education for all?

251. *See* Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918, 919–20, 922 (finding that collective efficacy, a combination of "social cohesion and trust" between neighbors and "the willingness of local residents to intervene for the common good," is "strongly negatively associated with violence" in a neighborhood).

252. *See* Patrick Sharkey, Outlook, *Why Do We Need the Police?*, WASH. POST (June 12, 2020), https://perma.cc/7FWM-APL7 (arguing that redirecting resources from the police to community organizers and leaders tasked with "primary responsibility for creating a safe community . . . can begin to transform a neighborhood"). For an analysis of police abolition that uses the history of abolitionism in American politics to develop a nuanced theory of policing and restorative justice, see Meghan G. McDowell & Luis A. Fernandez, *'Disband, Disempower, and Disarm': Amplifying the Theory and Practice of Police Abolition*, 26 CRITICAL CRIMINOLOGY 373 (2018).

253. *See* Sharkey, *supra* note 252 (arguing that "police are effective in reducing violence" and that abolishing the police "is likely to lead to a rise in violence" in many cities); *see also id.* ("Over the past 10 years, an expanding body of research has shown just how damaging violence is to community life, children's academic trajectories and healthy child development."); Patrick Sharkey, *The Long Reach of Violence: A Broader Perspective on Data, Theory, and Evidence on the Prevalence and Consequences of Exposure to Violence*, 2018 ANN. REV. CRIMINOLOGY 85, 86 (2017) ("Violence has a long reach. . . . A growing body of evidence suggests that the consequences of violence extend well beyond those who are victimized and those who see or even hear about an act of violence. Violence happens to people, but it also happens to places." (citation omitted)). A growing body of research shows a negative correlation between police presence and violent crime. *See, e.g.*, Steven Mello, *More COPS, Less Crime,* 172 J. PUB. ECON. 174, 189 (finding that "an additional officer per 10,000 residents reduces victimization costs by about $35 per capita" as a result of reduced crime rates).

real reform.[254] Further, abolitionists put undue faith in the efficiency of municipal and community institutions to do the work police departments do.[255] Perhaps most importantly, abolition has garnered substantial skepticism even from within communities where police misconduct is a problem.[256] Significant opposition to an idea among the very beneficiaries it was meant to empower raises important questions about the viability of a collective will to institutionalize its goals.

Abolition, therefore, highlights a paradox of citizenship at the structural core of the policing dispute. Abolishing the police arises as a blanket resistance to a broader systemic oppression for which police departments are the institutional enforcers. On one hand, to undo a racist structure and perfect citizenship for the marginalized, (most) cops must go. On the other hand, that same system of marginalization has created an immediate and often pressing need for public safety among victims of police violence in order to retain some semblance of freedom—to hold property undisturbed, to be left alone in public spaces, to drive a car without fear of arbitrary detention or worse, to be safe in one's home—that is also a promise of American citizenship. Better to make policing more equal and equitable than to abandon it altogether. Each view imagines a citizenship perfected by personal dignity as a basic human right.

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254. *See* Catie Edmondson, *Democrats Unveil Sweeping Bill Targeting Police Misconduct and Racial Bias*, N.Y. TIMES (June 8, 2020), https://perma.cc/TQA6-NAR3 (last updated June 23, 2020) (noting that police abolition "has picked up scant support among . . . Democrats in Congress, even in the Progressive Caucus, whose members have coalesced around measures to increase law enforcement accountability").

255. *See* Charles Fain Lehman, Letter to the Editor, *Social Workers Won't Replace Police Anytime Soon*, WALL ST. J. (July 20, 2022, 11:20 AM), https://perma.cc/K5AA-GL8Z ("An offender's mental illness does not mean that a social worker should, or can, respond to his violence. Maybe mental-health responders can take some of the busy work off the cops' plate. But they can't get them out of 'the business' altogether.").

256. *See* Steve Crabtree, *Most Americans Say Policing Needs 'Major Changes'*, GALLUP (July 22, 2020), https://perma.cc/6WBX-LU43 (reporting poll results showing that only 22% of Black respondents favored abolition and 20% of Latino respondents compared to 15% of respondents overall); Ben Guarino, *Few Americans Want to Abolish Police, Gallup Survey Finds*, WASH. POST (July 22, 2020, 4:30 AM), https://perma.cc/67GJ-GBBM ("Abolishing the police was not a majority opinion held by any group in the poll, including when examined by race, age or political affiliation.").

B. Defund the Police

The proposal to defund the police became one of the starkest rallying cries of the 2020 summer protests over police brutality.[257] 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.[258] The essential idea is that spending on police continues to grow along with the power of police, and that this fiscal (and more 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 human capital.[259]

City (and sometimes county) budgets reveal a tremendous commitment to law enforcement, even as crime has gone down.[260] From 1977 to 2017, state and local government spending on police increased from $42 billion to nearly $115 billion.[261] While crime has decreased in most places,[262] poverty and economic immobility have not.[263] For instance, Baltimore

257. Deena Zaru & Tonya Simpson, *'Defund the Police' Movement 6 Months After Killing of George Floyd*, ABC NEWS (Nov. 25, 2020, 7:49 AM), https://perma.cc/3T56-MWBS.

258. *See id*.

259. Paige Fernandez, *Defunding the Police Isn't Punishment—It Will Actually Make Us Safer*, COSMOPOLITAN (Apr. 13, 2021), https://perma.cc/H94Y-VW2A.

260. *See* Polly Mosendz & Jameelah D. Robinson, *While Crime Fell, the Cost of Cops Soared,* BLOOMBERG L. (June 4, 2020), https://perma.cc/3TLE-4V9R ("[P]olicing has consistently made up about 3.7% of state and local budgets since the 1970s. However, crime has been trending downward for years . . . .").

261. *Id.*

262. *See* John Gramlich, *What the Data Says (and Doesn't Say) About Crime in the United States*, PEW RSCH. CTR. (Nov. 20, 2020), https://perma.cc/3YGB-PA7D.

263. *See Economic Mobility: Is the American Dream in Crisis?, Hearing Before the Subcomm. on Econ. Pol'y of the S. Comm. on Banking, Hous. & Urb. Aff.*, 116th Cong. 3 (2019) (statement of Oren M. Cass, Manhattan Institute for Policy Research), https://perma.cc/V6RR-ENCG (PDF) ("For children born in 1950, 79 percent had higher earnings by age thirty than their parents had . . . . But for those born in 1980, only 50 percent could say the same. Looking ahead . . . , only 37 percent of Americans expect that . . . children

had a poverty rate of about 22% in 2017.[264] That year, according to one comprehensive account, Baltimore devoted 19% of its total operating budget to its police and sheriff departments, but only 16.1% to all of the following services combined: public education, substance abuse and mental health, housing and community development, educational grants, employment development, and services for the homeless and low- and moderate-income families.[265] In Los Angeles, 16.9% of the city's total budget went to police,[266] while New York's relatively low 6% of its total budget nevertheless represented police spending of almost $5 billion.[267] These facts buttress a fiscal efficiency argument in favor of defunding or "invest/divest."[268]

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.[269] Policing

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today . . . will be better off financially than their parents." (internal quotation omitted)).

264. *Poverty in Baltimore, Maryland*, WELFARE INFO, https://perma.cc/WX9A-YFJY.

265. *See* KATE HAMAJI ET AL., CTR. FOR POPULAR DEMOCRACY ET AL., FREEDOM TO THRIVE: REIMAGINING SAFETY & SECURITY IN OUR COMMUNITIES 15 (2017), https://perma.cc/SNW9-ZVQ9 (PDF).

266. *Id.* at 46.

267. *Id*. at 57.

268. Prior to George Floyd's murder, conversations were already in place about efforts to curb police budgets as the number of police killings of unarmed Black people rose. For a discussion of the public costs associated with divestment, as well as a breakdown of the comparative costs of policing across major metropolitan cities and how those funds could be used in inner-city communities, see Brentin Mock, *The Price of Defunding the Police*, BLOOMBERG: CITYLAB (July 14, 2017, 7:00 AM), https://perma.cc/25W5-2LTE. For an overall snapshot of municipal spending on police, see Niall McCarthy, *How Much Do U.S. Cities Spend On Policing?*, STATISTA (June 12, 2020), https://perma.cc/SK67-XNET.

269. *See* CTR. FOR ADVANCING OPPORTUNITY ET AL., THE STATE OF OPPORTUNITY IN AMERICA: UNDERSTANDING BARRIERS & IDENTIFYING SOLUTIONS 4 (2019), https://perma.cc/G632-MZJK (PDF) ("Though black and Hispanic [residents of impoverished and socially immobile communities] are less likely than whites to feel people like them are treated fairly by their local police or legal system, they are *more* likely than whites to say they would like the police to spend more time in their area." (emphasis in original)).

needs to improve through reform, not divestment of resources.[270] Reform is expensive, which may require *more funding*, as the Biden administration has suggested, not less.[271]

From a structural point of view, this is an important local government issue. It is possible *both* that critical non-police services are severely underfunded and that police forces should maintain their funding levels. It need not necessarily entail a zero-sum battle 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.[272] For some proponents, this reflects the immoral nature of many local budgets.[273] They argue, therefore, that overspending on police and underspending 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 and discriminatory practices that contribute to criminal conduct in the first place.[274]

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.[275] They describe huge regional differences in pay between

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270. *See Biden Suggests More Police Funding, No Jail for Drug Offenders*, REUTERS (Feb. 16, 2021, 11:38 PM), https://perma.cc/RUU5-LLRT.

271. *See id.*

272. *See* HAMAJI ET. AL, *supra* note 265, at 3 ("While research supports community members' assertion that increased spending on police does not make them safer, cities remain steadfast in police investment and continue to spend significant portions of their budgets on policing.").

273. *See id.* at 2 ("For government, budgets are all moral documents. They are an articulation of what—and whom—our cities, counties, states, and country deem worthy of investment.").

274. *See 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.").

275. *See generally* Stephen Rushin & Roger Michalski, *Police Funding,* 72 FLA. L. REV. 277 (2020).

small, rural—often Southern—towns with a handful of officers, compared to larger cities in California and New York.[276] Even nearby departments compete with each other, increasing pay disparities.[277] Further, fiscal disparities reflect disparities in training resources (and surely the capacity of officers to pay their own liability damages).[278] Many municipalities rely on part-time officers, and many officers work part-time across multiple departments.[279] Applications to become officers are down nationally, especially among people of color.[280] In all, Professors Rushin and Michalski present a descriptive case about the structural problems of police underfunding caused by tax base disparities across municipalities, suggesting that a community tends to get only the quality of policing it is able to pay for.[281] The status quo thus favors wealthier communities.[282]

As informative as their analysis is, it 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.[283] Those social services play a remedial role, sometimes serving as a safety net, in the poorer communities damaged by the structural inequality that Professors Rushin and Michalski decry. While law enforcement budgets and union power have grown, those agencies, nonprofit contractors, and service providers have seen their budgets grow only slightly or get cut. The police underfunding argument, therefore, compares apple jurisdictions to oranges.

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276. *See id.* at 769.

277. *See id.* at 298.

278. *Id.*

279. *Id.* at 294.

280. *Id.* at 296–98.

281. *Id.* at 330.

282. *Id.* at 324

> Because most jurisdictions rely heavily on revenue generated from local taxes to fund local policies, wealthier communities with fewer public-safety concerns can often afford to levy similar or even lower taxes to acquire higher amounts of revenue. This exacerbates inequality, leaving wealth areas with more resources to allocate to community services other than policing as compared to many poorer areas.

283. *See supra* notes 265–267, 272–274 and accompanying text.

Nevertheless, their conclusions represent 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 that routinely fail to produce accountability.[284] It asks why law enforcement would even be compelled to use extra dollars to institute reforms. What is the incentive for police departments that in recent years have spent millions militarizing their equipment and tactics,[285] 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 § 14141[286] authority and police forces shown to follow a pattern and practice of excessive force. For instance, the DOJ's investigation of the police force in Cleveland, Ohio, up to and including the killing of 12-year-old Tamir Rice called for internal reforms that could

284. *See supra* Part I.B.

285. *See* Allison McCartney et al., *After Pouring Billions into Militarization of U.S. Cops, Congress Weighs Limits*, BLOOMBERG (July 1, 2020), https://perma.cc/2QEN-EDU2.

286. 34 U.S.C. § 12601 (formerly codified at 42 U.S.C. § 14141).

cost up to $55 million dollars over five years.[287] There is finally evidence of change in institutional practice. However, these changes followed attempts by the DOJ just ten years earlier to get the Cleveland Police Department to reform.[288] 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 approach to defunding the police could work in a more selective way.[289] It may also indicate a preference for disinvestment mainly in cities

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287. *See* C.R. DIV., DEP'T OF JUST., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 7–9 (2014), https://perma.cc/4LQ6-DLMQ (PDF) (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"); Marisa Saenz, *Consent Decree in Cleveland: A Semi-Annual Report Details a Long Road Ahead*, WKYC STUDIOS (Sept. 23, 2022, 11:18 PM), https://perma.cc/V2KE-YK8J (last updated Sept. 23, 2022, 11:54 PM) ("[E]ach year the consent decree remains in place, between $6 million and $10 million are invested into the process.").

288. *See* C.R. DIV., DEP'T OF JUST., *supra* note 287, at 39. According to the DOJ, in 2014, "CDP's systemic failures [were] such that the [Civil Rights] 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. CDP Internal Affairs Unit investigators admitted bias in favor of police officers and evaluated conduct against a deferential standard not supported by the law. *See id.* (reporting that "many" of the investigators only found a violation if evidence of an officer's misconduct met the "unreasonably high" and "inappropriate" standard of "beyond a reasonable doubt"). In a department that the DOJ found to suffer from extreme systemic problems of officer misconduct, discipline was extremely rare. *Id.* Many of the same structural deficiencies at the CDP had already been found and investigated by the DOJ *ten years before*. *Id.*

289. Jill Cowan et al., *Protesters Urged Defunding the Police. Schools in Big Cities Are Doing It.*, N.Y. TIMES (Feb. 17, 2021), https://perma.cc/2ESA-T7PL (last updated Mar. 8, 2021).

and police departments above a certain size. The most traction has occurred in the school policing context where a few large city districts (such as 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.[290] 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.

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.[291] Governments spend on what 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.[292] 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.[293]

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290. *See id.*

291. *See supra* notes 272–274.

292. It should be noted here that other public union members, such as teachers, see this occur with some frequency. *See, e.g.*, David W. Chen & Javier C. Hernández, *In New York, Mayor Seeks Teacher Cuts*, N.Y. TIMES (May 6, 2011), https://perma.cc/J4TM-AM6C (describing then-Mayor Bloomberg's proposal to lay off five percent of all New York City schoolteachers—while "largely" sparing the NYPD from budget cuts).

293. Some police alternative programs, like Denver's STAR Program and CAHOOTS in Eugene, Oregon, have already begun to show positive results, especially where they are designed to bring non-lethal first responders to calls involving low-threat situations such as trespass, disturbed persons, welfare, and suicide risk. *See* STAR PROGRAM EVALUATION (2021), https://perma.cc/4FBQ-CFJP (PDF); Samantha Michaels, *The Alternative to Police That Is Proven to Reduce Violence*, MOTHER JONES (June 7, 2022), https://perma.cc/2Q9R-8T6K.

C. Legislating Reform

At the local and state levels, the well-organized intensity of focus on legislative reform has produced some notable structural changes in use-of-force standards, traffic stop scrutiny, and no-knock warrant bans. First, the California legislature altered the legal standard for police use of force, supplementing the police-friendly reasonable police officer standard with the citizen-friendly duty to use only necessary force.[294] Second, given substantial research that shows the acute risks of traffic stops, some commentators have argued for reconsidering whether police are the proper authority for executing them.[295] Third, several state legislatures and city councils have moved to either reduce police budgets or limit police authority. Once the Portland, Oregon, city council cut the Portland Police Bureau budget by $27 million, voters approved a new independent police oversight board in November 2020, with a new collective bargaining agreement and other state legislative proposals under consideration.[296] Local officials in Minneapolis, where George Floyd was killed, cut over $8 million from the police budget and are locked in a battle over whether to take public

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294. *See* 2019 Cal. Stat. ch. 170 § 2 (2019) (codified at CAL. PENAL CODE § 835a(a)(2))

> As set forth below, it is the intent of the Legislature that peace officers use deadly force only when necessary in defense of human life. In determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer.

295. *See* Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1477–78 (2021) (arguing that "removing police from traffic enforcement would help to achieve . . . fairness and equality, especially for people of color and other marginalized communities vulnerable to overpolicing and overcriminalization in today's driving regime"). *But see* T.J. Wilham, *How Traffic Stops Can Help Reduce Violent Crime*, KOAT ACTION NEWS, https://perma.cc/YP8T-7V86 (last updated July 23, 2019, 12:20 PM) (reporting that "data driven approaches to crime and safety" (or "D-DACTS"), which provide police officers with maps of where to look for traffic violations based on trends of when serious crime occurs, have resulted in a reduction in violent crime in cities around the country).

296. *See* Jim Redden, *Police Reform Will Move Forward in 2021*, PORTLAND TRIB. (Dec. 30, 2020), https://perma.cc/E8AP-YW2A.

safety out of police hands entirely.[297] 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.[298] The version of "Breonna's Law" introduced in the House of Representatives would have required police to give notice and activate body-worn cameras before entering to execute a warrant.[299] In addition, it would have established rebuttable presumptions in investigative proceedings regarding unrecorded conduct.[300] The bill would have expanded the scope of suits against state and local governments and limit defenses.[301] However, it was the narrower Senate version of Breonna's Law that passed the General Assembly and was signed into law a year after her death.[302]

Perhaps no reform effort is as structurally ambitious as the George Floyd Justice in Policing Act of 2021[303] that passed the House of Representatives on March 3, 2021.[304] In its current state, H.R. 1280 would address multiple aspects of police

297. *See* Joshua Vaughn, *How George Floyd's Death Is Pushing Minneapolis to Rethink Public Safety*, THE APPEAL (Feb. 19, 2021), https://perma.cc/K3V9-SQ6J (describing the movement to entirely disband the Minneapolis Police Department and replace it with a Department of Public Safety and Violence Prevention); *see also* Liz Navratil, *Minneapolis Moves Forward on Community Safety Office After Council's OK*, STAR TRIB. (Oct. 20, 2022, 10:54 AM), https://perma.cc/2YQP-433H.

298. *See* Rachel Treisman, *Kentucky Law Limits Use of No-Knock Warrants, a Year After Breonna Taylor's Killing*, NPR (April 9, 2021, 3:19 PM), https://perma.cc/E346-FDZG. Two versions of the bill were introduced: a "more comprehensive version of the ban" in the House of Representatives and a narrower one in the Senate. *Id.*

299. H.B. 21 §§ 1–2, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021).

300. *See id.* § 4(2) ("[T]here shall be a rebuttable presumption in any investigative or legal proceedings, excluding criminal proceedings against the peace officer, that the missing footage would have reflected misconduct by the peace officer.").

301. *Id.* § 6.

302. *See* Treisman, *supra* note 298 (noting that the enacted version of Breonna's Law, which originated in the Senate, still allows no-knock warrants in certain situations).

303. George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021).

304. Sean Collins, *The House Has Passed the George Floyd Justice in Policing Act*, VOX (Mar. 3, 2021, 9:34 PM), https://perma.cc/3KPL-775T.

accountability, such as record-keeping and transparency, and training, such as racial profiling and the use of body cameras.[305] As structuralist national legislation, the proposed law would centralize, through federal oversight principally by the Civil Rights Division of the Department of Justice, what is currently mostly local decision-making and would standardize the practice of policing in key respects. Specifically, the Act would mandate state data collection,[306] increase investigatory powers of independent bodies,[307] create a national police misconduct registry,[308] ban no-knock warrants in drug cases,[309] incentivize a ban on chokeholds,[310] require body cameras for federal law enforcement officers,[311] prohibit racial profiling,[312] improve training and hiring of diverse law enforcement departments,[313] study ways to change the culture of law enforcement,[314] and significantly increase funding for federal enforcement of the Act itself.[315] Some of this would follow the enhancement of traditional powers of the Attorney General's office, such as pattern and practice investigations.[316] Still more would occur through substantive changes in the law—for instance, the elimination of qualified immunity as a defense[317] and replacement of the virtually unattainable "willfulness" standard of 18 U.S.C. § 242 with a "knowingly or recklessly" standard.[318] The proposed statute uses significant incentives and penalties to reach areas of local control, such as whether a municipality can collectively bargain for certain disciplinary measures with police unions. For instance, § 103(d) of the Act would deny significant federal grants to government units that entered into

305. *See* H.R. 1280 § 1(b).
306. *Id.* § 341(b).
307. *Id.* § 104.
308. *Id.* § 201.
309. *Id.* § 362.
310. *Id.* § 363.
311. *Id.* § 372.
312. *Id.* § 311.
313. *Id.* §§ 114, 366.
314. *Id.* § 115.
315. *Id.* § 116.
316. *Id.* § 103.
317. *Id.* § 102.
318. *Id.* § 101(1).

or renewed any agreement with a labor organization that would hinder pattern and practice relief or conflicts with the terms of a consent decree.[319]

As a structural remedy, it seems as fair to ask whether the Act will 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 demilitarized 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, which, in the cruelest irony of systemic oppression, have *always* had the greatest unmet need for quality public safety. Yet right now, the politics of the current Congress make passage of such a law unlikely.[320] The events of the past years have hardened pro-police instincts into backlash; at least half the country sees the proposed statute as a radical gesture of hard-left lawlessness.[321] In 2020, 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

319. *Id.* § 103(d).

320. *See* Collins, *supra* note 304.

321. *See, e.g.*, Press Release, Marjorie Taylor Greene, BACK THE BLUE: Congresswoman Marjorie Taylor Greene Eviscerates the Democrats' Hate All Police Bill (Mar. 1, 2021), https://perma.cc/Z7PK-L5JG.

> would study rates of homicide, arrest and incarceration and death, among other things.[322]

The Republican bill situated the problem in reconciliation and educational training about race relations: the proper subjects for museums, not courtrooms or disciplinary hearings. While it went further than "bad apples" and the individual racial animus paradigm of racism, its educational campaign lacked the urgency of citizenship rights and human dignity by merely offering new venues in which to debate the extent to which a problem between law enforcement and Black communities really exists. That much has already been shown in generations of lethal hardship.

This is not a disconnect over structure or its meaning but a contest over its transformation. Both sides in Congress understand what structure is—the thing that makes things go. The proposed federal Act is optimal because its reforms would reach multiple institutional practices at once, end the data mystification by instituting national standards of information certainty, incentivize the creation of competing structures of accountability and repeal the judge-made obstacles to civil rights relief, such as an expansive qualified immunity, that were promised to Black people since Reconstruction. The argument may be made that none of these reforms directly affect the attitudes and beliefs that sustain the permanence of racism. The very conceit of a structuralist approach, however, is that these mindsets are more mutable and subject to systems so long as the norms are enforced. If new design determines new outcomes, the thinking and the organizational norms will change, too.

CONCLUSION

This Article attempts 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. It laid out the legal impediments to police accountability for excessive force as well as the institutional obstacles, all understood as system design features rather than procedural

322. Emily Cochrane & Luke Broadwater, *Here Are the Differences Between the Senate and House Bills to Overhaul Policing*, N.Y. TIMES (June 17, 2020), https://perma.cc/ZB76-RSH4 (last updated June 23, 2020).

aberrations. As of this writing, the need for somber 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.[323] While the police officers who took Elijah McClain's life with the injection of a toxic chemical have been charged in his death, their arraignments—and justice—have been repeatedly delayed.[324] The police officers who shot into the home of Breonna Taylor will not be prosecuted for her death, and the one officer who faced charges for recklessly risking the lives of her neighbors was acquitted.[325] Minneapolis has settled with the family of George Floyd for a record $27 million dollars.[326] The first officer charged in his death is in prison.[327] New structures will bring new narratives unafraid of public safety, and that time is overdue.

323. Michael Hill & Carolyn Thompson, *No Charges Against Rochester Police Officers Involved in Daniel Prude's Death,* AP NEWS (Feb. 23, 2021), https://perma.cc/78D9-3VDS.

324. Sherry, *supra* note 1.

325. Trotta, *supra* note 1.

326. Rachel Treisman, *Minneapolis Reaches $27 Million Settlement with Family of George Floyd*, NPR (Mar. 12, 2021, 2:21 PM), https://perma.cc/5EFJ-F6GN.

327. Bill Chappel, *Chauvin Trial: Judge Reinstates 3rd-Degree Murder Charge over George Floyd's Killing,* NPR (Mar. 11, 2021, 9:45 AM), https://perma.cc/8RPU-G5B8.